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Rules and Regulations

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 31507; Amdt. No. 574]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: 0901 UTC, October 05, 2023.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg. 26, Room 217, Oklahoma City, OK 73099. Telephone: (405) 954–1139.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC, on September 1, 2023.

Thomas J. Nichols,

Aviation Safety, Flight Standards Service, Manager, Standards Section, Flight Procedures & Airspace Group, Flight Technologies and Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows.

PART 95—IFR ALTITUDES

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113 and 14 CFR 11.49(b)(2).

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINT

[Amendment 574 effective date October 05, 2023]

From	To	MEA
Color Routes		
§ 95.2 Red Federal Airway R39 Is Amended To Delete		
OSCARVILLE, AK NDB	* ANIAK, AK NDB	** 2000
* 3500—MCA ANIAK, AK NDB , NE BND		
** 1400—MOCA		
ANIAK, AK NDB	TAKOTNA RIVER, AK NDB	* 6000
* 5400—MOCA		
TAKOTNA RIVER, AK NDB	MINCHUMINA, AK NDB	5000

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINT—Continued

[Amendment 574 effective date October 05, 2023]

From	To	MEA
MINCHUMINA, AK NDB	ICE POOL, AK NDB	4000
§ 95.60 Blue Federal Airway B2 Is Amended To Delete		
POINT LAY, AK NDB	CAPE LISBURNE, AK NDB/DME	4000
CAPE LISBURNE, AK NDB/DME *4100—MOCA	HOTHAM, AK NDB	*8000
HOTHAM, AK NDB *4300—MOCA	TIN CITY, AK NDB/DME	*5000
TIN CITY, AK NDB/DME *5900—MOCA *6000—GNSS MEA	FORT DAVIS, AK NDB	*7000

From	To	MEA	MAA
§ 95.3000 Low Altitude RNAV Routes **§ 95.3225 RNAV Route T225 Is Amended To Read in Part**			
HOOPER BAY, AK VOR/DME *2800—MOCA	AKELT, AK FIX	*4600	17500
AKELT, AK FIX *1300—MOCA	ZIPIX, AK WP	*2100	17500
ZIPIX, AK WP *2500—MOCA	ALMOT, AK FIX	*3300	17500
ALMOT, AK FIX *2200—MCA HERLA, AK FIX , SW BND *2200—MOCA	HERLA, AK FIX	*3700	17500
HERLA, AK FIX *2200—MCA MKLUR, AK WP , NE BND	MKLUR, AK WP	*2000	17500
MKLUR, AK WP *3000—MCA UNALAKLEET, AK VOR/DME , NE BND	UNALAKLEET, AK VOR/DME	*3000	17500
§ 95.3226 RNAV Route T226 Is Amended To Read in Part			
BIG DELTA, AK VORTAC	DEYEP, AK FIX	7000	17500
DEYEP, AK FIX	WUTGA, AK WP	6400	17500
WUTGA, AK WP *3600—MCA HEXAX, AK WP , S BND	HEXAX, AK WP	*7100	17500
§ 95.3228 RNAV Route T228 Is Amended by Adding			
ZIKNI, AK WP	KUCYE, AK WP	3600	17500
HIKAX, AK WP	HIPIV, AK WP	3800	17500
HIPIV, AK WP	ECIPI, AK WP	2000	17500
CIRSU, AK WP	FAQIR, AK WP	2600	17500
FAQIR, AK WP *1400—MOCA	BARROW, AK VOR/DME	*2100	17500
Is Amended To Delete			
CAPE NEWENHAM, AK NDB/DME	KUCYE, AK WP	4600	17500
HIKAX, AK WP	SHISHMAREF, AK NDB	4000	17500
SHISHMAREF, AK NDB *2000—MOCA	ECIPI, AK WP	*10000	17500
Is Amended To Read in Part			
ECIPI, AK WP	JAPKI, AK WP	4000	17500
JAPKI, AK WP	PODKE, AK WP	4000	17500
PODKE, AK WP	CIRSU, AK WP	4000	17500
§ 95.3230 RNAV Route T230 Is Amended by Adding			
ST PAUL ISLAND, AK NDB/DME	GARRS, AK FIX	3000	17500
GARRS, AK FIX *1500—MOCA	KING SALMON, AK VORTAC	*2400	17500
Is Amended To Delete			
ST PAUL ISLAND, AK NDB/DME	CHINOOK, AK NDB	*3000	17500

From	To	MEA	MAA
*2700—MOCA			
§ 95.3244 RNAV Route T244 Is Amended by Adding			
CONFI, AK WP	JERDN, AK WP	*3700	17500
*4100—MCA JERDN, AK WP , E BND			
JERDN, AK WP	CHEFF, AK WP	5200	17500
Is Amended To Read in Part			
CHEFF, AK WP	BETPE, AK WP	*6700	17500
*7600—MCA BETPE, AK WP , E BND			
§ 95.3260 RNAV Route T260 Is Amended by Adding			
VANTY, AK WP	COGNU, AK WP	2000	17500
COGNU, AK WP	FEDEV, AK WP	*4000	17500
*3400—MOCA			
FEDEV, AK WP	NOME, AK VOR/DME	6100	17500
Is Amended To Delete			
NOME, AK VOR/DME	TIN CITY, AK NDB/DME	6900	17500
TIN CITY, AK NDB/DME	COGNU, AK WP	5300	17500
COGNU, AK WP	POINT HOPE, AK NDB	3000	17500
§ 95.3270 RNAV Route T270 Is Amended by Adding			
HIPIV, AK WP	HEXOG, AK WP	5000	17500
HEXOG, AK WP	HALUS, AK WP	5600	17500
Is Amended To Delete			
NORTON BAY, AK NDB	HEXOG, AK WP	*6000	17500
*5400—MOCA			
HEXOG, AK WP	SHISHMAREF, AK NDB	5000	17500
§ 95.3271 RNAV Route T271 Is Amended by Adding			
JIVCO, AK WP	WUXON, AK WP	3900	17500
WUXON, AK WP	WOLCI, AK WP	*3800	17500
*4200—MCA WOLCI, AK WP , NE BND.			
Is Amended To Read in Part			
COLD BAY, AK VORTAC	BINAL, AK FIX	3600	17500
BINAL, AK FIX	KING SALMON, AK VORTAC	3000	17500
WOLCI, AK WP	WIDVA, AK WP	*7300	17500
*7600—MCA WIDVA, AK WP , NE BND			
§ 95.3277 RNAV Route T277 Is Amended by Adding			
EPEHO, AK WP	JODGU, AK WP	4500	17500
Is Amended To Delete			
EPEHO, AK WP	POINT LAY, AK NDB	*6400	17500
*5500—MOCA			
Is Amended To Read in Part			
VOVUY, AK WP	EPEHO, AK WP	*16000	17500
*4800—MCA EPEHO, AK WP , E BND			
*9400—MOCA			
§ 95.3282 RNAV Route T282 Is Amended by Adding			
VENCE, AK FIX	AKTIE, AK WP	4000	17500
AKTIE, AK WP	FUZES, AK WP	3700	17500
FUZES, AK WP	ENVOI, AK WP	3400	17500
ENVOI, AK WP	ZOSTU, AK WP	3700	17500
ZOSTU, AK WP	ROSII, AK WP	3900	17500
Is Amended To Delete			
VENCE, AK FIX	HORSI, AK FIX	5000	17500

From	To	MEA	MAA
HORSI, AK FIX	PERZO, AK WP	4700	17500
Is Amended To Read in Part			
ROSII, AK WP	TADUE, AK WP	3900	17500
TADUE, AK WP	PERZO, AK WP	3600	17500
PERZO, AK WP	FAIRBANKS, AK VORTAC	3600	17500
§ 95.3299 RNAV Route T299 Is Amended by Adding			
OBEPE, VA FIX	UCREK, VA WP	*5800	10000
*5500—MCA UCREK, VA WP , SW BND			
SCAPE, PA FIX	HARRISBURG, PA VORTAC	3800	17500
HARRISBURG, PA VORTAC	BOBSS, PA FIX	3100	17500
BOBSS, PA FIX	EAST TEXAS, PA VOR/DME	3000	17500
EAST TEXAS, PA VOR/DME	ALLENTOWN, PA VORTAC	*2700	17500
*2900—MCA ALLENTOWN, PA VORTAC , NE BND			
ALLENTOWN, PA VORTAC	HUGUENOT, NY VOR/DME	3400	17500
HUGUENOT, NY VOR/DME	WEARD, NY FIX	*3400	17500
*4700—MCA WEARD, NY FIX , NE BND			
WEARD, NY FIX	ALBANY, NY VORTAC	6400	17500
Is Amended To Read in Part			
UCREK, VA WP	KAIJE, VA WP	4600	10000
KAIJE, VA WP	BAMMY, WV WP	*5500	10000
*4500—MCA BAMMY, WV WP , SW BND			
BAMMY, WV WP	REEES, PA WP	4300	10000
REEES, PA WP	SCAPE, PA FIX	3700	10000
§ 95.3365 RNAV Route T365 Is Added To Read			
BROOKLEY, AL VORTAC	GARTS, MS WP	2000	17500
GARTS, MS WP	MIZZE, MS FIX	2200	17500
MIZZE, MS FIX	MAGNOLIA, MS VORTAC	2400	17500
§ 95.3376 RNAV Route T376 Is Added To Read			
FAGIN, AK FIX	VAYUT, AK WP	*5000	17500
*3000—MCA VAYUT, AK WP , W BND			
VAYUT, AK WP	WOLCI, AK WP	*2500	17500
*4200—MCA WOLCI, AK WP , SE BND			
WOLCI, AK WP	JETIG, AK WP	4900	17500
JETIG, AK WP	FEDGI, AK WP	*4900	17500
*5100—MCA FEDGI, AK WP , E BND			
FEDGI, AK WP	WUKSU, AK WP	5600	17500
WUKSU, AK WP	HAMPU, AK WP	5600	17500
HAMPU, AK WP	HOMER, AK VOR/DME	3700	17500
§ 95.3379 RNAV Route T379 Is Added To Read			
MAYHW, AK WP	MUPVE, AK WP	7400	17500
MUPVE, AK WP	HIBNA, AK WP	7000	17500
HIBNA, AK WP	JEKBO, AK WP	*6800	17500
*6100—MCA JEKBO, AK WP , S BND			
JEKBO, AK WP	ZOKAM, AK WP	5300	17500
ZOKAM, AK WP	JEBDA, AK WP	5500	17500
JEBDA, AK WP	AMEDE, AK WP	5500	17500
AMEDE, AK WP	ZARUM, AK WP	5600	17500
ZARUM, AK WP	TIRIE, AK WP	5600	17500
TIRIE, AK WP	UTICE, AK WP	4400	17500
§ 95.3380 RNAV Route T380 Is Added To Read			
EMMONAK, AK VOR/DME	HUMLA, AK WP	*2100	17500
*1300—MOCA			
HUMLA, AK WP	HUROP, AK WP	*2800	17500
*2000—MOCA			
HUROP, AK WP	JOPES, AK WP	*2700	17500
*1900—MOCA			
JOPES, AK WP	ANESE, AK WP	*3000	17500
*2000—MOCA			
ANESE, AK WP	EYOPA, AK WP	*4000	17500
*3200—MOCA			

From	To	MEA	MAA
EYOPA, AK WP	DAVBE, AK WP	*3500	17500
*3000—MOCA			
DAVBE, AK WP	CIBUP, AK WP	3600	17500
CIBUP, AK WP	AMEDE, AK WP	5000	17500
AMEDE, AK WP	CERTU, AK WP	*5300	17500
*4600—MCA CERTU, AK WP , W BND			
CERTU, AK WP	FABGI, AK WP	3500	17500
FABGI, AK WP	SPARREVOHN, AK VOR/DME	5500	17500
§ 95.3386	**RNAV Route T386 Is Added To Read**		
FAIRBANKS, AK VORTAC	DEYEP, AK FIX	6700	17500
DEYEP, AK FIX	WUTGA, AK WP	*6000	17500
*6200—MCA WUTGA, AK WP , NE BND			
WUTGA, AK WP	FIXEG, AK WP	*6600	17500
*5500—MCA FIXEG, AK WP , SW BND			
FIXEG, AK WP	JEGPA, AK WP	*4100	17500
*4100—MCA JEGPA, AK WP , SW BND.			
JEGPA, AK WP	WEXIK, AK WP	4000	17500
§ 95.3388	**RNAV Route T388 Is Added To Read**		
WIXER, AK WP	ZOPAB, AK WP	5200	17500
ZOPAB, AK WP	HEBMI, AK WP	5000	17500
HEBMI, AK WP	ZEMIR, AK WP	*10000	17500
*5400—MOCA			
ZEMIR, AK WP	JUDAX, AK WP	*10000	17500
*4300—MOCA			
JUDAX, AK WP	BAILY, AK FIX	*10000	17500
*4800—MOCA			
§ 95.3452	**RNAV Route T452 Is Added To Read**		
VINSE, PA FIX	BADDI, PA FIX	4700	17500
BADDI, PA FIX	HARRISBURG, PA VORTAC	*4000	17500
*3600—MCA HARRISBURG, PA VORTAC , W BND			
HARRISBURG, PA VORTAC	JOANE, PA FIX	3000	17500
JOANE, PA FIX	GEERI, PA FIX	2400	17500
GEERI, PA FIX	REESY, PA WP	2700	17500
§ 95.3456	**RNAV Route T456 Is Added To Read**		
VINSE, PA FIX	AMISH, PA FIX	4200	17500
AMISH, PA FIX	SCAPE, PA FIX	3600	17500
SCAPE, PA FIX	NOENO, PA FIX	3800	17500
NOENO, PA FIX	PIFER, PA FIX	2700	17500
PIFER, PA FIX	GRAMO, PA FIX	2600	17500
GRAMO, PA FIX	DELRO, PA FIX	2900	17500
DELRO, PA FIX	ROAST, PA FIX	2900	17500
ROAST, PA FIX	GEERI, PA FIX	2600	17500
GEERI, PA FIX	PADRE, PA FIX	2700	17500
PADRE, PA FIX	FOLEZ, PA WP	2600	17500
FOLEZ, PA WP	MODENA, PA VORTAC	2300	17500
§ 95.3471	**RNAV Route T471 Is Added To Read**		
RCOLA, LA WP	RELAY, LA FIX	1800	17500
RELAY, LA FIX	WRACK, LA FIX	2000	17500
WRACK, LA FIX	NTCHZ, MS WP	2100	17500
NTCHZ, MS WP	ZAROX, LA FIX	2000	17500
ZAROX, LA FIX	MONROE, LA VORTAC	1900	17500
§ 95.3473	**RNAV Route T473 Is Added To Read**		
ICEKI, MS WP	NTCHZ, MS WP	2000	17500
NTCHZ, MS WP	TULLO, LA WP	2000	17500
TULLO, LA WP	MONROE, LA VORTAC	2000	17500
§ 95.3474	**RNAV Route T474 Is Added To Read**		
ALEXANDRIA, LA VORTAC	NTCHZ, MS WP	2000	17500
NTCHZ, MS WP	BARNE, MS WP	*3500	17500
*1900—MOCA			

From	To	MEA	MAA
BARNE, MS WP	MAGNOLIA, MS VORTAC	3500	17500
§ 95.3477 RNAV Route T477 Is Added To Read			
CPTAL, MD WP	HAGERSTOWN, MD VOR	3300	17500
HAGERSTOWN, MD VOR	VINSE, PA FIX	*4200	17500
*4700—MCA VINSE, PA FIX , N BND			
VINSE, PA FIX	BLINK, PA FIX	4700	17500
BLINK, PA FIX	PHILIPSBURG, PA VORTAC	4900	17500
§ 95.3481 RNAV ROute T481 Is Added To Read			
BIORKA ISLAND, AK VORTAC	LYRIC, AK FIX	5100	17500
LYRIC, AK FIX	SISTERS ISLAND, AK VORTAC	5800	17500
SISTERS ISLAND, AK VORTAC	CHILL, AK WP	7400	17500
CHILL, AK WP	BAVKE, AK WP	8700	17500
BAVKE, AK WP	MAGNM, AK WP	9300	17500
§ 95.3719 RNAV Route T719 Is Added To Read			
U.S. CANADIAN BORDER	LATCH, AK FIX	3000	17500
LATCH, AK FIX	BIORKA ISLAND, AK VORTAC	4000	17500
§ 95.4000 High Altitude RNAV Routes			
§ 95.4117 RNAV Route Q117 Is Amended to Read in Part			
PRONI, NC WP	CUDLE, NC WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
§ 95.4131 RNAV Route Q131 Is Amended To Delete			
KALDA, VA FIX	ZJAAY, MD WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
Is Amended To Read in Part			
WAALT, NC WP	PRONI, NC WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
PRONI, NC WP	EARZZ, NC WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
§ 95.4167 RNAV Route Q167 Is Amended by Adding			
KALDA, VA WP	ZJAAY, MD WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
§ 95.4180 RNAV Route Q180 Is Added To Read			
BUCKEYE, AZ VORTAC	DEMING, NM VORTAC	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
DEMING, NM VORTAC	NEWMAN, TX VORTAC	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
§ 95.4409 RNAV Route Q409 Is Amended by Adding			
TRPOD, MD WP	OYVAY, DE WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
OYVAY, DE WP	VILLS, NJ WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
Is Amended To Delete			
TRPOD, MD WP	GNARO, DE WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
GNARO, DE WP	VILLS, NJ WP	*18000	45000
*18000—GNSS MEA			

From	To	MEA	MAA
*DME/DME/IRU MEA	.....	.....	.....
§ 95.4439 RNAV Route Q439 Is Amended by Adding			
HOWYU, DE WP *18000—GNSS MEA *DME/DME/IRU MEA	RADDS, DE FIX	*18000	45000
RADDS, DE FIX *18000—GNSS MEA *DME/DME/IRU MEA	WNSTN, NJ WP	*18000	45000
WNSTN, NJ WP *18000—GNSS MEA *DME/DME/IRU MEA	AVALO, NJ FIX	*18000	45000
AVALO, NJ FIX *18000—GNSS MEA *DME/DME/IRU MEA	BRIGS, NJ FIX	*18000	45000

From	To	MEA
§ 95.6001 Victor Routes—U.S. **§ 95.6011 VOR Federal Airway V11 Is Amended To Delete**		
BROOKLEY, AL VORTAC	GREENE COUNTY, MS VORTAC	2000
GREENE COUNTY, MS VORTAC *1900—MOCA *3000—GNSS MEA	MIZZE, MS FIX	*4000
MIZZE, MS FIX *2400—MOCA	MAGNOLIA, MS VORTAC	*3000
§ 95.6013 VOR Federal Airway V13 Is Amended To Read in Part		
DULUTH, MN VORTAC *6000—MRA *10000—MCA WEMAN, MN FIX , NE BND	*WEMAN, MN FIX	4000
WEMAN, MN FIX	U.S. CANADIAN BORDER	10000
§ 95.6037 VOR Federal Airway V37 Is Amended To Read in Part		
JOTTA, NC FIX *5900—MOCA	DOILY, VA FIX	*7000
DOILY, VA FIX	PULASKI, VA VORTAC	6000
§ 95.6044 VOR Federal Airway V44 Is Amended To Read in Part		
BALTIMORE, MD VORTAC *13500—MCA PALEO, MD FIX , E BND	*PALEO, MD FIX	2200 .....
§ 95.6070 VOR Federal Airway V70 Is Amended To Delete		
PICAYUNE, MS VOR/DME	GREENE COUNTY, MS VORTAC	2000
GREENE COUNTY, MS VORTAC	MONROEVILLE, AL VORTAC	2000
§ 95.6071 VOR Federal Airway V71 Is Amended To Delete		
FIGHTING TIGER, LA VORTAC *1800—MOCA	WRACK, LA FIX	*2200
WRACK, LA FIX *2200—MOCA *2200—GNSS MEA	NATCHEZ, MS VOR/DME	*3500
NATCHEZ, MS VOR/DME	MONROE, LA VORTAC	2000
§ 95.6120 VOR Federal Airway V120 Is Amended To Read in Part		
GREAT FALLS, MT VORTAC	LEWISTOWN, MT VOR/DME	8600
LEWISTOWN, MT VOR/DME	ESTRO, MT FIX	7800
ESTRO, MT FIX *7800—MOCA #MEA IS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE.	MILES CITY, MT VOR/DME	*11000
§ 95.6194 VOR Federal Airway V194 Is Amended To Read in Part		
MCB, MS VORTAC *3500—MCA MIZZE, MS FIX , SW BND	*MIZZE, MS FIX	**3500

From	To	MEA
**2000—MOCA		
§ 95.6212 VOR Federal Airway V212 Is Amended To Read in Part		
SETTA, MS FIX	MC COMB, MS VORTAC E BND W BND	*3000 *4000
*2000—MOCA		
§ 95.6245 VOR Federal Airway V245 Is Amended To Delete		
ALEXANDRIA, LA VORTAC	NATCHEZ, MS VOR/DME	2000
NATCHEZ, MS VOR/DME	MAGNOLIA, MS VORTAC	3500
§ 95.6554 VOR Federal Airway V554 Is Amended To Delete		
NATCHEZ, MS VOR/DME	*TULLO, LA WP	**6000
*6000—MCA TULLO, LA WP , SE BND **1800—MOCA		
TULLO, LA WP	MONROE, LA VORTAC	2000
§ 95.6570 VOR Federal Airway V570 Is Amended To Delete		
ALEXANDRIA, LA VORTAC	NATCHEZ, MS VOR/DME	2000
NATCHEZ, MS VOR/DME	MC COMB, MS VORTAC	2000

From	To	MEA	MAA
§ 95.7001 Jet Routes **§ 95.7070 Jet Route J70 Is Amended To Read in Part**			
MULLAN PASS, ID VOR/DME	LEWISTOWN, MT VOR/DME	22000	45000
LEWISTOWN, MT VOR/DME	DICKINSON, ND VORTAC	#21000	45000
#MEA IS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE.			
§ 95.7184 Jet Route J184 Is Amended To Delete			
BUCKEYE, AZ VORTAC	DEMING, NM VORTAC	23000	45000
DEMING, NM VORTAC	NEWMAN, TX VORTAC	18000	45000
§ 95.7590 Jet Route J590 Is Amended To Delete			
LAKE CHARLES, LA VORTAC	FIGHTING TIGER, LA VORTAC	18000	45000
FIGHTING TIGER, LA VORTAC	GREENE COUNTY, MS VORTAC	18000	45000
GREENE COUNTY, MS VORTAC	MONTGOMERY, AL VORTAC	18000	45000

Airway segment		Changeover points	
From	To	Distance	From
§ 95.8003 VOR Federal Airway Changeover Points **V245 Is Amended To Delete Changeover Point**			
NATCHEZ, MS VOR/DME	MAGNOLIA, MS VORTAC	25	NATCHEZ

[FR Doc. 2023–19378 Filed 9–7–23; 8:45 am]
BILLING CODE 4910–13–P

RAILROAD RETIREMENT BOARD

20 CFR Part 220

Determining Disability

CFR Correction

This rule is being published by the Office of the Federal Register to correct an editorial or technical error that appeared in the most recent annual revision of the Code of Federal Regulations.

■ In Title 20 of the Code of Federal Regulations, Parts 1 to 399, revised as of April 1, 2023, in the tables in appendix 3 to part 220, remove ''≤'' and add ''>'' wherever it appears in the following entries:

■ 1. Under ''C. Cardiac'':

a. Under ''Body Part: Cardiac, Confirmatory Tests'', under ''Coronary artery disease:'', the entry for ''Angiography'';

b. Under ''Body Part: Cardiac, Job Title: Trainman'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

c. Under ''Body Part: Cardiac, Job Title: Engineer'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

d. Under ''Body Part: Cardiac, Job Title: Dispatcher'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

e. Under Body ''Part: Cardiac, Job Title: Carman'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

f. Under ''Body Part: Cardiac, Job Title: Signalman'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

g. Under ''Body Part: Cardiac, Job Title: Trackman'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

h. Under ''Body Part: Cardiac, Job Title: Machinist'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

i. Under ''Body Part: Cardiac, Job Title: Shop Laborer'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

j. Under ''Body Part: Cardiac, Job Title: Sales Representative'':

i. Under ''Hypertension:'', the entry for ''Medical record review'', in all places;

ii. Under ''Arrhythmia: heart block:'', the entry for ''Holter'';

k. Under ''Body Part: Cardiac, Job Title: General Office Clerk'', under ''Arrhythmia: heart block:'', the entry for ''Holter'';

■ 2. Under ''D. Respiratory'':

a. Under ''Body Part: Respiratory Confirmatory Tests'', under ''Asthma:'', the entry for ''Spirometry'' and the first ''≤'' in the entry for ''Methacholine challenge test'';

b. Under ''Body Part: Respiratory, Job Title: Trainman'':

i. Under ''Bronchiectasis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

ii. Under ''Chronic bronchitis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iii. Under ''Chronic obstructive pulmonary disease (COPD):'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iv. Under ''Pulmonary fibrosis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

v. Under ''Restrictive lung disease:'', the entry for ''Pulmonary exercise test or exercise ABG'';

vi. Under ''Silicosis:'', the entry for ''Resting ABG'';

c. Under ''Body Part: Respiratory, Job Title: Carman'':

i. Under ''Bronchiectasis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

ii. Under ''Chronic bronchitis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iii. Under ''Chronic obstructive pulmonary disease (COPD):'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iv. Under ''Pulmonary fibrosis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

v. Under ''Restrictive lung disease:'', the entry for ''Pulmonary exercise test or exercise ABG'';

vi. Under ''Silicosis:'', the entry for ''Resting ABG'';

d. Under ''Body Part: Respiratory, Job Title: Signalman'':

i. Under ''Bronchiectasis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

ii. Under ''Chronic bronchitis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iii. Under ''Chronic obstructive pulmonary disease (COPD):'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iv. Under ''Pulmonary fibrosis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

v. Under ''Restrictive lung disease:'', the entry for ''Pulmonary exercise test or exercise ABG'';

vi. Under ''Silicosis:'', the entry for ''Resting ABG'';

e. Under ''Body Part: Respiratory, Job Title: Trackman'':

i. Under ''Bronchiectasis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

ii. Under ''Chronic bronchitis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iii. Under ''Chronic obstructive pulmonary disease (COPD):'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iv. Under ''Pulmonary fibrosis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

v. Under ''Restrictive lung disease:'', the entry for ''Pulmonary exercise test or exercise ABG'';

vi. Under ''Silicosis:'', the entry for ''Resting ABG'';

f. Under ''Body Part: Respiratory, Job Title: Machinist'':

i. Under ''Bronchiectasis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

ii. Under ''Chronic bronchitis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iii. Under ''Chronic obstructive pulmonary disease (COPD):'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iv. Under ''Pulmonary fibrosis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

v. Under ''Restrictive lung disease:'', the entry for ''Pulmonary exercise test or exercise ABG'';

vi. Under ''Silicosis:'', the entry for ''Resting ABG'';

g. Under ''Body Part: Respiratory, Job Title: Shop Laborer'':

i. Under ''Bronchiectasis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

ii. Under ''Chronic bronchitis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iii. Under ''Chronic obstructive pulmonary disease (COPD):'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

iv. Under ''Pulmonary fibrosis:'', the entries for ''Resting ABG'' and ''Pulmonary exercise test or exercise ABG'';

v. Under ''Restrictive lung disease:'', the entry for ''Pulmonary exercise test or exercise ABG'';

vi. Under ''Silicosis:'', the entry for ''Resting ABG'';

■ 3. Under ''F. Cervical Spine'', under ''Body Part: CE Spine, Confirmatory Tests'', under ''Radiculopathy:'', the second entry for ''Physical examination: arm'';

■ 4. Under ''G. Shoulder and Elbow'':

a. Under ''Body Part: Shoulder and Elbow, Job Title: Trainman'', under ''Permanent functional limitation, elbow:'', the entry for ''Physical examination'';

b. Under ''Body Part: Shoulder and Elbow, Job Title: Engineer'', under ''Permanent functional limitation, elbow:'', the entry for ''Physical examination'';

c. Under ''Body Part: Shoulder and Elbow, Job Title: Carman'', under

''Permanent functional limitation, elbow:'', the entry for ''Physical examination'';

d. Under ''Body Part: Shoulder and Elbow, Job Title: Signalman'', under ''Permanent functional limitation, elbow:'', the entry for ''Physical examination'';

e. Under ''Body Part: Shoulder and Elbow, Job Title: Trackman'', under ''Permanent functional limitation, elbow:'', the entry for ''Physical examination'';

f. Under ''Body Part: Shoulder and Elbow, Job Title: Machinist'', under ''Permanent functional limitation, elbow:'', the entry for ''Physical examination'';

g. Under ''Body Part: Shoulder and Elbow, Job Title: Shop Laborer'', under ''Permanent functional limitation, elbow:'', the entry for ''Physical examination'';

■ 5. Under ''H. Hand and Arm'':

a. Under ''Body Part: Hand and Arm, Job Title: Trainman'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

b. Under ''Body Part: Hand and Arm, Job Title: Engineer'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

c. Under ''Body Part: Hand and Arm, Job Title: Dispatcher'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

d. Under ''Body Part: Hand and Arm, Job Title: Carman'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

e. Under ''Body Part: Hand and Arm, Job Title: Signalman'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

f. Under ''Body Part: Hand and Arm, Job Title: Trackman'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

g. Under ''Body Part: Hand and Arm, Job Title: Machinist'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

h. Under ''Body Part: Hand and Arm, Job Title: Shop Laborer'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

i. Under ''Body Part: Hand and Arm, Job Title: Sales Representative'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

j. Under ''Body Part: Hand and Arm, Job Title: General Office Clerk'':

i. Under ''Fracture, wrist:'', the third entry for ''Physical examination—range of motion'';

ii. Under ''Wrist: permanent functional limitation:'', the third entry for ''Physical examination—range of motion'';

■ 6. Under ''I. Hip'':

a. Under ''Body Part: Hip, Job Title: Trainman'', under ''Ankylosis, hip:'', all entries for ''Physical examination—range of motion'';

b. Under ''Body Part: Hip, Job Title: Engineer'', under ''Ankylosis, hip:'', all entries for ''Physical examination—range of motion'';

c. Under ''Body Part: Hip, Job Title: Carman'', under ''Ankylosis, hip:'', all entries for ''Physical examination—range of motion'';

d. Under ''Body Part: Hip, Job Title: Signalman'', under ''Ankylosis, hip:'', all entries for ''Physical examination—range of motion'';

e. Under ''Body Part: Hip, Job Title: Trackman'', under ''Ankylosis, hip:'', all entries for ''Physical examination—range of motion'';

f. Under ''Body Part: Hip, Job Title: Machinist'', under ''Ankylosis, hip:'', all entries for ''Physical examination—range of motion'';

g. Under ''Body Part: Hip, Job Title: Shop Laborer'', under ''Ankylosis, hip:'', all entries for ''Physical examination—range of motion'';

■ 7. Under ''J. Knee'':

a. Under ''Body Part: Knee, Job Title: Trainman'':

i. Under ''Arthritis knee:'', the second entry for ''Physical examination—range of motion'';

ii. Under ''Meniscectomy, medial or lateral:'', the second entry for ''Physical examination—range of motion'';

iii. Under ''Collateral ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

iv. Under ''Cruciate and collateral ligament tear:'', the second entry for ''Physical examination—range of motion'';

v. Under ''Cruciate ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'':

vi. Under ''Intercondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

vii. Under ''Osteomyelitis, chronic knee:'', the second entry for ''Physical examination—range of motion'';

viii. Under ''Osteonecrosis:'', the second entry for ''Physical examination—range of motion'';

ix. Under ''Patellofemoral arthritis:'', the second entry for ''Physical examination—range of motion'';

x. Under ''Patellar fracture nonunion with displacement:'', the second entry for ''Physical examination—range of motion'' and the entry for ''X-ray knee'';

xi. Under ''Plateau fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xii. Under ''Patellectomy:'', the second entry for ''Physical examination—range of motion'';

xiii. Under ''Patellar, subluxation, recurrent:'', the second entry for ''Physical examination—range of motion'';

xiv. Under ''Supracondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xv. Under ''Tibial shaft fracture:'', the second entry for ''Physical examination—range of motion'' and the entry for ''Post fracture angulation'';

b. Under ''Body Part: Knee, Job Title: Engineer'':

i. Under ''Arthritis knee:'', the second entry for ''Physical examination—range of motion'';

ii. Under ''Meniscectomy, medial or lateral:'', the second entry for ''Physical examination—range of motion'';

iii. Under ''Collateral ligament tear with laxity:'', the second entry for

''Physical examination—range of motion'';

iv. Under ''Cruciate and collateral ligament tear:'', the second entry for ''Physical examination—range of motion'';

v. Under ''Cruciate ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

vi. Under ''Intercondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

vii. Under ''Osteomyelitis, chronic knee:'', the second entry for ''Physical examination—range of motion'';

viii. Under ''Osteonecrosis:'', the second entry for ''Physical examination—range of motion'';

ix. Under ''Patellofemoral arthritis:'', the second entry for ''Physical examination—range of motion'';

x. Under ''Patellar fracture nonunion with displacement:'', the second entry for ''Physical examination—range of motion'' and the entry for ''X-ray knee'';

xi. Under ''Plateau fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xii. Under ''Patellectomy:'', the second entry for ''Physical examination—range of motion'';

xiii. Under ''Patellar, subluxation, recurrent:'', the second entry for ''Physical examination—range of motion'';

xiv. Under ''Supracondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xv. Under ''Tibial shaft fracture:'', the second entry for ''Physical examination—range of motion'' and the entry for ''Post fracture angulation'';

c. Under ''Body Part: Knee, Job Title: Carman'':

i. Under ''Arthritis knee:'', the second entry for ''Physical examination—range of motion'';

ii. Under ''Meniscectomy, medial or lateral:'', the second entry for ''Physical examination—range of motion'';

iii. Under ''Collateral ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

iv. Under ''Cruciate and collateral ligament tear:'', the second entry for ''Physical examination—range of motion'';

v. Under ''Cruciate ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

vi. Under ''Intercondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

vii. Under ''Osteomyelitis, chronic knee:'', the second entry for ''Physical examination—range of motion'';

viii. Under ''Osteonecrosis:'', the second entry for ''Physical examination—range of motion'';

ix. Under ''Patellofemoral arthritis:'', the second entry for ''Physical examination—range of motion'';

x. Under ''Patellar fracture nonunion with displacement:'', the second entry for ''Physical examination—range of motion'' and the entry for ''X-ray knee'';

xi. Under ''Plateau fracture:'', the entry for ''Post fracture angulation'', and the second entry for ''Physical examination—range of motion'';

xii. Under ''Patellectomy:'', the second entry for ''Physical examination—range of motion'';

xiii. Under ''Patellar, subluxation, recurrent:'', the second entry for ''Physical examination—range of motion'';

xiv. Under ''Supracondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xv. Under ''Tibial shaft fracture:'', the second entry for ''Physical examination—range of motion'' and the entry for ''Post fracture angulation'';

d. Under ''Body Part: Knee, Job Title: Signalman'':

i. Under ''Arthritis knee:'', the second entry for ''Physical examination—range of motion'';

ii. Under ''Meniscectomy, medial or lateral:'', the second entry for ''Physical examination—range of motion'';

iii. Under ''Collateral ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

iv. Under ''Cruciate and collateral ligament tear:'', the second entry for ''Physical examination—range of motion'';

v. Under ''Cruciate ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

vi. Under ''Intercondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

vii. Under ''Osteomyelitis, chronic knee:'', the second entry for ''Physical examination—range of motion'';

viii. Under ''Osteonecrosis:'', the second entry for ''Physical examination—range of motion'';

ix. Under ''Patellofemoral arthritis:'', the second entry for ''Physical examination—range of motion'';

x. Under ''Patellar fracture nonunion with displacement:'', the second entry for ''Physical examination—range of motion'' and the entry for ''X-ray knee'';

xi. Under ''Plateau fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xii. Under ''Patellectomy:'', the second entry for ''Physical examination—range of motion'';

xiii. Under ''Patellar, subluxation, recurrent:'', the second entry for ''Physical examination—range of motion'';

xiv. Under ''Supracondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for the second entry for ''Physical examination—range of motion'';

xv. Under ''Tibial shaft fracture:'', the second entry for ''Physical examination—range of motion'' and the entry for ''Post fracture angulation'';

e. Under ''Body Part: Knee, Job Title: Trackman'':

i. Under ''Arthritis knee:'', the second entry for ''Physical examination—range of motion'';

ii. Under ''Meniscectomy, medial or lateral:'', the second entry for ''Physical examination—range of motion'';

iii. Under ''Collateral ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

iv. Under ''Cruciate and collateral ligament tear:'', the second entry for ''Physical examination—range of motion'';

v. Under ''Cruciate ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

vi. Under ''Intercondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

vii. Under ''Osteomyelitis, chronic knee:'', the second entry for ''Physical examination—range of motion'';

viii. Under ''Osteonecrosis:'', the second entry for ''Physical examination—range of motion'';

ix. Under ''Patellofemoral arthritis:'', the second entry for ''Physical examination—range of motion'';

x. Under ''Patellar fracture nonunion with displacement:'', the second entry for ''Physical examination—range of motion'' and the entry for ''X-ray knee'';

xi. Under ''Plateau fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xii. Under ''Patellectomy:'', the second entry for ''Physical examination—range of motion'';

xiii. Under ''Patellar, subluxation, recurrent:'', the second entry for Physical examination—range of motion'';

xiv. Under ''Supracondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xv. Under ''Tibial shaft fracture:'', the second entry for ''Physical examination—range of motion'' and the entry for ''Post fracture angulation'';

f. Under ''Body Part: Knee, Job Title: Machinist'':

i. Under ''Arthritis knee:'', the second entry for ''Physical examination—range of motion'';

ii. Under ''Meniscectomy, medial or lateral:'', the second entry for ''Physical examination—range of motion'';

iii. Under ''Collateral ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

iv. Under ''Cruciate and collateral ligament tear:'', the second entry for ''Physical examination—range of motion'';

v. Under ''Cruciate ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

vi. Under ''Intercondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

vii. Under ''Osteomyelitis, chronic knee:'', the second entry for ''Physical examination—range of motion'';

viii. Under ''Osteonecrosis:'', the second entry for ''Physical examination—range of motion'';

ix. Under ''Patellofemoral arthritis:'', the second entry for ''Physical examination—range of motion'';

x. Under ''Patellar fracture nonunion with displacement:'', the second entry for ''Physical examination—range of motion'' and the entry for ''X-ray knee'';

xi. Under ''Plateau fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xii. Under ''Patellectomy:'', the second entry for ''Physical examination—range of motion'';

xiii. Under ''Patellar, subluxation, recurrent:'', the second entry for ''Physical examination—range of motion'';

xiv. Under ''Supracondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xv. Under ''Tibial shaft fracture:'', the second entry for ''Physical examination—range of motion'' and the entry for ''Post fracture angulation'';

g. Under ''Body Part: Knee, Job Title: Shop Laborer'':

i. Under ''Arthritis knee:'', the second entry for ''Physical examination—range of motion'';

ii. Under ''Meniscectomy, medial or lateral:'', the second entry for ''Physical examination—range of motion'';

iii. Under ''Collateral ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

iv. Under ''Cruciate and collateral ligament tear:'', the second entry for ''Physical examination—range of motion'';

v. Under ''Cruciate ligament tear with laxity:'', the second entry for ''Physical examination—range of motion'';

vi. Under ''Intercondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

vii. Under ''Osteomyelitis, chronic knee:'', the second entry for ''Physical examination—range of motion'';

viii. Under ''Osteonecrosis:'', the second entry for ''Physical examination—range of motion'';

ix. Under ''Patellofemoral arthritis:'', the second entry for ''Physical examination—range of motion'';

x. Under ''Patellar fracture nonunion with displacement:'', the second entry for ''Physical examination—range of motion'' and the entry for ''X-ray knee'';

xi. Under ''Plateau fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xii. Under ''Patellectomy:'', the second entry for ''Physical examination—range of motion'';

xiii. Under ''Patellar, subluxation, recurrent:'', the second entry for ''Physical examination—range of motion'';

xiv. Under ''Supracondylar fracture:'', the entry for ''Post fracture angulation'' and the second entry for ''Physical examination—range of motion'';

xv. Under ''Tibial shaft fracture:'', the second entry for ''Physical examination—range of motion'' and the entry for ''Post fracture angulation'';

■ 8. Under ''K. Ankle and Foot'':

a. Under ''Body Part: Ankle and Foot, Job Title: Trainman'':

i. Under ''Ankle fracture:'', the entry for ''Physical examination'';

ii. Under ''Ankylosis, ankle:'', the third entry for ''Physical examination—range of motion'';

iii. Under ''Arthritis, subtalar joint (hindfoot):'', the entry for ''Physical examination'';

iv. Under ''Arthritis, talonavicular joint (hindfoot):'', the entry for ''Physical examination'';

v. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';

vi. Under ''Hindfoot fracture:'', both entries for ''Physical examination'';

b. Under ''Body Part: Ankle and Foot, Job Title: Engineer'':

i. Under ''Ankle fracture:'', the entry for ''Physical examination'';

ii. Under ''Ankylosis, ankle:'', the first and third entries for ''Physical examination—range of motion'';

iii. Under ''Arthritis, subtalar joint (hindfoot):'', the entry for ''Physical examination'';

iv. Under ''Arthritis, talonavicular joint (hindfoot):'', the entry for ''Physical examination'';

v. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';

vi. Under ''Hindfoot fracture:'', both entries for ''Physical examination'';

c. Under ''Body Part: Ankle and Foot, Job Title: Dispatcher'':

i. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';

ii. Under ''Hindfoot fracture:'', both entries for ''Physical examination'';

d. Under ''Body Part: Ankle and Foot, Job Title: Carman'':

i. Under ''Ankle fracture:'', the entry for ''Physical examination'';

ii. Under ''Ankylosis, ankle:'', the first and third entries for ''Physical examination—range of motion'';

iii. Under ''Arthritis, subtalar joint (hindfoot):'', the entry for ''Physical examination'';

iv. Under ''Arthritis, talonavicular joint (hindfoot):'', the entry for ''Physical examination'';

v. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';

vi. Under ''Hindfoot fracture:'', both entries for ''Physical examination'';

e. Under ''Body Part: Ankle and Foot, Job Title: Signalman'':

i. Under ''Ankle fracture:'', the entry for ''Physical examination'';

ii. Under ''Ankylosis, ankle:'', the first and third entries for ''Physical examination—range of motion'';

iii. Under ''Arthritis, subtalar joint (hindfoot):'', the entry for ''Physical examination'';

iv. Under ''Arthritis, talonavicular joint (hindfoot):'', the entry for ''Physical examination'';

v. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';

vi. Under ''Hindfoot fracture:'', both entries for ''Physical examination'';

f. Under ''Body Part: Ankle and Foot, Job Title: Trackman'':

i. Under ''Ankle fracture:'', the first entry for ''Physical examination—range of motion'';

ii. Under ''Ankylosis, ankle:'', the first and third entries for ''Physical examination—range of motion'';

iii. Under ''Arthritis, subtalar joint (hindfoot):'', the entry for ''Physical examination'';

iv. Under ''Arthritis, talonavicular joint (hindfoot):'', the entry for ''Physical examination'';

v. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';

vi. Under ''Hindfoot fracture:'', both entries for ''Physical examination'';

g. Under ''Body Part: Ankle and Foot, Job Title: Machinist'':

i. Under ''Ankle fracture:'', the entry for ''Physical examination'';
ii. Under ''Ankylosis, ankle:'', the first and third entries for ''Physical examination—range of motion'';
iii. Under ''Arthritis, subtalar joint (hindfoot):'', the entry for ''Physical examination'';
iv. Under ''Arthritis, talonavicular joint (hindfoot):'', the entry for ''Physical examination'';
v. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';
vi. Under ''Hindfoot fracture:'', both entries for ''Physical examination'';
h. Under ''Body Part: Ankle and Foot, Job Title: Shop Laborer'':
i. Under ''Ankle fracture:'', the entry for ''Physical examination'';
ii. Under ''Ankylosis, ankle:'', the first and third entries for ''Physical examination—range of motion'';
iii. Under ''Arthritis, subtalar joint (hindfoot):'', the entry for ''Physical examination'';
iv. Under ''Arthritis, talonavicular joint (hindfoot):'', the entry for ''Physical examination'';
v. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';
vi. Under ''Hindfoot fracture:'', both entries for ''Physical examination'';
i. Under ''Body Part: Ankle and Foot, Job Title: Sales Representative'':
i. Under ''Arthritis, ankle:'', the entry for ''Physical examination'';
ii. Under ''Hindfoot fracture:'', both entries for ''Physical examination''.

[FR Doc. 2023–19567 Filed 9–7–23; 8:45 am]

BILLING CODE 0099–10–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 587

Publication of Russian Harmful Foreign Activities Sanctions Regulations Web General License 13F

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of a web general license.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing one general license (GL) issued pursuant to the Russian Harmful Foreign Activities Sanctions Regulations: GL 13F, which was previously made available on OFAC's website.

DATES: GL 13F was issued on August 10, 2023. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

FOR FURTHER INFORMATION CONTACT: OFAC: Assistant Director for Licensing, 202–622–2480; Assistant Director for Regulatory Affairs, 202–622–4855; or Assistant Director for Compliance, 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

This document and additional information concerning OFAC are available on OFAC's website: *https://ofac.treasury.gov.*

Background

On August 10, 2023, OFAC issued GL 13F to authorize certain transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587. GL 13F has an expiration date of November 8, 2023, and was made available on OFAC's website (*https://ofac.treasury.gov*) when it was issued. The text of this GL is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations

31 CFR Part 587

General License No. 13F

Authorizing Certain Administrative Transactions Prohibited by Directive 4 Under Executive Order 14024

(a) Except as provided in paragraph (b) of this general license, U.S. persons, or entities owned or controlled, directly or indirectly, by a U.S. person, are authorized to pay taxes, fees, or import duties, and purchase or receive permits, licenses, registrations, or certifications, to the extent such transactions are prohibited by Directive 4 under Executive Order 14024, *Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation,* provided such transactions are ordinarily incident and necessary to the day-to-day operations in the Russian Federation of such U.S. persons or entities, through 12:01 a.m. eastern standard time, November 8, 2023.

(b) This general license does not authorize:

(1) Any debit to an account on the books of a U.S. financial institution of the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, or the Ministry of Finance of the Russian Federation; or

(2) Any transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587 (RuHSR), including transactions involving any person blocked pursuant to the RuHSR, unless separately authorized.

(c) Effective August 10, 2023, General License No. 13E, dated May 19, 2023, is replaced and superseded in its entirety by this General License No. 13F.

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

Dated: August 10, 2023.

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2023–19434 Filed 9–7–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0758]

Safety Zones in Reentry Sites; Jacksonville, Florida

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard is activating three safety zones for the National Aeronautics and Space Administration (NASA) Commercial Crew Program 6 (Crew-6) mission reentry vehicle splashdown, and recovery operations. These operations will occur in the U.S. Exclusive Economic Zone (EEZ). Our regulation for safety zones in reentry sites within the Seventh Coast Guard District identifies the regulated areas for this event. No U.S.-flagged vessel may enter the safety zones unless authorized by the Captain of the Port Savannah or a designated representative. Foreign-flagged vessels are encouraged to remain outside the safety zones.

DATES: The regulations in 33 CFR 165.T07–0806 will be enforced for the safety zones identified in the **SUPPLEMENTARY INFORMATION** section below for the dates and times specified.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant Junior Grade Anthony Harris, Marine Safety Unit Savannah, Waterways Division, U.S. Coast Guard; telephone 912–210–8714, email at *Anthony.E.Harris@uscg.mil.*

SUPPLEMENTARY INFORMATION: With this document, the Coast Guard Captain of the Port (COTP) Savannah is activating a portion of the safety zone as listed in 33 CFR 165.T07–0806(a)(1), and the safety zones listed in (a)(2) and (a)(3) on September 4, 2023 through September 11, 2023, for the National Aeronautics and Space Administration (NASA) Commercial Crew Program 6 (Crew-6) mission reentry vehicle splashdown, and the associated recovery operations in the U.S. EEZ. These safety zones are located within the COTP Savannah Area of Responsibility (AOR) offshore of

Jacksonville, Florida. The Coast Guard is activating these safety zones in order to protect vessels and waterway users from the potential hazards created by reentry vehicle splashdowns and recovery operations. In accordance with the general regulations in 33 CFR part 165, subpart C, no U.S.-flagged vessel may enter the safety zones unless authorized by the COTP Savannah or a designated representative except as provided in § 165.T07–0806(d)(3). All foreign-flagged vessels are encouraged to remain outside the safety zones.

There are four other safety zones listed in § 165.T07–0806(a)(2) through (a)(5), which are located within the COTP St. Petersburg and Jacksonville AORs, that are being simultaneously activated through separate notifications of enforcement of the regulation document issued under Docket Numbers USCG–2023–0719, and USCG–2023–0757.[1]

Twenty-four hours prior to the Crew-6 recovery operations, the COTP Jacksonville, the COTP Savannah, the COTP St. Petersburg, or designated representative will inform the public that whether any of the five safety zones described in § 165.T07–0806, paragraph (a), will remain activated (subject to enforcement). If one of the safety zones described in § 165.T07–0806, paragraph (a), remains activated it will be enforced for four hours prior to the Crew-6 splashdown and remain activated until announced by Broadcast Notice to Mariners on VHF–FM channel 16, and/or Marine Safety Information Bulletin (as appropriate) that the safety zone is no longer subject to enforcement. After the Crew-6 reentry vehicle splashdown, the COTP or a designated representative will grant general permission to come no closer than 3 nautical miles of any reentry vehicle or space support vessel engaged in the recovery operations, within the activated safety zone described in § 165.T07–0806, paragraph (a). Once the reentry vehicle, and any personnel involved in reentry service, are removed from the water and secured onboard a space support vessel, the COTP or designated representative will issue a Broadcast Notice to Mariners on VHF–FM channel 16 announcing the activated safety zone is no longer subject to enforcement. The recovery operations are expected to last approximately one hour.

The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

Dated: September 1, 2023.

Nathaniel L. Robinson,

Commander, U.S. Coast Guard, Captain of the Port Savannah.

[FR Doc. 2023–19392 Filed 9–7–23; 8:45 am]

BILLING CODE 9110–04–P

[1] These notifications of enforcement of the regulation can be found at: *https://regulations.gov* by searching for docket number USCG–2023–0719, and USCG–2023–0757.

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 120

[EPA–HQ–OW–2023–0346; FRL–11132–01–OW]

RIN 2040–AG32

Revised Definition of ''Waters of the United States''; Conforming

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) and the Department of the Army (''the agencies'') are amending the Code of Federal Regulations (CFR) to conform the definition of ''waters of the United States'' to a 2023 Supreme Court decision. This conforming rule amends the provisions of the agencies' definition of ''waters of the United States'' that are invalid under the Supreme Court's interpretation of the Clean Water Act in the 2023 decision.

DATES: This final rule is effective on September 8, 2023.

ADDRESSES: The agencies have established a docket for this action under Docket ID No. EPA–HQ–OW–2023–0346. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Whitney Beck, Oceans, Wetlands and Communities Division, Office of Water (4504T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–2281; email address: *CWAwotus@epa.gov,* and Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310–0104; telephone number: (703) 459–6026; email address: *usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil.*

SUPPLEMENTARY INFORMATION:

I. Why are the agencies issuing this final rule?

This action amends Code of Federal Regulations (CFR) provisions promulgated in ''Revised Definition of 'Waters of the United States,' '' 88 FR 3004 (January 18, 2023) (''2023 Rule''), to conform to the 2023 Supreme Court decision in *Sackett* v. *EPA,* 598 U.S. _, 143 S. Ct. 1322 (2023) (''*Sackett*''). The Administrative Procedure Act (APA) provides that, when an agency for good cause finds that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. 553(b)(B). The Environmental Protection Agency (EPA) and the Department of the Army (''the agencies'') have determined that there is good cause under APA section 553(b)(B) to issue this final rule without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary. Certain provisions of the 2023 Rule are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.* The effect of the *Sackett* decision was to render these provisions immediately inconsistent with the Supreme Court's interpretation of the Clean Water Act. Consistent with the agencies' previously stated intent regarding the severability of the 2023 Rule in the event that provisions of that rule were held invalid, *see* 88 FR 3135, the agencies are conforming the 2023 Rule's definition of the term ''waters of the United States'' to the Supreme Court's decision. Specifically, the agencies are revising 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), and (c)(2) and (6) to amend aspects of the definition as needed to conform to the Supreme Court's interpretation of the Clean Water Act in *Sackett.* Because the sole purpose of this rule is to amend these specific provisions of the 2023

Rule to conform with *Sackett,* and such conforming amendments do not involve the exercise of the agencies' discretion, providing advance public notice and seeking comment is unnecessary. A notice and comment process would neither provide new information to the public nor inform any agency decision-making regarding the aspects of the regulations defining ''waters of the United States'' that are invalid as inconsistent with the Clean Water Act under *Sackett.*

For similar reasons, there is good cause under the APA to make this rule immediately effective, 5 U.S.C. 553(d)(3), because this rule does not impose any burdens on the regulated community; rather, it merely conforms the 2023 Rule to the Supreme Court's decision in *Sackett* by amending the provisions of the 2023 Rule that are invalid under the Supreme Court's interpretation of the Clean Water Act. Making the rule immediately effective will also provide more clarity and certainty to the regulated community and the public following the *Sackett* decision. Many States and industry groups challenging the 2023 Rule have advocated in litigation for quick action by the agencies in light of *Sackett,* citing the need for regulatory certainty and less delay in processing approved jurisdictional determinations and certain Clean Water Act permits. A delayed effective date for amendments to regulations defining ''waters of the United States'' to conform to *Sackett* would prolong confusion and potentially result in project delays for prospective permittees that seek approved jurisdictional determinations to evaluate whether their projects will result in discharges to ''waters of the United States.'' Making the rule immediately effective also avoids delaying provision of clarity to aid States and authorized Tribes administering Clean Water Act permitting programs and to members of the general public who seek to understand which waters are subject to the Clean Water Act's requirements. It is thus appropriate for the agencies to revise the affected provisions in 40 CFR 120.2 and 33 CFR 328.3 to conform to *Sackett* as quickly as possible and to make those revisions immediately effective.

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, 33 U.S.C. 1251 *et seq.* (''Clean Water Act'' or ''Act''). Central to the framework and protections provided by the Clean Water Act is the term ''navigable waters,'' defined in the Act as ''the waters of the United States, including the territorial seas.'' 33 U.S.C. 1362(7). On January 18, 2023, the final ''Revised Definition of 'Waters of the United States' '' rule was published in the **Federal Register**, and the rule took effect on March 20, 2023.[1]

In 2006, the Supreme Court addressed the scope of ''waters of the United States'' in *Rapanos* v. *United States,* 547 U.S. 715 (2006) (''*Rapanos*''). As the Court in *Sackett* noted, no position in *Rapanos* commanded a majority of the Court. *Sackett,* 143 S. Ct. at 1344. In *Rapanos,* all nine members of the Court agreed that the term ''waters of the United States'' encompasses some waters that are not navigable in the traditional sense. *Rapanos,* 547 U.S. at 731 (Scalia, J., plurality opinion) (''We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term, *SWANCC,* 531 U.S. at 167; *Riverside Bayview,* 474 U.S. at 133.''). A four-Justice plurality in *Rapanos* interpreted the term ''waters of the United States'' as covering ''relatively permanent, standing or continuously flowing bodies of water,'' *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a ''continuous surface connection'' to such waterbodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.'' *Id.* at 732 n.5 (emphasis in original). Justice Kennedy's concurring opinion took a different approach, concluding that ''to constitute '''navigable waters''' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.'' *Id.* at 759. He concluded that wetlands possess the requisite significant nexus if the wetlands ''either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' *Id.* at 780. The four dissenting Justices in *Rapanos* would have deferred to the agencies and also concluded that waters would be jurisdictional under ''either the plurality's or Justice Kennedy's test.'' *Id.* at 810 & n.14 (Stevens, J., dissenting).

The 2023 Rule incorporated the two jurisdictional standards from *Rapanos* into the definition of the term ''waters of the United States.'' First, under that rule, the ''relatively permanent standard'' refers to the test to identify: relatively permanent, standing or continuously flowing tributaries connected to traditional navigable waters, the territorial seas, or interstate waters; relatively permanent, standing or continuously flowing additional waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters; and, adjacent wetlands and certain impoundments with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. Second, the ''significant nexus standard'' under the 2023 Rule refers to the test to identify waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. The regulatory text also defined ''significantly affect'' for purposes of the significant nexus standard. 88 FR 3006. Under the 2023 Rule, waters were jurisdictional if they met either standard.

The 2023 Rule also defined the term ''adjacent'' with no changes from the agencies' longstanding regulatory definition. ''Adjacent'' was defined as ''bordering, contiguous, or neighboring.'' 88 FR 3116–17. Wetlands separated from other ''waters of the United States'' by man-made dikes or barriers, natural river berms, beach dunes and the like were defined as ''adjacent'' wetlands. *Id.*

On May 25, 2023, the Supreme Court decided *Sackett* v. *EPA.* While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in that rule. The enterprise of the 2023 Rule—to define ''waters of the United States''—was the same as the Supreme Court's enterprise in *Sackett:* ''to identify with greater clarity what the Act means by 'the waters of the United States.' '' 143 S. Ct. at 1329; *see also id.* at 1331 (''The meaning of [33 U.S.C. 1362(7)] is the persistent problem that we must address.''). The Supreme Court recognized the agencies' definition and utilization of ''adjacent'' and

[1] As a result of litigation, the 2023 Rule is enjoined in 27 States as of the date this final rule was signed. *See Texas* v. *EPA,* Nos. 23–00017 & 23–00020 (S.D. Tex. March 19, 2023); *West Virginia* v. *EPA,* No. 23–00032 (D.N.D. April 12, 2023); *Commonwealth of Kentucky* v. *EPA,* Nos. 23–5343/5345 (6th Cir. May 10, 2023).

''significant nexus'' ''as set out in [the agencies'] most recent rule,'' the 2023 Rule, 143 S. Ct. at 1335, 1341, but concluded that the significant nexus standard was ''inconsistent with the text and structure of the [Clean Water Act].'' *Id.* at 1341. Instead, the Court ''conclude[d] that the *Rapanos* plurality was correct: the [Clean Water Act]'s use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water ''forming geographic[al] features'' that are described in ordinary parlance as ''streams, oceans, rivers, and lakes.'' ' '' *Id.* at 1336 (quoting *Rapanos,* 547 U.S. at 739). The Court also ''agree[d] with [the plurality's] formulation of when wetlands are part of 'the waters of the United States,' '' *id.* at 1340–41: ''when wetlands have 'a continuous surface connection to bodies that are ''waters of the United States'' in their own right, so that there is no clear demarcation between ''waters'' and wetlands.' '' *Id.* at 1344 (citing *Rapanos,* 547 U.S. at 742, 755). Thus, the Supreme Court concluded that ''this interpretation''—*i.e.,* the interpretation of adjacent wetlands as ''waters of the United States'' set out in the 2023 Rule—''is inconsistent with the text and structure of the CWA'' insofar as it incorporated the ''significant nexus'' test and defined ''adjacent'' other than as the *Rapanos* plurality defined the term. *Id.* at 1341.

The agencies are revising the 2023 Rule to remove the significant nexus standard and to amend its definition of ''adjacent'' as these provisions are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.* See section II of this preamble for the specific amendments. Under the decision in *Sackett,* waters are not jurisdictional under the Clean Water Act based on the significant nexus standard. In addition, under the decision in *Sackett,* wetlands are not defined as ''adjacent'' or jurisdictional under the Clean Water Act solely because they are ''bordering, contiguous, or neighboring . . . [or] separated from other 'waters of the United States' by man-made dikes or barriers, natural river berms, beach dunes and the like.'' Therefore, under this conforming rule, waters cannot be found to be jurisdictional because they meet the significant nexus standard; nor can wetlands be found to be jurisdictional based on the definition of ''adjacent'' codified in the 2023 Rule. Furthermore, as a result of the decision in *Sackett* invalidating the significant nexus standard, the provision for assessment of streams and wetlands under the additional waters provision of paragraph (a)(5) is no longer valid as any jurisdictional streams and wetlands are covered by paragraphs (a)(1) through (4) of the 2023 Rule.[2]

Finally, the agencies are removing ''interstate wetlands'' from the 2023 Rule to conform with the decision in *Sackett.* The Supreme Court in *Sackett* examined the Clean Water Act and its statutory history and found the predecessor statute to the Clean Water Act covered and defined ''interstate waters'' as ''all *rivers, lakes, and other waters* that flow across or form a part of State boundaries.'' *Sackett* at 1337 (citing 33 U.S.C. 1160(a), 1173(e) (1970 ed.) (emphasis in original)). The Court concluded that the use of the term ''waters'' refers to such ''open waters'' and not wetlands. *Id.* As a result, under *Sackett,* the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid.

The agencies will continue to interpret the remainder of the definition of ''waters of the United States'' in the 2023 Rule consistent with the *Sackett* decision. And it is both reasonable and appropriate for the agencies to promulgate this rule in response to a significant decision of the Supreme Court and, to provide administrative guidance to address other issues that may arise outside this limited rule. *See County of Maui, Hawaii* v. *Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1476 (2020) (''EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules.''). The agencies have a wide range of available approaches to address such issues, including: approved jurisdictional determinations and Clean Water Act permits (both of which are final agency actions subject to judicial review); guidance; notice and comment rulemaking; and, agency forms and training materials. The agencies intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues they would like the agencies to address. The agencies are also committed to taking particular actions that have been requested by stakeholders to improve implementation of the definition of ''waters of the United States.'' For example, the agencies are working to improve coordination among Federal agencies through coordination memoranda and trainings. The agencies are also developing regionally-specific tools to facilitate implementation of the definition of ''waters of the United States.'' The agencies will continue to provide trainings to Tribes, States, and the public as appropriate to promote clarity and consistency. The agencies will continue to post materials and outreach opportunities to EPA's website at *https://www.epa.gov/wotus.*

[2] Lakes and ponds, however, may still be jurisdictional under paragraph (a)(5) if they do not fall within paragraphs (a)(1) through (3) of the 2023 Rule (for example, if they are not tributaries connected to waters identified in paragraph (a)(1) or (2)) and they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (3).

II. Which provisions are amended?

This final rule amends the following provisions in the 2023 Rule: 40 CFR 120.2(a)(1)(iii), (a)(3) through (5), (c)(2) and (6), and 33 CFR 328.3(a)(1)(iii), (a)(3) through (5), (c)(2) and (6). A list of these revisions is provided below.

- *40 CFR 120.2(a)(1)(iii) and 33 CFR 328.3(a)(1)(iii):* Removed the phrase ''including interstate wetlands'' from this provision. Made conforming edits to the regulatory text.
- *40 CFR 120.2(a)(3) and 33 CFR 328.3(a)(3):* Removed the significant nexus standard from the tributaries provision. Made conforming edits to the regulatory text.
- *40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4):* Removed the significant nexus standard from the adjacent wetlands provision. Made conforming edits to the regulatory text.
- *40 CFR 120.2(a)(5) and 33 CFR 328.3(a)(5):* Removed the significant nexus standard and streams and wetlands from the provision for intrastate lakes and ponds, streams, or wetlands not otherwise identified in the definition. Made conforming edits to the regulatory text.
- *40 CFR 120.2(c)(2) and 33 CFR 328.3(c)(2):* Revised the definition of ''adjacent''. Note that the agencies recognize that revising the definition of adjacent creates redundancy in 40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4), which already include the requirement for a ''continuous surface connection,'' but deleting existing regulatory text to reduce redundancy is outside the scope of the agencies' determination in this rule that there is good cause under APA section 553(b)(B) to issue this final rule without prior proposal and opportunity for comment.
- *40 CFR 120.2(c)(6) and 33 CFR 328.3(c)(6):* Removed the term ''significantly affect'' and its definition in its entirety.

III. Severability

The purpose of this section is to clarify the agencies' intent with respect to the severability of provisions of this

rule and the 2023 Rule as amended by this final rule in the event of litigation. In the event of a stay or invalidation of any part of this rule, the agencies' intent is to preserve the remaining portions of the rule to the fullest possible extent. Further, if any part of the 2023 Rule as amended by this rule is stayed or invalidated, the agencies' intent is to preserve its remaining portions to the fullest possible extent. The agencies explained in the 2023 Rule that it was carefully crafted so that each provision or element of the rule is capable of operating independently. 88 FR 3135. None of the amendments made in this rule affects the 2023 Rule's severability or undermines the ability of each part of this rule or the remaining parts of the 2023 Rule to operate independently.

The exclusive purpose of the 2023 Rule was to define ''waters of the United States,'' and this rule simply conforms that definition to *Sackett.* ''Waters of the United States'' is defined in paragraphs (a)(1) through (5), subject to the exclusions in paragraph (b), and using terms defined in paragraph (c). The categories in paragraphs (a)(1) through (5) are disjunctive, and while they may overlap, no one category (or subcategory) depends on another. The modifications to the 2023 Rule in this rule do not alter those basic features of the regulatory text. Therefore, if any provision or element of this rule or of the 2023 Rule as amended by this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule or the 2023 Rule, as amended, invalid. Further, if the application of any portion of this rule or the 2023 Rule, as amended by this rule, to a particular circumstance is determined to be invalid, the agencies intend that this rule and the 2023 Rule, as amended, remain applicable to all other circumstances.

For example, if paragraph (c)(2), which contains the revised definition of ''adjacent,'' were deemed invalid, it would affect implementation of paragraph (a)(4), which addresses ''adjacent wetlands,'' but it would not affect any other provision of this rule (or the 2023 Rule, as amended), all of which would continue to operate. As another example, if paragraph (a)(1)(iii), which provides that interstate waters (amended by this rule to no longer include interstate wetlands) are ''waters of the United States,'' were deemed invalid, every other provision of this rule (and the 2023 Rule as amended) could continue to operate. References to paragraph (a)(1) in paragraphs (a)(3) through (5), and paragraph (c)(2) would remain in effect, and paragraph (a)(1) would simply be read to consist of paragraphs (a)(1)(i) and (ii), without paragraph (a)(1)(iii) in whole or in part. As a third example, if one of the exclusions from ''waters of the United States'' in paragraph (b), or any part of one of the exclusions, were deemed invalid, the remainder of this rule, and thus, the 2023 Rule as amended, would remain in effect. The rationale for each exclusion in paragraph (b) is distinct and invalidating one exclusion would not have any practical impact on any other part of the definition of ''waters of the United States.''

IV. Statutory and Executive Orders 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 14094: Modernizing Regulatory Review

This action is a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, the agencies submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

This conforming rule amends the provisions of the agencies' definition of ''waters of the United States'' that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.* As such, it is the agencies' view that the rule does not by itself impose cost savings or forgone benefits.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities. However, this action may change terms and concepts used by EPA and Army to implement certain programs. The agencies thus may need to revise some of their collections of information to be consistent with this action and will do so consistent with the PRA and implementing regulations.

C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the agencies have invoked the APA ''good cause'' exemption under 5 U.S.C. 553(b).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of ''waters of the United States'' applies broadly to Clean Water Act programs, and this rule amending the definition of ''waters of the United States'' simply conforms to a decision of the Supreme Court. The action imposes no enforceable duty on any Tribal, State, or local governments, or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

This conforming rule amends the provisions of the agencies' definition of ''waters of the United States'' that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.* Because the limited amendments in this rule do not involve the exercise of the agencies' discretion, federalism consultation would neither provide new information nor inform any agency decision-making regarding the aspects of the regulations defining ''waters of the United States'' that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.* The agencies recognize, however, that changes to the definition of ''waters of the United States'' may be of interest to State and local governments. The agencies intend to hold discussions with State and local governments on implementation of the definition of ''waters of the United States.''

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule amends the provisions of the agencies' definition of ''waters of the United States'' that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.* Because the amendments in this rule do not involve the exercise of the agencies' discretion, in this instance Tribal consultation and coordination could not inform the decision-making in this final rule. The agencies recognize, however, that changes to the definition of ''waters of the United States'' may be of interest

to Tribal governments. The agencies intend to hold discussions with Tribes on implementation of the definition of ''waters of the United States.''

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA and the Army interpret Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies have reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order.

This conforming rule amends the provisions of the agencies' definition of ''waters of the United States'' that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.* Because these amendments are necessary to conform to the Supreme Court's decision and do not involve the exercise of the agencies' discretion, the rule does not concern an environmental health risk or safety risk and is not subject to Executive Order 13045. Similarly, this action does not concern human health, and therefore EPA's Policy on Children's Health also does not apply.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This rule does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

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 communities with environmental justice concerns. Executive Order 14096 (88 FR 25251, April 21, 2023) supplements the foundational efforts of Executive Order 12898 to address environmental justice.

EPA and the Army believe that it is not necessary to assess whether this action would result in disproportionate and adverse effects on communities with environmental justice concerns, as this is a conforming rule and the targeted amendments made do not reflect an exercise of agency discretion. In prior analyses of potential distributional impacts of the 2023 Rule (see *Economic Analysis for Final ''Revised Definition of 'Waters of the United States''' Rule,* Docket ID No. EPA–HQ–OW–2021–0602–2489), the agencies examined whether the change in benefits due to that rule may be differentially distributed among communities with environmental justice concerns in the affected areas when compared to two baselines—the primary baseline of the pre-2015 regulatory regime and the secondary baseline of the 2020 Navigable Waters Protection Rule. In that prior analysis, for most of the wetlands and affected waters impacted at a hydrologic unit code (HUC) [3] 12 watershed level, there was no evidence of potential environmental justice impacts from the 2023 Rule warranting further analysis when compared to both baselines.

The agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns. Climate change will exacerbate the existing risks faced by communities with environmental justice concerns. However, this conforming rule merely amends the provisions of the agencies' definition of ''waters of the United States'' that are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett.* As noted above, these amendments on their own do not result in any cost savings or forgone benefits not directed by the operation of law. Because this rule does not involve the exercise of the agencies' discretion, the agencies did not engage with communities with environmental justice concerns in developing this action.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the agencies 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). The CRA allows the issuing agency to make a rule effective sooner than otherwise would be provided by the CRA if the agency makes a good cause finding that notice and comment public rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The agencies have made a good cause finding for this rule as discussed in section I of this preamble, including the basis for that finding.

[3] HUC boundaries are established by the U.S. Geological Survey and Natural Resources Conservation Service. These boundaries are numbered using nested codes to represent the scale of the watershed size. For example, HUC 12 watersheds are smaller than HUC 4 watersheds.

List of Subjects

33 CFR Part 328

Administrative practice and procedure, Environmental protection, Navigation (water), Water pollution control, Waterways.

40 CFR Part 120

Environmental protection, Water pollution control, Waterways.

Michael L. Connor,

Assistant Secretary of the Army (Civil Works), Department of the Army.

Michael S. Regan,

Administrator, Environmental Protection Agency.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, 33 CFR part 328 is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 2. Section 328.3 is amended by:
■ a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);
■ b. Removing paragraph (a)(4)(iii);
■ c. Revising paragraphs (a)(5) and (c)(2); and
■ d. Removing paragraph (c)(6).

The revisions read as follows:

§ 328.3 Definitions.

* * * * *

(a) * * *

(1) * * *

(iii) Interstate waters;

* * * * *

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) * * *

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively

permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

* * * * *

(c) * * *

(2) *Adjacent* means having a continuous surface connection.

* * * * *

Title 40—Protection of Environment

For reasons set out in the preamble, 40 CFR part 120 is amended as follows:

PART 120—DEFINITION OF WATERS OF THE UNITED STATES

■ 3 The authority citation for part 120 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 4. Section 120.2 is amended by:

■ a. Revising paragraphs (a)(1)(iii), (a)(3), and (a)(4)(ii);

■ b. Removing paragraph (a)(4)(iii);

■ c. Revising paragraphs (a)(5) and (c)(2); and

■ d. Removing paragraph (c)(6).

The revisions read as follows:

§ 120.2 Definitions.

* * * * *

(a) * * *

(1) * * *

(iii) Interstate waters;

* * * * *

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

(4) * * *

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

* * * * *

(c) * * *

(2) *Adjacent* means having a continuous surface connection.

* * * * *

[FR Doc. 2023–18929 Filed 9–7–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2022–0580; FRL–11047–02–R5]

Air Plan Approval; Ohio; Approval of the Muskingum River SO_2 Attainment Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving, under the Clean Air Act (CAA), a revision to the Ohio State Implementation Plan (SIP) intended to provide for attainment of the 2010 primary, health-based 1-hour sulfur dioxide (SO_2) national ambient air quality standard (NAAQS or standard) for the Muskingum River SO_2 nonattainment area. This SIP revision (hereinafter referred to as Ohio's Muskingum River SO_2 attainment plan or plan), includes Ohio's attainment demonstration and other attainment planning elements required under the CAA. EPA is finding that Ohio has appropriately demonstrated that the plan provides for attainment of the 2010 1-hour primary SO_2 NAAQS in the Muskingum River, Ohio nonattainment area and that the plan meets the other applicable requirements under the CAA. EPA is also incorporating by reference Ohio Director's Final Findings and Orders (DFFOs), issued on May 23, 2023, into the Ohio SIP. The DFFOs set forth additional requirements at Globe Metallurgical (Globe) to verify appropriate source characterization for modeling purposes.

DATES: This final rule is effective on October 10, 2023.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2022–0580. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Gina Harrison, Environmental Scientist, at (312) 353–6956 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Gina Harrison, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–6956, *harrison.gina@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. Background

On January 18, 2022 (87 FR 2555), EPA partially approved and partially disapproved Ohio's SO_2 plan for the Muskingum River area submitted on April 3, 2015, and October 13, 2015, and supplemented on June 23, 2020. EPA's January 18, 2022, final rule provided an explanation of the applicable provisions in the CAA and the measures and limitations identified in Ohio's attainment plan to satisfy these provisions.

The partial disapproval started sanctions clocks for this area under CAA section 179(a)–(b), including a requirement for 2-for-1 offsets for any major new sources or major modifications 18 months after the effective date of this action, and highway funding sanctions 6 months thereafter, as well as initiated an obligation for EPA to promulgate a Federal Implementation Plan (FIP) within 24 months, under CAA section 110(c).

Ohio supplemented the attainment demonstration on June 24, 2022, substituting new measures in lieu of a land acquisition and modifying the air quality modeling to include the use of site-specific meteorological data. Ohio submitted additional supplemental information on July 28, 2022, and May 23, 2023, including revised DFFOs for Globe, issued on May 23, 2023, that supersede the June 23, 2020 DFFOs.

II. Proposed Rule

On June 22, 2023 (88 FR 40726), EPA proposed to approve Ohio's SIP attainment plan submission for the Muskingum River SO_2 nonattainment area, which the state submitted to EPA on April 3, 2015, October 13, 2015, and June 23, 2020, and supplemented on June 24, 2022, July 28, 2022, and May 23, 2023. The SO_2 attainment plan included Ohio's attainment

demonstration for this area. The attainment plan also addressed requirements for emission inventories, reasonably available control measures (RACM) and reasonably available control technology (RACT), reasonable further progress (RFP), and contingency measures. Ohio has previously addressed requirements regarding nonattainment area new source review. Because Ohio's submission provides an appropriate testing requirement to confirm the modeling, EPA has determined that Ohio's SO_2 attainment plan for the Muskingum River SO_2 nonattainment area meets the applicable requirements of CAA sections 110, 172, 191, and 192.

A key element of Ohio's attainment plan is Ohio's revised DFFOs, issued to Globe on May 23, 2023. Among other requirements, Ohio's DFFOs retain SO_2 emission limits for Globe set forth in the 2020 DFFOs as a matrix of limits based on 26 separate operating scenarios at the two baghouses, where each of the 26 scenarios was modeled to demonstrate attainment and maintenance of the SO_2 standard. As part of the proposed approval of Ohio's attainment plan for this area, EPA proposed to approve Ohio's May 23, 2023, DFFOs for the Globe facility into the SIP. These DFFOs supersede the previous 2020 DFFOs, retain the SO_2 limits and other requirements set forth in the 2020 DFFOs, and require additional testing, monitoring, and confirmation of certain flow parameters for verification of source modeling characterization. For the reasons discussed in the proposed rule, EPA finds that these requirements are sufficient for the required attainment plan demonstration.

III. Public Comments

The public comment period for EPA's proposed rule ended on July 24, 2023. EPA received no comments on the proposal.

IV. Final Action

EPA is approving Ohio's SIP attainment plan submission for the Muskingum River SO_2 nonattainment area, which the state previously submitted to EPA on April 3, 2015, October 13, 2015, and June 23, 2020, and supplemented on June 24, 2022, July 28, 2022, and May 23, 2023. This SO_2 attainment plan included Ohio's attainment demonstration for this area. The attainment plan also addressed requirements for emission inventories, RACT/RACM, RFP, and contingency measures. By this action, EPA is codifying its approval of both Ohio's May 23, 2023, DFFOs issued to Globe and Ohio's attainment plan for the Muskingum River SO_2 nonattainment area.

This approval terminates the highway funding sanction and FIP clocks started under CAA section 179 resulting from EPA's partial disapproval of the prior SIP. It also removes the permitting offset sanction that has been in place since August 17, 2023.

V. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Ohio Regulations described in section II of this preamble and set forth in the amendments to 40 CFR part 52 below. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov,* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

VI. Statutory and Executive Order Reviews

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

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

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

Ohio EPA did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this

[1] 62 FR 27968 (May 22, 1997).

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 7, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: August 31, 2023.

Debra Shore,

Regional Administrator, Region 5.

For the reasons stated in the preamble, title 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. In § 52.1870:

■ a. Amend the table in paragraph (d) by adding an entry for ''Globe Metallurgical, Inc.'' before the entry for ''Hilton Davis''.

■ b. Amend the table in paragraph (e) under the heading ''Summary of Criteria Pollutant Attainment Plans'' by revising the entry entitled ''SO_2 (2010)'' for ''Muskingum River''.

The addition and revision read as follows:

§ 52.1870 Identification of plan.

* * * * *

(d) * * *

EPA Approved Ohio Source-Specific Provisions

Name of source	Number	Ohio effective date	EPA approval date	Comments
*	*	*	*	*
Globe Metallurgical Inc	DFFOs	5/23/2023	9/8/2023, [Insert **Federal Register** Citation]	
*	*	*	*	*

(e) * * *

EPA Approved—Ohio Nonregulatory and Quasi-Regulatory Provisions

Title	Applicable geographical or non-attainment area	State date	EPA approval	Comments
*	*	*	*	*
Summary of Criteria Pollutant Attainment Plans				
*	*	*	*	*
SO_2 (2010)	Muskingum River	5/24/2023	9/8/2023, [Insert **Federal Register** Citation]	
*	*	*	*	*

■ 3. Section 52.1873 is amended by removing and reserving paragraph (b).

[FR Doc. 2023–19201 Filed 9–7–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2020–0343; FRL–11279–01–R6]

Air Plan Approval; Texas; Clean Air Act Requirements for Enhanced Vehicle Inspection and Maintenance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving portions of the State Implementation Plan (SIP) revisions submitted to the EPA by the State of Texas (the State) for the 2008 8-hour ozone National Ambient Air Quality Standard (NAAQS). The SIP revisions being approved describe how CAA requirements for vehicle Inspection and Maintenance (I/M) are met in the Dallas-Fort Worth (DFW) and Houston-Galveston-Brazoria (HGB) Serious ozone nonattainment areas.

DATES: This rule is effective on October 10, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID EPA–R06–OAR–2020–0343. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Clovis Steib, EPA Region 6 Office, Infrastructure and Ozone Section, 214–665–7566, *steib.clovis@epa.gov.* Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

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

I. Background

The background for this action is discussed in detail in our March 1, 2021, proposal (86 FR 11913). In that document, we proposed to approve portions of two revisions to the Texas SIP submitted to the EPA on May 13, 2020, that describe how CAA requirements for Enhanced vehicle I/M and Nonattainment New Source Review (NNSR) are met in the DFW and HGB Serious ozone nonattainment areas for the 2008 ozone NAAQS.

Our March 2021 proposal provided a detailed description of the revisions and the rationale for the EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period for our March 2021 proposal closed on March 31, 2021. We received comments during the public comment period pertaining to the vehicle I/M portion of EPA's proposal from the Air Law for All (ALFA), on behalf of the Center for Biological Diversity and the Center for Environmental Health.[1] The comments received are available for review in the docket for this rulemaking. The EPA finalized the proposed approval of revisions that address the CAA requirements for NNSR in a separate rulemaking (see 87 FR 59697, October 3, 2022). Our responses to the comments addressing vehicle I/M are provided in Section II of this action.

Our March 2021 proposal addresses the DFW and HGB Serious ozone nonattainment area requirements for the 2008 ozone NAAQS. However, on October 7, 2022, the EPA reclassified the eight-county HGB area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties) and the ten-county DFW area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise counties) from Serious to Severe nonattainment (87 FR 60926). The attainment date for these Severe nonattainment areas is July 20, 2027. Also on October 7, 2022, the EPA reclassified the six-county HGB area (Brazoria, Chambers, Fort Bend, Galveston, Harris, and Montgomery counties) and the nine-county DFW area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Tarrant, and Wise counties) from Marginal to Moderate nonattainment under the 2015 ozone NAAQS (87 FR 60897). The attainment date for these Moderate nonattainment areas is August 3, 2024. These reclassifications are important to mention here because CAA section 182(c)(3) requires the implementation of an Enhanced I/M program in ozone nonattainment areas classified as Serious or higher and CAA section 182(b)(4) requires the implementation of a Basic I/M program in Moderate ozone nonattainment areas. This final action does not address whether the DFW and HGB Moderate nonattainment areas meet the Basic I/M requirement for the 2015 ozone NAAQS, which instead will be addressed in a separate future SIP revision from Texas and EPA action.

II. Response to Comments

Comment: Commenters assert that in proposing to approve the Texas SIP submission inasmuch as it describes how vehicle I/M requirements are met for the HGB and DFW nonattainment areas, the EPA expressly relies on EPA's performance standard which requires states to show that their I/M program is equivalent to a model program defined by EPA.[2] Commenters maintain that I/M performance standard modeling (PSM) is not a one-time obligation and should be performed each time a nonattainment area is classified as Serious for a revised NAAQS. Commenters also assert that Texas has not demonstrated that its Enhanced I/M program is equivalent to a model program as defined under the I/M Rule and that EPA's proposal is silent about whether the Texas I/M program continues to meet the Enhanced program performance standard for the 2008 ozone NAAQS. Commenters maintain that equivalence cannot be assumed. Commenters state that in order to demonstrate equivalence, a state must utilize the most current version of the EPA's mobile source emissions model, which, at the time of the comment, was MOVES3.[3]

Response: An I/M performance standard is a collection of program design elements which defines a benchmark program to which a proposed or existing I/M program is compared in terms of its potential to reduce emissions of relevant pollutants and precursors (*e.g.,* in ozone areas, namely volatile organic compounds (VOCs) and oxides of nitrogen (NO_x)) by certain comparison dates. In general, Enhanced I/M programs shall be designed and implemented to meet or exceed a minimum performance standard, which is expressed as emission levels in area-wide average grams per mile (gpm), achieved from on-road vehicles as a result of the program. The purpose of conducting PSM is to demonstrate that an I/M program meets the applicable performance standard, as defined within the I/M regulations (40 CFR part 51, subpart S) and the Clean Air Act.[4] The EPA has recognized that areas have had to meet the I/M requirements for previous standards. In the case of Texas, the DFW and HGB areas had to meet the Enhanced performance standard in response to requirements under the 1-hour ozone standard. The EPA previously approved Texas's I/M program as meeting the Enhanced performance standard under the 1-hour standard.[5] For areas that had previously met certain SIP requirements, the EPA's practice has been to accept ''certification SIPs'' to help streamline the development of SIPs. In this SIP revision, the Texas Commission on Environmental Quality (TCEQ) certified that the current Texas I/M program meets the I/M requirements for purposes of the 2008 ozone NAAQS.

For SIPs submitted to meet requirements under the 2008 standard,

[1] Henceforth, we refer to ALFA as ''commenters.''

[2] For the Enhanced I/M performance standard, see 40 CFR 51.351(d).

[3] MOVES is the EPA's MOtor Vehicle Emission Simulator. Information on MOVES is available at *https://www.epa.gov/moves/latest-version-motor-vehicle-emission-simulator-moves.*

[4] October 2022, EPA–420–B–22–034: ''Performance Standard Modeling for New and Existing Vehicle Inspection and Maintenance (I/M) Programs Using the MOVES Mobile Source Emissions Model.''

[5] The Clean Air Act requires certain urbanized ozone nonattainment areas classified Moderate and higher to have I/M programs to ensure that emission controls on vehicles are properly maintained. The Texas vehicle I/M program, which is referred to as the Texas Motorist Choice (TMC) Program, was approved by the EPA in the **Federal Register** on November 14, 2001 (66 FR 57261).

previous EPA guidance [6] was not clear whether certification SIPs should include PSM. In the SIP requirements rule for the 2015 ozone standard, EPA indicated that SIPs submitted to address I/M requirements under the 2015 ozone standard must provide PSM to support that an area continues to meet the I/M requirement for that standard. The DFW and HGB areas were reclassified as Moderate under the 2015 standard and must demonstrate through modeling that the existing I/M programs for both areas meet the Basic I/M requirements. Texas recently proposed a SIP revision to address these Moderate area requirements. In that SIP revision,[7] Texas provided performance standard modeling that sufficiently shows that its current I/M program meets the Enhanced I/M standard. So, even though EPA's previous guidance was unclear, a review of the PSM (as described below) shows that the Texas program meets the Enhanced standard for the 2008 standard. As a result, the comment is moot.

PSM analyses of existing I/M programs in DFW and HGB show the applicable I/M performance standard for the DFW and HGB nonattainment areas are met. The PSM was included in the state's proposed SIP revisions for the 2015 ozone NAAQS on May 31, 2023.[8] The PSM demonstrations were submitted by the state as part of its 2015 I/M requirements. The submissions consist of separate PSM analyses for the DFW and HGB nonattainment areas. Copies of the modeling summary are included in the docket [9] for this action. This additional modeling information was reviewed and helped inform the EPA's decision.

Consistent with EPA's October 2022 Performance Standard Modeling Guidance,[10] a single analysis year and corresponding analysis can satisfy more than one PSM demonstration for an area under two different NAAQS if the analysis year is appropriate for both NAAQS. In the case of HGB and DFW, the State must demonstrate that the current I/M program satisfies the Basic I/M SIP requirement for the 2015 ozone NAAQS and in doing so can demonstrate the Enhanced I/M SIP requirement for the 2008 ozone NAAQS is also satisfied. Considering this scenario, EPA's current guidance [11] allows the State to use the 8-hour ozone Enhanced performance standard (40 CFR 51.351(i)), if the PSM demonstration is for an analysis year that satisfies both I/M SIPs and ozone NAAQS. In other words, if an I/M program meets the Enhanced performance standard, then it would also meet the Basic performance standard so long as the analysis years are appropriate for the two ozone standards in question. Consistent with the I/M rule, the EPA's current guidance [12] states that the appropriate analysis year for all reclassifications is the ''Attainment date OR program implementation date, whichever is later.''

The EPA has clearly stated that PSM modeling is required when states certify compliance under the 2015 ozone standard. Texas performed such modeling of the DFW and HGB programs required for Serious areas designated and classified under the 8-hour ozone standard.

Upon review of the modeling files and summary results of the TCEQ PSM analyses, EPA concludes that the modeling was conducted consistent with the I/M rule and EPA's 2022 PSM guidance; and that TCEQ has demonstrated that the Enhanced performance standard was met in the DFW and HGB subject I/M areas.

TCEQ used MOVES3.1 to conduct the analyses using 2023 as the analysis year. The reason why 2023 is an appropriate analysis year for the 2008 ozone NAAQS is because (per page 10 of the guidance [13])—''For cases in which the attainment date has passed, PSM should be performed for an analysis year contemporary to when the corresponding I/M SIP will be submitted.'' Since the attainment year for the Serious ozone classification has been passed, then using the most recent future year is appropriate, *i.e.,* 2023.

TCEQ correctly modeled the existing DFW I/M and HGB I/M programs against the Enhanced performance standard benchmark program (40 CFR 51.351(i)). The results of the analyses demonstrated that the emissions rates, expressed in gpm for the existing DFW I/M and HGB I/M programs for VOC and NO_X are lower than the modeled emission rates using the Enhanced performance standard benchmark program: [14]

TABLE 1—SUMMARY OF NO_X PERFORMANCE STANDARD EVALUATION FOR DFW 2015 OZONE NAAQS NONATTAINMENT AREA EXISTING I/M PROGRAM [15]

County	I/M program NO_X emission rate	I/M NO_X performance standard benchmark	I/M NO_X performance standard benchmark plus buffer	Does existing program meet I/M performance standard?
Collin	0.25	0.25	0.27	Yes.
Dallas	0.26	0.26	0.28	Yes.
Denton	0.30	0.29	0.31	Yes.
Ellis	0.40	0.40	0.42	Yes.
Johnson	0.47	0.47	0.49	Yes.
Kaufman	0.46	0.46	0.48	Yes.
Parker	0.54	0.54	0.56	Yes.
Tarrant	0.26	0.26	0.28	Yes.

[6] The old 2014 guidance: January 2014, EPA–420–B–14–006: ''Performance Standard Modeling for New and Existing Vehicle Inspection and Maintenance (I/M) Programs Using the MOVES Mobile Source Emissions Model).''

[7] On May 31, 2023, the State approved proposal of both the DFW and HGB Moderate Area Attainment Demonstration (AD) SIP Revisions for the 2015 Eight-Hour Ozone NAAQS (Non-Rule Project #s: 2022–021–SIP–NR and 2022–022–SIP–NR, respectively). Included in Appendix C of each of these proposals were I/M Performance Standard Modeling (PSM) for the existing I/M Program in their respective 2015 Ozone NAAQS nonattainment areas.

[8] Ibid.

[9] *https://www.regulations.gov/docket/EPA-R06-OAR-2020-0343.*

[10] October 2022, EPA–420–B–22–034, pgs 9–10: ''Performance Standard Modeling for New and Existing Vehicle Inspection and Maintenance (I/M) Programs Using the MOVES Mobile Source Emissions Model.''

[11] Ibid.

[12] Ibid. See *Table 1: Analysis Years for PSM for an 8-hour Ozone NAAQS* on page 10 of the guidance.

[13] Ibid.

[14] Evaluating whether an existing I/M program meets the Enhanced Performance Standard requires demonstrating that the existing program emission rates for NO_X and VOC do not exceed the benchmark program's emission rates within a 0.02 gram per mile buffer.

TABLE 2—SUMMARY OF VOC PERFORMANCE STANDARD EVALUATION FOR DFW 2015 OZONE NAAQS NONATTAINMENT AREA EXISTING I/M PROGRAM [16]

County	I/M program VOC emission rate	I/M VOC performance standard benchmark	I/M VOC performance standard benchmark plus buffer	Does existing program meet I/M performance standard?
Collin	0.17	0.17	0.19	Yes.
Dallas	0.14	0.14	0.16	Yes.
Denton	0.18	0.18	0.20	Yes.
Ellis	0.14	0.14	0.16	Yes.
Johnson	0.19	0.20	0.22	Yes.
Kaufman	0.14	0.14	0.16	Yes.
Parker	0.17	0.17	0.19	Yes.
Tarrant	0.16	0.17	0.19	Yes.

TABLE 3—SUMMARY OF NO_X PERFORMANCE STANDARD EVALUATION FOR HGB 2015 OZONE NAAQS NONATTAINMENT AREA EXISTING I/M PROGRAM [17]

County	I/M program NO_X emission rate	I/M NO_X performance standard benchmark	I/M NO_X performance standard benchmark plus buffer	Does existing program meet I/M performance standard?
Brazoria	0.29	0.29	0.31	Yes.
Fort Bend	0.27	0.27	0.29	Yes.
Galveston	0.24	0.24	0.26	Yes.
Harris	0.26	0.26	0.28	Yes.
Montgomery	0.28	0.28	0.30	Yes.

TABLE 4—SUMMARY OF VOC PERFORMANCE STANDARD EVALUATION FOR HGB 2015 OZONE NAAQS NONATTAINMENT AREA EXISTING I/M PROGRAM [18]

County	I/M program VOC emission rate	I/M VOC performance standard benchmark	I/M VOC performance standard benchmark plus buffer	Does existing program meet I/M performance standard?
Brazoria	0.17	0.17	0.19	Yes.
Fort Bend	0.19	0.20	0.22	Yes.
Galveston	0.17	0.18	0.20	Yes.
Harris	0.14	0.14	0.16	Yes.
Montgomery	0.16	0.16	0.18	Yes.

Therefore, the DFW I/M and HGB I/M programs meet the Enhanced performance standard for the 2008 ozone standard.

Comment: Commenter asserts that EPA has failed to enforce its rules requiring biennial evaluations of Enhanced I/M programs, and the proposal is silent on whether Texas conducts these evaluations, and if so, what the evaluations show.

Response: This comment is outside the scope of this rulemaking. However, the EPA notes that Texas has and continues to provide, EPA Region 6 with their biennial performance evaluations pursuant to 40 CFR 51.353(c)(1). The most recent and past biennial reports are posted on TCEQ's website.[19] The biennial reports are sufficient and satisfy the reporting requirements of the regulation.

III. Final Action

We are approving portions of the Texas SIP revisions submitted to the EPA for the 2008 ozone NAAQS. The SIP revisions being approved describe how CAA requirements for the Enhanced vehicle I/M are met in the DFW and HGB Serious ozone nonattainment areas for the 2008 ozone NAAQS.

IV. Environmental Justice Considerations

The EPA reviewed demographic data,[20] which provides an assessment of individual demographic groups of the populations living within the affected DFW and HGB 2008 ozone nonattainment areas, as well as the State of Texas as a whole. The EPA then compared the data to the national average for each of the demographic groups. The results of this analysis are being provided for informational and transparency purposes. The EJScreen model can only generate output for five counties at a time, and since the DFW 2008 8-hr ozone nonattainment area consists of ten counties and HGB 2008 8-hr ozone nonattainment area consists

[15] PSM for the Existing I/M Program in the DFW 2015 Ozone Nonattainment Area: *See Table 3–1.*

[16] Ibid: *See Table 3–2.*

[17] PSM for the Existing I/M Program in the HGB 2015 Ozone Nonattainment Area: *See Table 3–1.*

[18] Ibid: *See Table 3–2.*

[19] See *https://www.tceq.texas.gov/airquality/mobilesource/vim/im_rules_links.html.*

[20] See *https://www.census.gov/quickfacts/fact/table/US/PST045222.*

of eight counties, each area was split into two sections. As mentioned previously, the HGB and DFW nonattainment areas for the 2015 ozone NAAQS are a subset of the HGB and DFW nonattainment areas for the 2008 ozone NAAQS and therefore, the EJscreen reports for the DFW and HGB 2008 nonattainment areas include all the nonattainment counties in these two areas.

Section 1 of the DFW nonattainment area covers Denton, Collin, Dallas, Tarrant, and Rockwall counties. For Section 1 of the DFW nonattainment area, the results of the demographic analysis indicate that, for populations within the five-county area, the percent people of color (persons who reported their race as a category other than white alone (not Hispanic or Latino)) is above the national average for the five-county area; and above the national average for the State of Texas as a whole (59.3 and 59.7 percent, respectively versus 40.7 percent). Within people of color, the percent of the population that is Black or African American alone is above the national average for the five-county area; and slightly below the national average for the State of Texas as a whole (18.4 and 13.2 percent, respectively versus 13.6 percent), and the percent of the population that is American Indian/Alaska Native is below the national average for both the five-county area and the State as a whole (0.9 and 1.1 percent, respectively versus 1.3 percent). The percent of the population that is ''two or more races'' is slightly lower than the national average for both the five-county area and State as a whole (2.5 and 2.2 percent, respectively versus 2.9 percent). The percent of people living below the poverty level is slightly below the national average for the five-county area; and above the national average for the State of Texas as a whole (11.2 and 14.2 percent, respectively versus 11.6 percent).

Section 2 of the DFW nonattainment area covers Wise, Parker, Kaufman, Ellis, and Johnson counties. For Section 2 of the DFW nonattainment area, the results of the demographic analysis indicate that, for populations within the five-county area, the percent people of color (persons who reported their race as a category other than white alone (not Hispanic or Latino)) is below the national average for the five-county area; and above the national average for the State of Texas as a whole (34.9 and 59.7 percent, respectively versus 40.7 percent). Within people of color, the percent of the population that is Black or African American alone is below the national average for the five-county area; and slightly below the national average for the State of Texas as a whole (8.9 and 13.2 percent, respectively versus 13.6 percent), and the percent of the population that is American Indian/Alaska Native is slightly below the national average for both the five-county area and the State as a whole (1 and 1.1 percent, respectively versus 1.3 percent). The percent of the population that is ''two or more races'' is slightly lower than the national average for both the five-county area and State as a whole (2.1 and 2.2 percent, respectively versus 2.9 percent). The percent of people living below the poverty level is below the national average for the five-county area; and above the national average for the State of Texas as a whole (9 and 14.2 percent, respectively versus 11.6 percent).

Section 1 of the HGB nonattainment area covers Harris, Galveston, Chambers, Fort Bend and Brazoria counties. For Section 1 of the HGB nonattainment area, the results of the demographic analysis indicate that, for populations within the five-county area, the percent people of color (persons who reported their race as a category other than white alone (not Hispanic or Latino)) is above the national average for the five-county area; and above the national average for the State of Texas as a whole (69.3 and 59.7 percent, respectively versus 40.7 percent). Within people of color, the percent of the population that is Black or African American alone is above the national average for the five-county area; and slightly below the national average for the State of Texas as a whole (19.8 and 13.2 percent, respectively versus 13.6 percent), and the percent of the population that is American Indian/Alaska Native is slightly below the national average for both the five-county area and the State as a whole (1 and 1.1 percent, respectively versus 1.3 percent). The percent of the population that is ''two or more races'' is slightly lower than the national average for both the five-county area and State as a whole (2.1 and 2.2 percent, respectively versus 2.9 percent). The percent of people living below the poverty level in the five-county area and the State as a whole, is above the national average (14.5 and 14.2 percent, respectively versus 11.6 percent).

Section 2 of the HGB nonattainment area covers Montgomery, Liberty, and Waller counties. For Section 2 of the HGB nonattainment area, the results of the demographic analysis indicate that, for populations within the three county area, the percent people of color (persons who reported their race as a category other than white alone (not Hispanic or Latino)) is very close to the national average for the three-county area; and above the national average for the State of Texas as a whole (40.2 and 59.7 percent, respectively versus 40.7 percent). Within people of color, the percent of the population that is Black or African American alone is below the national average for the three-county area; and slightly below the national average for the State of Texas as a whole (8.2 and 13.2 percent, respectively versus 13.6 percent), and the percent of the population that is American Indian/Alaska Native is slightly below the national average for both the three-county area and the State as a whole (1.1 and 1.1 percent, respectively versus 1.3 percent). The percent of the population that is ''two or more races'' is slightly lower than the national average for both the three-county area and State as a whole (2 and 2.2 percent, respectively versus 2.9 percent). The percent of people living below the poverty level is slightly below the national average in the three-county area; and above the national average for the State as a whole (11.3 and 14.2 percent, respectively versus 11.6 percent).

This final SIP action finds that the Texas I/M program meets the I/M requirements in the DFW and HGB Serious ozone nonattainment areas per the 2008 and 2015 8-hour ozone NAAQS revisions. We expect that this action and resulting emissions reductions will generally be neutral or contribute to reduced environmental and health impacts on all populations in the State of Texas, including people of color and low-income populations. At a minimum, this action would not worsen any existing air quality and is expected to ensure the area is meeting requirements to attain and/or maintain air quality standards. Further, there is no information in the record indicating that this action is expected to have disproportionately high or adverse human health or environmental effects on a particular group of people.

V. Statutory and Executive Order Reviews

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

• Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' [21] The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.'' [22]

TCEQ did not evaluate Environmental Justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA performed an EJ analysis, as is described earlier in the section titled, ''Environmental Justice Considerations.'' The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of E.O. 12898 of achieving EJ for people of color, low-income populations, and Indigenous peoples.

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 7, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 30, 2023.

Earthea Nance,

Regional Administrator, Region 6.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 52 as follows:

PART 52–APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart SS—Texas

■ 2. In § 52.2270, the second table in paragraph (e), titled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' is amended by adding an entry at the end for ''Enhanced Vehicle Inspection and Maintenance (I/M) Requirement for the 2008 Ozone NAAQS Serious Nonattainment Areas'' to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(e) * * *

[21] See *https://www.epa.gov/environmentaljustice/learn-about-environmental-justice.*

[22] *https://www.epa.gov/environmentaljustice/learn-about-environmental-justice.*

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/effective date	EPA approval date	Comments
* *	* *	*	*	*
Enhanced Vehicle Inspection and Maintenance (I/M) Requirement for the 2008 Ozone NAAQS Serious Nonattainment Areas.	Dallas-Fort Worth and Houston-Galveston-Brazoria Ozone Nonattainment Areas.	5/13/2020	9/8/2023 [Insert **Federal Register** citation].	

[FR Doc. 2023–19377 Filed 9–7–23; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA–HQ–OAR–2003–0118; FRL–11349–01–OAR]

RIN 2060–AG12

Protection of Stratospheric Ozone: Determination 38 for Significant New Alternatives Policy Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Determination of acceptability.

SUMMARY: This determination of acceptability expands the list of acceptable substitutes pursuant to the U.S. Environmental Protection Agency's Significant New Alternatives Policy program. This action lists as acceptable additional substitutes for use in the refrigeration and air conditioning and fire suppression sectors.

DATES: This determination is applicable on September 8, 2023.

ADDRESSES: EPA established a docket for this action under Docket ID No. EPA–HQ–OAR–2003–0118 (continuation of Air Docket A–91–42). All electronic documents in the docket are listed in the index at *www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the EPA Air Docket (Nos. A–91–42 and EPA–HQ–OAR–2003–0118), EPA Docket Center (EPA/DC), William J. Clinton West, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20460. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. For further information on EPA Docket Center services and the current status, please visit us online at *www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Margaret Sheppard by telephone at (202) 343–9163, by email at *Sheppard.Margaret@epa.gov,* or by mail at U.S. Environmental Protection Agency, Mail Code 6205A, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Listing of New Acceptable Substitutes

This action is listing as acceptable additional substitutes for use in the refrigeration and air conditioning and fire suppression sectors. This action presents EPA's most recent decisions under the Significant New Alternatives Policy (SNAP) program to list as acceptable several substitutes in different end-uses. New substitutes are:

- R–471A in retail food refrigeration, industrial process refrigeration, and cold storage warehouses (new equipment only);
- R–515B in retail food refrigeration (refrigerated food processing and dispensing equipment, remote condensing units, and supermarket systems), commercial ice machines, and cold storage warehouses (new equipment only);
- Powdered Aerosol I in total flooding fire suppression (both occupied and normally unoccupied areas).

EPA's review of certain substitutes listed in this document is pending for other end-uses. Listing decisions in the end-uses in this document do not prejudge EPA's listings of these substitutes for other end-uses. While certain substitutes being added through this action to the acceptable lists for specific end-uses may have a higher risk in one or more SNAP criteria than certain other substitutes already listed as acceptable or acceptable subject to restrictions, they have a similar or lower overall risk than other acceptable substitutes in those end-uses.

For additional information on SNAP, visit the SNAP portion of EPA's Ozone Layer Protection website at: *www.epa.gov/snap.* Copies of the full lists of acceptable substitutes for ozone-depleting substances (ODS) in the industrial sectors covered by the SNAP program are available at *www.epa.gov/snap/substitutes-sector.* For more information on the Agency's process for administering the SNAP program or criteria for evaluation of substitutes, refer to the initial SNAP rulemaking published March 18, 1994 (59 FR 13044), and the regulations codified at 40 CFR part 82, subpart G. SNAP decisions and the appropriate **Federal Register** citations are found at: *www.epa.gov/snap/snap-regulations.* Under the SNAP program, EPA may list a substitute as acceptable for specified end-uses where the Agency has reviewed the substitute and found no reason to restrict or prohibit its use. Substitutes listed as unacceptable; acceptable, subject to narrowed use limits; or acceptable, subject to use conditions are also listed in the appendices to 40 CFR part 82, subpart G.

The sections below discuss each substitute listing in detail and summarize the results of EPA's assessment of the human health and environmental risks posed by each substitute. EPA's evaluation considers the criteria at 40 CFR 82.180(a)(7), including: atmospheric effects and related health and environmental effects, ecosystem risks, consumer risks, flammability, and cost and availability of the substitute. When evaluating potential substitutes, EPA evaluates these criteria in risk screens, which are technical documents that evaluate risks to human health and the environment from substitutes in specific end-uses, including comparisons to other available substitutes and evaluations against relevant thresholds of risk starting with protective assumptions.

The risk screens cited in this document include evaluation of atmospheric effects, exposure assessments, toxicity data, flammability, and other environmental impacts such as ecotoxicity and local air quality impacts. Each of these analyses is described in more detail at *www.epa.gov/snap/overview-snap.* In this document, the global warming potentials (GWPs) for the substitutes are determined using the 100-year GWP values from the International Panel on Climate Change's (IPCC) Fourth Assessment Report (AR4) [1] for all substances or components of blends.[2] For substances for which no GWP is provided in AR4, the 100-year GWP listed in World Meteorological Organization (WMO) 2022 [3] is used. Where a GWP value in the source document is preceded with a less than (<), very less than (<<), greater than (>), approximately (~), or similar symbol, the numerical value from the source document is cited in this document. For blends of chemicals, such as the listed refrigerant blends, this document weights the GWPs of each component of the blend by their mass percentage in the blend.

Appendix A contains tables summarizing each listing decision in this action. The statements in the ''Further Information'' column in the tables provide additional information but these are not legally binding under section 612 of the Clean Air Act (CAA). Although you are not required to follow recommendations in the ''Further Information'' column of the table under section 612 of the CAA, some of these statements may refer to obligations that are enforceable or binding under Federal or State programs other than the SNAP program. The identification of other enforceable or binding requirements should not be construed as a comprehensive list of such obligations. In many instances, the information simply refers to standard operating practices in existing industry standards and/or building codes. When using these substitutes in the identified end-use, EPA strongly encourages you to apply the information in the ''Further Information'' column. Many of these recommendations, if adopted, would not require significant changes to existing operating practices.

Under separate authority of subsection (i) of the American Innovation and Manufacturing (AIM) Act of 2020, EPA has proposed restrictions on higher-GWP hydrofluorocarbons (HFCs) in specific sectors and subsectors (December 15, 2022; 87 FR 76738). The Agency notes that once that rule is finalized, it may restrict certain substitutes that are listed as acceptable under the SNAP program for some uses. Thus, an acceptable listing of a substitute under the SNAP program should not be considered full permission to use that substitute in all circumstances. Any restrictions under subsection (i) of the AIM Act, as well as other relevant authorities, must also be considered.[4]

You can find submissions to EPA for the substitutes listed in this document, as well as other materials supporting the decisions in this action, in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov.*

A. Refrigeration and Air Conditioning

1. R–471A

EPA's decision: EPA finds R–471A acceptable as a substitute for use in:

- Retail food refrigeration—stand-alone equipment (new equipment only)
- Retail food refrigeration—refrigerated food processing and dispensing equipment (new equipment only)
- Retail food refrigeration—remote condensing units (new equipment only)
- Retail food refrigeration—supermarket systems (new equipment only)
- Industrial process refrigeration (new equipment only)
- Cold storage warehouses (new equipment only)

R–471A, marketed under the trade name Solstice® 471A, is a weighted blend of 78.7 percent hydrofluoroolefin (HFO)–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene; (Chemical Abstracts Service Registry Number [CAS Reg. No.] 29118–24–9); 17.0 percent HFO–1336mzz(E), also known as *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2); and 4.3 percent HFC–227ea, which is also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0) .

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in this end-use in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, ''Supporting Materials for Notice 38 Listing of R–471A in Refrigeration and Air Conditioning. SNAP Submission Received December 8, 2021.'' EPA performed assessments to examine the health and environmental risks of this substitute and the results are summarized below. These assessments are available in Docket EPA–HQ–OAR–2003–0118:

- ''Risk Screen on Substitutes in Retail Food Refrigeration (New Equipment). Substitute: R–471A (Solstice® N71).''
- ''Risk Screen on Substitutes in Industrial Process Refrigeration and Cold Storage Warehouses (New Equipment). Substitute: R–471A (Solstice® N71).''

Environmental information: R–471A has an ozone depletion potential (ODP) of zero. Its components, HFO–1234ze(E), HFO–1336mzz(E), and HFC–227ea, have GWPs of one, [5] 26,[6] and 3,220, respectively.[7] If these values are weighted by mass percentage, then R–471A has a GWP of about 144. The components of R–471A are excluded from the EPA's regulatory definition of volatile organic compounds (VOC) under CAA regulations (see 40 CFR 51.100(s)) addressing the development of State implementation plans (SIPs) to attain and maintain the National Ambient Air Quality Standards (NAAQS). Knowingly venting or releasing this refrigerant blend is limited by the venting prohibition under section 608(c)(2) of the CAA, codified in EPA's regulations at 40 CFR 82.154(a).

Flammability information: R–471A is not flammable. The American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) has assigned R–471A a flammability class of

[1] IPCC, 2007: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Solomon, S., Qin, D., Manning, M., Chen, Z., Marquis, M., Averyt, K.B., Tignor M., and Miller, H.L. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. This document is accessible at *www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.*

[2] The AR4 100-year GWP values are consistent with the exchange values for the regulated hydrofluorocarbons (HFCs) listed in subsection (c) of the American Innovation and Manufacturing (AIM) Act and with Annexes A, C, and F of the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Montreal Protocol).

[3] WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2022,* GAW Report No. 278, 509 pp.; WMO: Geneva, 2022. Available at: *https://ozone.unep.org/system/files/documents/Scientific-Assessment-of-Ozone-Depletion-2022.pdf.* (WMO, 2022). In this action, the 100-year GWP values are used.

[4] For example, there may be restrictions or prohibitions in regulations issued under section 610 of the CAA at 40 CFR part 82 subpart C for nonessential products containing ODS, under the Toxic Substances Control Act, under the Occupation Safety and Health Act, and under State or local laws and regulations that warrant consideration.

[5] WMO, 2022.

[6] Ibid.

[7] Unless otherwise stated, all GWPs in this document for individual chemicals are 100-year values from IPCC's Fourth Assessment Report (AR4), based upon the 100-year GWPs in IPCC, 2007, if available, in that document.

''1,'' meaning it does not propagate a flame under standard test conditions.[8]

Toxicity and exposure data: Potential health effects of exposure to this substitute include drowsiness or dizziness. The substitute may also irritate the skin or eyes or cause frostbite. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

ASHRAE has established an occupational exposure limit (OEL) for the blend of 710 ppm on an eight-hour time-weighted average (8-hr TWA).[9] For the components of R–471A, the Workplace Environmental Exposure Limit (WEEL) Committee of the Occupational Alliance for Risk Science (OARS) has established a WEEL of 400 ppm on an 8-hr TWA for HFO–1336mzz(E) and ASHRAE has established OELs of 800 ppm and 1,000 ppm on an 8-hr TWA for HFO–1234ze(E) and HFC–227ea, respectively. EPA anticipates that users will be able to meet these workplace guidance limits and address potential health risks by following recommendations in the manufacturer's safety data sheet (SDS), ASHRAE Standard 15, and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: R–471A has an ODP of zero, comparable to or less than other listed substitutes in these end-uses with ODPs ranging from zero to less than 0.0004.

For new remote condensing units and supermarket systems, R–471A's GWP of about 144 is lower than that of other acceptable substitutes for new equipment such as R–450A (GWP of 601), R–513A (GWP of 630), R–407A (GWP of 2,110), and R–421A (GWP of 2,630). R–471A's GWP of about 144 is higher than that of other acceptable substitutes for new equipment such as ammonia vapor compression in a secondary loop (GWP of zero) and carbon dioxide (CO_2) (GWP of one). There may be situations in which ammonia or CO_2 may not be feasible for new remote condensing units and supermarket systems or are restricted by local laws and building codes and standards, particularly for smaller equipment used in a public area.

For stand-alone equipment, R–471A's GWP of about 144 is lower than that of other acceptable substitutes for new equipment such as R–450A (GWP of 601) and R–513A (GWP of 630). R–471A's GWP of about 144 is higher than that of other acceptable substitutes for new equipment such as ammonia vapor compression in a secondary loop (GWP of zero), CO_2 (GWP of one), and propane (GWP of three). There may be situations in which ammonia in a secondary loop, CO_2, or larger charges of propane may not be feasible or are restricted by local laws and building codes and standards because of flammability or toxicity.

For refrigerated food processing and dispensing equipment, R–471A's GWP of about 144 is comparable to or lower than that of other acceptable substitutes for new equipment such as R–450A (GWP of 601), R–513A (GWP of 630), HFC–134a (GWP of 1,430), and R–426A (GWP of 1,510). R–471A's GWP of about 144 is higher than that of other acceptable substitutes for new equipment such as ammonia vapor compression in a secondary loop (GWP of zero) and CO_2 (GWP of one). There may be situations in which ammonia in a secondary loop or CO_2 may not be feasible for new refrigerated food processing and dispensing equipment or are restricted by local laws and building codes and standards, due to flammability and toxicity.

For industrial process refrigeration, R–471A's GWP of about 144 is comparable to or lower than that of other acceptable substitutes for new equipment such as R–450A (GWP of 601), R–513A (GWP of 630), R–404A (GWP of 3,920) and R–508B (GWP of 13,400). R–471A's GWP of about 144 is higher than that of other acceptable substitutes for new equipment such as ammonia absorption (GWP of zero), CO_2 (GWP of one), and propane (GWP of three). There may be situations in which ammonia, CO_2, or propane may not be feasible for new industrial process refrigeration equipment, *e.g.,* because of temperature range, or are restricted by local laws and building codes and standards, due to flammability and toxicity.

For cold storage warehouses, R–471A's GWP of about 144 is comparable to or lower than that of other acceptable substitutes for new equipment such as R–450A (GWP of 601), R–513A (GWP of 630), and R–407F (GWP of 1,820). R–471A's GWP of about 144 is higher than that of other acceptable substitutes for new equipment such as ammonia absorption (GWP of zero) and CO_2 (GWP of one). There may be situations in which ammonia or CO_2 may not be feasible for new cold storage warehouses or are restricted by local laws and building codes and standards, particularly for smaller equipment.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-uses. Toxicity risks can be minimized by use consistent with the OARS WEEL and ASHRAE OELs, ASHRAE 15, and other industry standards, recommendations in the manufacturer's SDS, and other safety precautions common in the refrigeration and air conditioning industry.

EPA finds R–471A acceptable in the retail food refrigeration (new equipment only)—refrigerated food processing and dispensing equipment, remote condensing units, stand-alone units, and supermarket systems; industrial process refrigeration (new equipment only); and cold storage warehouses (new equipment only) end-uses because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-uses.

2. R–515B

EPA's decision: EPA finds R–515B acceptable as a substitute for use in:

- Retail food refrigeration—refrigerated food processing and dispensing equipment (new equipment only)
- Retail food refrigeration—remote condensing units (new equipment only)
- Retail food refrigeration—supermarket systems (new equipment only)
- Commercial ice machines (new equipment only)
- Cold storage warehouses (new equipment only)

R–515B is a weighted blend of 91.1 percent HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9), and 8.9 percent HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0).

You may find a copy of the applicant's submissions, with CBI redacted, providing the required health and environmental information for this substitute in these end-uses in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the names, ''Supporting Materials for Notice 38 Listing of R–515B in Refrigeration and Air Conditioning. SNAP Submission Received May 28, 2020'' and ''Supporting Materials for Notice 38 Listing of R–515B in Refrigeration and Air Conditioning. SNAP Submission Received December 10, 2021.'' EPA performed assessments to examine the health and environmental risks of this substitute and the results are summarized below. These assessments are available in Docket EPA–HQ–OAR–2003–0118:

- ''Risk Screen on Substitutes in Retail Food Refrigeration—Refrigerated

[8] ASHRAE Standard 34–2022, Designation and Safety Classification of Refrigerants.

[9] Ibid.

Food Processing and Dispensing Equipment (New Equipment). Substitute: R–515B (Solstice® N15).''

• ''Risk Screen on Substitutes in Retail Food Refrigeration—Supermarket Systems and Remote Condensing Units (New Equipment). Substitute: R–515B (Solstice® N15).''

• ''Risk Screen on Substitutes in Commercial Ice Machines (New Equipment). Substitute: R–515B (Solstice® N15).''

• ''Risk Screen on Substitutes in Cold Storage Warehouses (New Equipment). Substitute: R–515B (Solstice® N15).''

Environmental information: R–515B has an ODP of zero. Its components, HFO–1234ze(E) and HFC–227ea, have a GWP of one [10] and 3,220, respectively. If these values are weighted by mass percentage, then R–515B has a GWP of about 287. The components of R–515B are excluded from the EPA's regulatory definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. Knowingly venting or releasing this refrigerant blend is limited by the venting prohibition under section 608(c)(2) of the CAA, codified at 40 CFR 82.154(a)(1).

Flammability information: R–515B is not flammable. ASHRAE has assigned R–515B a flammability class of ''1.'' [11]

Toxicity and exposure data: Potential health effects of exposure to this substitute include drowsiness or dizziness. The substitute may also irritate the skin or eyes or cause frostbite. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

ASHRAE has established OELs of 800 ppm and 1000 ppm as an 8-hr TWA for HFO–1234ze(E) and HFC–227ea, respectively. For the R–515B blend itself, ASHRAE recommends an OEL of 810 ppm.[12] EPA anticipates that users will be able to meet each of the OELs and address potential health risks by following recommendations in the manufacturer's SDS, in ASHRAE Standard 15, and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: R–515B has an ODP of zero, comparable to or less than other listed substitutes in these end-uses, with ODPs ranging from zero to less than 0.0004.

For refrigerated food processing and dispensing equipment, R–515B's GWP of about 287 is comparable to or lower than that of other acceptable substitutes for new equipment such as R–450A (GWP of 601), R–513A (GWP of 630), HFC–134a (GWP of 1,430), and R–426A (GWP of 1,510). R–515B's GWP of about 287 is higher than that of other acceptable substitutes for new equipment such as ammonia vapor compression in a secondary loop (GWP of zero) and CO_2 (GWP of one). There may be situations in which ammonia in a secondary loop or CO_2 may not be feasible for new refrigerated food processing and dispensing equipment or are restricted by local laws and building codes and standards, due to flammability and toxicity.

For remote condensing units and supermarket systems, R–515B's GWP of about 287 is comparable to or lower than that of other acceptable substitutes for new equipment such as R–450A (GWP of 601), R–513A (GWP of 630), R–407A (GWP of 2,110), and R–421A (GWP of 2,630). R–515B's GWP of about 287 is higher than that of other acceptable substitutes for new equipment such as ammonia vapor compression in a secondary loop (GWP of zero) and CO_2 (GWP of one). There may be situations in which ammonia or CO_2 may not be feasible for new remote condensing units and supermarket systems or are restricted by local laws and building codes and standards, particularly for smaller equipment used in a public area.

For commercial ice machines, R–515B's GWP of about 287 is comparable to or lower than that of other acceptable substitutes for new equipment, such as R–513A (GWP of 630), R–449B (GWP of 1,410), R–410A (GWP of 2,090), R–404A (GWP of 3,920), and R–507A (GWP of 3,990). R–515B's GWP of about 287 is higher than that of other acceptable substitutes for new equipment such as ammonia vapor compression in a secondary loop (GWP of zero), CO_2 (GWP of one), and propane (GWP of three). There may be situations in which ammonia in a secondary loop, CO_2, or larger charges of propane may not be feasible or are restricted by local laws and building codes and standards because of flammability or toxicity.

For cold storage warehouses, R–515B's GWP of about 287 is comparable to or lower than that of other acceptable substitutes for new equipment such as R–450A (GWP of 601), R–513A (GWP of 630), and R–407F (GWP of 1,820). R–515B's GWP of about 287 is higher than that of other acceptable substitutes for new equipment such as ammonia absorption (GWP of zero) and CO_2 (GWP of one). There may be situations in which ammonia or CO_2 may not be feasible for new cold storage warehouses or are restricted by local laws and building codes and standards, particularly for smaller equipment.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-uses. Toxicity risks can be minimized by use consistent with the ASHRAE OELs, ASHRAE 15, and other industry standards, recommendations in the manufacturer's SDS, and other safety precautions common in the refrigeration and air conditioning industry.

EPA finds R–515B acceptable in the end-uses listed above because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-uses.

B. Fire Suppression and Explosion Protection

1. Powdered Aerosol I (GreenSol)

EPA's decision: EPA finds Powdered Aerosol I acceptable as a substitute for:

• Total flooding uses, both occupied and normally unoccupied spaces

Powdered Aerosol I is prepared as a solid material that generates, by a combustion process, a powdered aerosol that acts chemically and physically to extinguish fires. Based on review of information from the submitter that supports the safe use of the powdered aerosol in normally occupied spaces, EPA determines that Powdered Aerosol I is acceptable for use in total flooding systems for both occupied and normally unoccupied spaces. In the ''Further Information'' column of the tables summarizing today's listing decisions and found at the end of this document, we state that use of this agent should be used in accordance with the safety guidelines in the latest edition of the National Fire Protection Association (NFPA) 2010 Standard for Aerosol Extinguishing Systems. Although EPA is not requiring use conditions on the use of Powdered Aerosol I, we believe that the fire suppression industry will use this agent safely because the NFPA 2010 Standard establishes health and safety requirements for its use [13] and because of the acceptable level of toxicity of this substitute (see below under ''Toxicity and exposure data).''

You may find the redacted submission in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov*

[10] WMO, 2022.

[11] ASHRAE Standard 34–2022, Designation and Safety Classification of Refrigerants.

[12] Ibid.

[13] EPA is a member of NFPA's standard-setting committee in developing NFPA 2010 and provides relevant health information for that document.

under the name, ''Supporting Documentation for Notice 38 Listing of Powdered Aerosol I (GreenSol) in Fire Suppression. SNAP Submission Received December 1, 2020.'' EPA performed an assessment to examine the health and environmental risks of this substitute and the results are summarized below. This assessment is available in Docket EPA–HQ–OAR–2003–0118:

- ''Risk Screen on Substitutes in Total Flooding Systems in Normally Occupied Spaces. Substitute: Powdered Aerosol I (GreenSol).''

Environmental information: The active ingredients of Powdered Aerosol I are solids both before and after use; thus, their ODP and GWP are both zero. The gaseous post-activation products for Powdered Aerosol I also have zero ODP and those released with GWPs are carbon monoxide (CO) and CO_2 with GWPs of three or less. The remaining gaseous post-activation products either have no GWP or are present only in trace amounts. Further, the remaining gaseous post-activation products are not organic, and thus are excluded from the EPA's regulatory definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. The solid active ingredients and particulate post-activation products have no ODP or GWP, do not participate in atmospheric photochemical reactions, and are inorganic compounds that are not VOC.

Flammability information: Powdered Aerosol I's post-activation products are nonflammable.

Toxicity and exposure data: Because the fire suppressant precursors are prepared as solids that are not reactive and do not crumble or flake, inhalation or ingestion of the pre-activation compounds is not likely. Exposure to Powdered Aerosol I after activation may cause temporary, mild irritation of the mucous membrane. If eye or skin contact occurs, end users should flush eyes with water or wash skin with soap and water. If inhaled, end users should be removed and exposed to fresh air. Exposure to the post-discharge products is expected to be below the relevant workplace exposure limits for those compounds. Because it is housed in a hermetically sealed container, exposure should not occur unless the system is activated.

The post-activation components of the proposed substitute are common compounds that are not expected to exceed immediately dangerous to life or health (IDLH) levels from the National Institute for Occupational Safety and Health (NIOSH) that apply to occupational and end-use exposure.

Information on additional safety recommendations: The discharge of the aerosol results in a reduction of visibility in the protected space due to the uniform distribution of the particulate generated. EPA recommends use in accordance with the NFPA 2010 standard to reduce any safety risks due to reduced visibility. In addition, EPA recommends that cross-zone detection systems and abort switches located near an exit from the protected space be employed; improved detection systems within the protected space and manual abort switches outside of the space could help avoid inadvertent discharge. The use of appropriate safety and protective equipment (*e.g.,* protective gloves, tightly sealed goggles, protective work clothing, and particulate-removing respirators using NIOSH type N95 or better filters) consistent with U.S. Occupational Safety and Health Administration (OSHA) guidelines minimizes personnel exposure from inhalation of the substitute.

EPA provides additional information on safe use of this substitute for establishments manufacturing, installing and maintaining equipment using this agent in the ''Further Information'' column of the tables summarizing the listing decisions in this document. EPA encourages users of substitutes to apply all statements in the ''Further Information'' column in their use of this substitute as best practices for safer use. In many instances, the information simply refers to standard operating practices in existing industry standards and/or building codes, which if adopted, would not require significant changes to existing operating practices.

EPA expects that procedures identified in the SDS for Powdered Aerosol I and good manufacturing practices will be adhered to, and that the appropriate safety and personal protective equipment (PPE) consistent with OSHA guidelines will be used during installation, servicing, post-discharge clean-up and disposal of total flooding systems using Powdered Aerosol I. The manufacturer should provide guidance upon installation of the system regarding the appropriate time after which workers may re-enter the area for disposal to allow the maximum settling of all particulates.

Comparison to other substitutes in this end-use: Powdered Aerosol I has an ODP of zero, comparable to other listed substitutes in this end-use, with ODPs ranging from zero to 0.048.

For total flooding agents, Powdered Aerosol I's GWP of zero (and one to three for certain post-activation products) is lower than that of other acceptable substitutes, such as HFC–227ea (GWP of 2,220) and other substitutes with GWPs up to 22,800.[14] Other acceptable substitutes in this end-use have comparable GWPs ranging from zero to one, such as water, inert gases, and a number of other powdered aerosol fire suppressants.

Toxicity risks can be minimized by use consistent with the NFPA 2010 standard, recommendations in the SDS, and other safety precautions common in the fire suppression industry. The potential toxicity risks due to inhalation exposure are common to many total flooding agents, including those already listed as acceptable under SNAP for this same end-use. Powdered Aerosol I's post-activation products are nonflammable, as are all other available total flooding agents.

EPA finds Powdered Aerosol I acceptable in the end-use listed above because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-use.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Paul M. Gunning,

Director, Office of Atmospheric Protection, Office of Air and Radiation.

Appendix A—Summary of Decisions for New Acceptable Substitutes

[14] For SF_6, the substitute with the highest GWP, the SNAP listing finds SF_6 as ''acceptable subject to narrowed use limits.''

REFRIGERATION AND AIR CONDITIONING

End-use	Substitute	Decision	Further information [1]
Retail food refrigeration—stand-alone equipment (*new equipment only*).	R–471A	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (Chemical Abstracts Service Registry Number [CAS Reg. No.] 29118–24–9); HFO–1336mzz(E), also known as *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2); and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–471A has a 100-year global warming potential (GWP) of 144. The blend is not flammable. The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) has established an occupational exposure limit (OEL) of 710 ppm on an 8-hr TWA for R–471A, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm for HFC–227ea on an eight-hour time-weighted average (8-hr TWA). The Occupational Alliance for Risk Science (OARS) has established a Workplace Environmental Exposure Limit (WEEL) of 400 ppm on an 8-hr TWA for HFO–1336mzz(E).
Retail food refrigeration—refrigerated food processing and dispensing equipment (*new equipment only*).	R–471A	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9); HFO–1336mzz(E), also known as *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2); and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–471A has a GWP of 144. The blend is not flammable. ASHRAE has established an OEL of 710 ppm on an 8-hr TWA for R–471A, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm for HFC–227ea on an 8-hr TWA. OARS has established a WEEL of 400 ppm on an 8-hr-TWA for HFO–1336mzz(E).
Retail food refrigeration—refrigerated food processing and dispensing equipment (*new equipment only*).	R–515B	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9) and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–515B has a GWP of 287. The blend is not flammable. ASHRAE has established an OEL of 810 ppm on an 8-hr TWA for R–515B, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm HFC–227ea on an 8-hr TWA.
Retail food refrigeration—remote condensing units (*new equipment only*).	R–471A	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9); HFO–1336mzz(E), also known as *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2); and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–471A has a GWP of 144. The blend is not flammable. ASHRAE has established an OEL of 710 ppm on an 8-hr TWA for R–471A, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm for HFC–227ea on an 8-hr TWA. OARS has established a WEEL of 400 ppm on an 8-hr-TWA for HFO–1336mzz(E).
Retail food refrigeration—remote condensing units (*new equipment only*).	R–515B	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9) and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–515B has a GWP of 287. The blend is not flammable. ASHRAE has established an OEL of 810 ppm on an 8-hr TWA for R–515B, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm HFC–227ea on an 8-hr TWA.
Retail food refrigeration—supermarket systems (*new equipment only*).	R–471A	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9); HFO–1336mzz(E), also known as *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2); and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–471A has a GWP of 144. The blend is not flammable. ASHRAE has established an OEL of 710 ppm on an 8-hr TWA for R–471A, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm for HFC–227ea on an 8-hr TWA. OARS has established a WEEL of 400 ppm on an 8-hr-TWA for HFO–1336mzz(E).

REFRIGERATION AND AIR CONDITIONING—Continued

End-use	Substitute	Decision	Further information [1]
Retail food refrigeration—supermarket systems (*new equipment only*).	R–515B	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9) and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–515B has a GWP of 287. The blend is not flammable. ASHRAE has established an OEL of 810 ppm on an 8-hr TWA for R–515B, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm HFC–227ea on an 8-hr TWA.
Industrial process refrigeration (*new equipment only*).	R–471A	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9); HFO–1336mzz(E), also known as *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2); and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–471A has a GWP of 144. The blend is not flammable. ASHRAE has established an OEL of 710 ppm on an 8-hr TWA for R–471A, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm for HFC–227ea on an 8-hr TWA. OARS has established a WEEL of 400 ppm on an 8-hr-TWA for HFO–1336mzz(E).
Commercial ice machines (*new equipment only*).	R–515B	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9) and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–515B has a GWP of 287. The blend is not flammable. ASHRAE has established an OEL of 810 ppm on an 8-hr TWA for R–515B, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm HFC–227ea on an 8-hr TWA.
Cold storage warehouses (*new equipment only*).	R–471A	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9); HFO–1336mzz(E), also known as *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2); and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–471A has a GWP of 144. The blend is not flammable. ASHRAE has established an OEL of 710 ppm on an 8-hr TWA for R–471A, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm for HFC–227ea on an 8-hr TWA. OARS has established a WEEL of 400 ppm on an 8-hr-TWA for HFO–1336mzz(E).
Cold storage warehouses (*new equipment only*).	R–515B	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9) and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–515B has a GWP of 287. The blend is not flammable. ASHRAE has established an OEL of 810 ppm on an 8-hr TWA for R–515B, as well as OELs of 800 ppm for HFO–1234ze(E) and 1,000 ppm HFC–227ea on an 8-hr TWA.

[1] See recommendations in the manufacturer's safety data sheet (SDS) and guidance for all listed refrigerants.

FIRE SUPPRESSION

End-use	Substitute	Decision	Further information
Total flooding	Powdered Aerosol I.	Acceptable	EPA recommends the use of this agent in accordance with the safety guidelines in the latest edition of the National Fire Protection Association (NFPA) 2010 standard for Aerosol Extinguishing Systems. For establishments manufacturing the agent or filling, installing, or servicing containers or systems to be used in total flooding applications, EPA recommends the following: —the appropriate safety and personal protective equipment (PPE) (*e.g.,* protective gloves, tightly sealed goggles, protective work clothing, and particulate-removing respirators with National Institute for Occupational Safety and Health (NIOSH) type N95 or better filters) consistent with Occupational Safety and Health Administration (OSHA) guidelines and requirements must be used during manufacture, installation, servicing, and disposal of total flooding systems using the agent;

FIRE SUPPRESSION—Continued

End-use	Substitute	Decision	Further information
			—adequate ventilation should be in place to reduce airborne exposure to constituents of agent; —an eye wash fountain and quick drench facility should be close to the production area; —training for safe handling procedures should be provided to all employees that would be likely to handle containers of the agent or extinguishing units filled with the agent; —workers responsible for clean-up should allow for maximum settling of all particulates before reentering area and wear appropriate personal protective equipment; and —all spills should be cleaned up immediately in accordance with good industrial hygiene practices. As required by the manufacturer, units installed in normally occupied spaces will be equipped with features such as a system-isolate switch and cross-zone detection system to reduce risk of accidental activation of an agent generator while persons are present in the protected space. Also, the manufacturer requires warning of pending discharge and delay in release to ensure egress prior to activation of the agent to reduce risk of exposure. See additional notes 1, 2, 3, 4, 5.

[1] EPA recommends that users consult Section VIII of the OSHA Technical Manual for information on selecting the appropriate types of personal protective equipment for all listed fire suppression agents. EPA has no intention of duplicating or displacing OSHA coverage related to the use of personal protective equipment (*e.g.,* respiratory protection), fire suppression, hazard communication, worker training or any other occupational safety and health standard with respect to halon substitutes.

[2] Use of all listed fire suppression agents should conform to relevant OSHA requirements, including 29 CFR part 1910, subpart L, §§ 1910.160 and 1910.162.

[3] Per OSHA requirements, protective gear (SCBA) should be available in the event personnel should reenter the area.

[4] Discharge testing should be strictly limited to that which is essential to meet safety or performance requirements.

[5] The agent should be recovered from the fire suppression system in conjunction with testing or servicing and recycled for later use or destroyed.

[FR Doc. 2023–19340 Filed 9–7–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 140501394–5279–02; RTID 0648–XD317]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Re-Opening of the Commercial Sector for Blueline Tilefish in the South Atlantic

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

ACTION: Temporary rule; re-opening.

SUMMARY: NMFS announces the re-opening of the commercial sector for blueline tilefish in the exclusive economic zone (EEZ) of the South Atlantic through this temporary rule. The most recent data for commercial landings of blueline tilefish indicate the commercial annual catch limit (ACL) for the 2023 fishing year has not yet been reached. Therefore, NMFS re-opens the commercial sector to harvest blueline tilefish in the South Atlantic EEZ for 6 days. The purpose of this temporary rule is to allow for the commercial ACL of blueline tilefish to be harvested while minimizing the risk of exceeding the commercial ACL.

DATES: This temporary rule is effective from 12:01 a.m. eastern time on September 11, 2023, through September 16, 2023.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes blueline tilefish and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council (Council) and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. All weights in this temporary rule are given in round weight.

Regulations at 50 CFR 622.193(z)(1)(i) specify the commercial ACL for blueline tilefish of 117,148 lb (53,137 kg), and the commercial accountability measure for blueline tilefish. NMFS is required to close the commercial sector when its ACL is reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. Recently in this 2023 fishing year, NMFS projected that commercial landings of blueline tilefish would reach the commercial ACL on August 2, 2023, and therefore closed commercial harvest for the rest of the year on that date (88 FR 50806, August 2, 2023). However, a recent update of commercial landings data indicates that the commercial ACL for blueline tilefish was not reached on August 2, 2023.

In accordance with 50 CFR 622.8(c), NMFS temporarily re-opens the commercial sector for blueline tilefish on September 11, 2023. The commercial sector will be open for 6 days or through September 16, 2023, to allow for the commercial ACL to be reached. The commercial sector will close again on September 17, 2023, and remain closed until January 1, 2024, the start of the next fishing year. NMFS has determined that this re-opening will allow for an additional opportunity to commercially harvest blueline tilefish while reducing the risk of exceeding the commercial ACL.

The operator of a vessel with a valid Federal commercial vessel permit for South Atlantic snapper-grouper with blueline tilefish on the vessel must have landed and bartered, traded, or sold such blueline tilefish before September 17, 2023. During the subsequent commercial closure from September 17 through the rest of 2023, all sale or

purchase of blueline tilefish is prohibited. The recreational sector for blueline tilefish in the South Atlantic EEZ is closed each year from January 1 through April 30, and from September 1 through December 31, and during these periods the bag and possession limits for blueline tilefish in or from the South Atlantic EEZ are zero. Additionally, these bag and possession limits apply to the harvest of blueline tilefish in both state and Federal waters in the South Atlantic on a vessel with a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is taken under 50 CFR 622.8(c), issued pursuant to section 304(b) of the Magnuson-Stevens Act, and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment is unnecessary. Such procedure is unnecessary, because the regulations associated with the commercial ACL of blueline tilefish and a re-opening to provide an opportunity for the commercial ACL to be harvested have already been subject to notice and public comment, and all that remains is to notify the public of the commercial sector re-opening.

For the reasons stated earlier, the Assistant Administrator for Fisheries also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: September 5, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–19450 Filed 9–5–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 173
Friday, September 8, 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 Parts 50, 51, and 71

[NRC–2020–0034]

RIN 3150–AK79

Increased Enrichment of Conventional and Accident Tolerant Fuel Designs for Light-Water Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory basis; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is requesting comments on a regulatory basis to support a rulemaking to amend the NRC's regulations related to the use of conventional and accident tolerant light-water reactor fuel designs. The NRC's goal is to establish effective and efficient licensing of applications using fuels enriched to greater than 5.0 and less than 20.0 weight percent uranium-235. The NRC will hold a public meeting to promote a full understanding of the planned rulemaking and facilitate public comment on the regulatory basis.

DATES: Submit comments by November 22, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0034. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. eastern time, Federal workdays; telephone: 301–415–1677.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Philip Benavides, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–3246, email: *Philip.Benavides@nrc.gov* and Carla Roque-Cruz, Office of Nuclear Reactor Regulation, telephone: 301–415–1455, email: *Carla.Roque-Cruz@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0034 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0034.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2020–0034 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons to not include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS. Please note that the NRC will not provide formal written responses to each of the comments received on the regulatory basis.

II. Discussion

The NRC is requesting comments on a regulatory basis to support a rulemaking that would amend the NRC's regulations to facilitate the use of light-water reactor fuel containing uranium enriched to greater than 5.0 weight percent uranium-235 (U–235) in part 50 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities,'' 10 CFR part 51,

''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' and 10 CFR part 71, ''Packaging and Transportation of Radioactive Material.'' This rulemaking would allow the NRC to prepare for the effective and efficient licensing of applications using fuels enriched to greater than 5.0 and less than 20.0 weight percent U–235 without compromising reasonable assurance of adequate protection of public health and safety, reduce the need for exemptions from existing regulations and license amendment requests, provide licensees operational flexibility and certainty in licensing of accident tolerant fuel, and support the principles of good regulation. The rule changes would apply to any light-water power reactor application submitted to the NRC under 10 CFR part 50 and part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.''

On June 22, 2022, the NRC held a comment gathering public meeting to obtain feedback from external stakeholders on the development of the regulatory basis for this proposed rule. The NRC offered the opportunity for stakeholders to make presentations during this meeting. In addition, the NRC conducted a comment gathering session and provided three topics for discussion: (1) regulations and associated guidance documents that should be evaluated in this rulemaking, (2) regulations that would likely require a licensee to request an exemption if licensees chose to pursue fuel enriched above 5.0 weight percent U–235, and (3) rulemaking schedule and impact on stakeholders. Attendees at this meeting included nongovernmental organizations, licensees, nuclear power industry representatives, and other members of the public. The NRC staff has prepared a regulatory basis to describe and document the results of assessments performed by the NRC staff in support of this proposed rulemaking. This regulatory basis and the meeting summary, including transcript, are available as indicated in the ''Availability of Documents'' section of this document.

The staff determined that the following regulations would be directly or indirectly affected by an increase in fuel enrichment level to greater than 5.0 and less than 20.0 weight percent U–235:

- § 50.67, Accident source term
- § 50.68, Criticality accident requirements
- § 51.51(b), Uranium fuel cycle environmental data—Table S–3
- § 51.52, Environmental effects of transportation of fuel and waste—Table S–4
- § 71.55, General requirements for fissile material packages

In addition to amending the regulations listed, the Commission directed the staff in SRM–SECY–21–0109, ''Staff Requirements—SECY–21–0109—Rulemaking Plan on Use of Increased Enrichment of Conventional and Accident Tolerant Fuel Designs for Light-Water Reactors,'' to appropriately address and analyze fuel fragmentation, relocation, and dispersal (FFRD) issues relevant to fuels of higher enrichment and burnup levels in the regulatory basis.

In the regulatory basis, the NRC staff concludes that there is sufficient basis to proceed with rulemaking and guidance development to address the regulatory issues associated with the use of fuel enriched to greater than 5.0 and less than 20.0 weight percent U–235. However, there are specific regulatory areas that would benefit from additional input from stakeholders before the NRC staff makes a final recommendation to the Commission on rulemaking.

The Commission has not approved any specific recommendation in the regulatory basis at this time, and as such, any conclusions regarding the elements of the increased enrichment of conventional and accident tolerant fuel designs for light-water reactor rulemaking are subject to change.

III. Specific Requests for Comments

General Questions

The NRC is requesting comment on the regulatory basis. As you prepare your comments, consider the following general questions:

1. Is the NRC considering appropriate options for each regulatory area described in the regulatory basis? Please provide a basis for your response.

2. Are there additional factors that the NRC should consider in each regulatory area? What are these factors? Please provide a basis for your response.

3. Are there any additional options that the NRC should consider during development of the proposed rule? Please provide a basis for your response.

4. Is there additional information concerning regulatory impacts that the NRC should include in its regulatory analysis for this rulemaking? Please provide a basis for your response.

5. Discuss whether the proposed rule would present hardships to regulated small entities. How could rule provisions be modified to lessen these impacts? Please provide a basis for your response.

6. What opportunities are there to increase the beneficial impacts of the rule on small entities? Please provide a basis for your response.

Specific Regulatory Issues

In addition to the general questions, the NRC is requesting specific feedback from the public and has prepared specific questions related to control room design criteria; transportation of uranium hexafluoride; and FFRD.

Control Room Design Criteria

The NRC is seeking comment on the alternatives proposed in Appendix A of the regulatory basis on control room design criteria.

1. Would the numerical selection of the control room design criteria be better aligned with regulations designed to limit occupational exposures during emergency conditions (*e.g.,* §§ 20.1206, ''Planned special exposures,'' and 50.54(x)) or regulations designed to limit annual occupational radiation exposures during normal operations (*e.g.,* § 20.1201, ''Occupational dose limits for adults,'' specifically the requirements in § 20.1201 (a)(1)(i))? Please provide a basis for your response.

2. Would a graded, risk-informed method, to demonstrate compliance with a range of acceptable control room design criterion values instead of a single selected value such as the current 5 rem (50 millisievert(mSv)) total effective dose equivalent (TEDE) provide the necessary flexibilities for current and future nuclear technologies up to but less than 20.0 weight percent U–235 enrichment? Please provide a basis for your response.

Transportation of Uranium Hexafluoride

The NRC is seeking comment on the alternatives proposed in Appendix E of the regulatory basis on fissile material package requirements. To date, industry plans communicated to the NRC have not indicated that there will be enough requests for package approvals for transporting UF_6 enriched up to but less than 20.0 weight percent U–235 to conclude that rulemaking would be the most efficient or effective process to support package approvals. Further, all alternatives to rulemaking that the NRC considered are nearly cost neutral in terms of implementation; however, rulemaking shifts the cost burdens to the NRC disproportionally when compared to taking no rulemaking action.

1. Is there additional information that can be shared to augment comments made by the public in June 2022 regarding the need for rulemaking to

support licensing new or existing UF_6 transportation package designs?

Fuel Fragmentation, Relocation, and Dispersal

The NRC staff has identified that additional feedback from stakeholders would be beneficial before making a final recommendation on rulemaking on FFRD. The NRC is seeking comment on the alternatives proposed in Appendix F of the regulatory basis on FFRD.

1. Are there any other alternatives not described in Appendix F of the regulatory basis on FFRD that the NRC should consider? Are there elements of the alternatives presented or other alternatives that the NRC should consider? Please provide a basis for your response.

2. Stakeholders previously expressed concerns on the proposed § 50.46a rule when it was initially proposed in 2010. What concerns about § 50.46a (*i.e.,* Alternative 2) exist in today's landscape? Please provide a basis for your response.

3. Under Alternative 2, as currently proposed in the regulatory basis, the staff would apply the regulatory precedent under which fuel dispersal that would challenge current regulatory requirements would not be permitted under loss-of-coolant accident (LOCA) conditions. Would the increased flexibilities gained from best-estimate assumptions and methods employed during large-break LOCA analyses make this alternative reasonable? Please provide a basis for your response.

4. What changes to plant operations, fuel designs, or safety analysis tools and methods would be necessary under each proposed alternative? Please provide a basis for your response.

5. Provide any information that would be relevant to more accurately estimate costs associated with each proposed alternative. Please provide a basis for your response.

6. What are the pros and cons of each alternative, including the degree to which each alternative is consistent with the principles of good regulation?

IV. Cumulative Effects of Regulation

The cumulative effects of regulation (CER) describe the challenges that licensees or other impacted entities (such as Agreement State agency partners) may face while implementing new regulatory positions, programs, and requirements (*e.g.,* rules, generic letters, backfits, inspections). The CER is an organizational effectiveness challenge that results from a licensee or impacted entity implementing a number of complex positions, programs, or requirements within a limited implementation period and with available resources (which may include limited available expertise to address a specific issue). The NRC has implemented CER enhancements to the rulemaking process to facilitate public involvement throughout the rulemaking process. Therefore, the NRC is specifically requesting comment on the cumulative effects that may result from this proposed rulemaking. In developing comments on the regulatory basis, consider the following questions:

1. In light of any current or projected CER challenges, how should the NRC provide sufficient time to implement the new proposed requirements, including changes to programs and procedures?

2. If CER challenges currently exist or are expected, what should be done to address them? For example, if more time is required for implementation of the new requirements, what period of time is sufficient?

3. What other (NRC or other agency) regulatory actions (*e.g.,* orders, generic communications, license amendment requests inspection findings of a generic nature) influence the implementation of the proposed rule's requirements?

4. What are the unintended consequences, and how should they be addressed?

5. Please comment on the NRC's cost and benefit estimates in the regulatory basis.

V. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published in the **Federal Register** on June 10, 1998 (63 FR 31885). The NRC requests comment on this document with respect to the clarity and effectiveness of the language used.

VI. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the methods, as indicated.

Document	ADAMS Accession No./web link/**Federal Register** citation
Rulemaking: Regulatory Basis for Increased Enrichment of Conventional and Accident Tolerant Fuel Designs for Light-Water Reactors, September 5, 2023.	ML23032A504
6/22/2022—Summary of Public Meeting to Discuss the Proposed Rulemaking on Increased Enrichment of Conventional and Accident Tolerant Fuel Designs for Light-Water Reactors, July 1, 2022.	ML22208A001
06/22/2022—Transcript of Public Meeting to Discuss the Proposed Rulemaking onIncreased Enrichment of Conventional and Accident Tolerant Fuel Designs for Light-Water Reactors, June 22, 2022.	ML22201A017
SRM–SECY–21–0109, ''Staff Requirements—SECY–21–0109—Rulemaking Plan on Use of Increased Enrichment of Conventional and Accident Tolerant Fuel Designs for Light-Water Reactors,'' March 16, 2022.	ML22075A103
''Plain Language in Government Writing,'' June 10, 1998	63 FR 31885

The NRC may post additional materials related to this rulemaking activity to the Federal rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2020–0034. These documents will inform the public of the current status of this activity and/or provide additional material for use at future public meetings.

The Federal rulemaking website allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) navigate to the docket folder (NRC–2020–0034); (2) click the ''Subscribe'' link; and (3) enter your email address and click on the ''Subscribe'' link.

Dated: September 5, 2023.

For the Nuclear Regulatory Commission.

Dafna E. Silberfeld,

Acting Director, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023–19452 Filed 9–7–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 52

[NRC–2022–0073]

Draft Regulatory Guide: Guidance for a Technology-Inclusive Content-of-Application Methodology To Inform the Licensing Basis and Content of Applications for Licenses, Certifications, and Approvals for Non-Light-Water Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting public comment on Appendix B and conforming changes to other parts of its draft Regulatory Guide (DG), DG–1404, Revision 1 ''Guidance for a Technology-Inclusive Content-of-Application Methodology to Inform the Licensing Basis and Content of Applications for Licenses, Certifications, and Approvals for Non-Light-Water Reactors.'' On May 25, 2023, the NRC published Revision 0 to DG–1404 requesting public comment, and on June 28, 2023, the NRC extended the public comment period to August 10, 2023. Since then, and consistent with item 1 in Appendix A to DG–1404, Revision 0, the NRC completed its development of Appendix B and revised DG–1404 (*i.e.,* Revision 1) to include this appendix and made conforming changes to other parts of the document. Appendix B provides additional guidance for the scope, level of detail, elements, and plant representation for a probabilistic risk assessment (PRA) supporting a Licensing Modernization Project (LMP)-based construction permit application.

DATES: Submit comments by October 10, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0073. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Michael Orenak, Office of Nuclear Reactor Regulation, telephone: 301–415–3229; email: *Michael.Orenak@nrc.gov,* Anders Gilbertson, Office of Nuclear Reactor Regulation, telephone: 301–415–1541; email: *Anders.Gilbertson@nrc.gov,* and Robert Roche-Rivera, Office of Nuclear Regulatory Research, telephone: 301–415–8113; email: *Robert.Roche-Rivera@nrc.gov.* They are on the staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0073 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0073.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* DG–1404, Revision 1, is available in ADAMS under Accession No. ML23194A194.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2022–0073 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Additional Information

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

The DG, entitled ''Guidance for a Technology-Inclusive Content-of-Application Methodology to Inform the Licensing Basis and Content of Applications for Licenses, Certifications, and Approvals for Non-Light-Water Reactors,'' is temporarily identified by its task number, DG–1404, Revision 1.

DG–1404, Revision 0, issued for public comment on May 25, 2023 (88 FR 33846), provides guidance to assist interested parties and prospective applicants for construction permits, operating licenses, combined licenses, manufacturing licenses, standard design approval, or design certifications in developing the content of applications using the LMP process. The guidance identifies an acceptable method for developing major portions of safety analysis reports in accordance with the LMP process to describe non-light-water

reactor facility designs and to help ensure the minimum requirements are met for the type of application selected. Revision 1 to DG–1404 is now being issued for public comment as the NRC has completed its development of Appendix B and made conforming changes to the DG–1404. The newly added Appendix B provides additional guidance for the scope, level of detail, elements, and plant representation for a PRA supporting an LMP-based part 50 of title 10 of the *Code of Federal Regulations* (10 CFR) construction permit application. Conforming changes to the base document of DG–1404 Revision 0 (staff position C.3.d) and DG–1404 Appendix A Revision 0 (item 1) were made to reflect the addition of Appendix B. The changes to the DG–1404, Revision 0 base document and Appendix A are shown in strikeout so that these changes can be easily identified (ADAMS Accession No. ML23248A343).

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

III. Backfitting, Forward Fitting, and Issue Finality

DG–1404, Revision 1, if finalized, would not constitute backfitting as defined in 10 CFR 50.109, ''Backfitting,'' and as described in Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests''; constitute forward fitting as that term is defined and described in MD 8.4; or affect the issue finality of any approval issued under 10 CFR part 52. The guidance would not apply to any current licensees or applicants under 10 CFR parts 50 or 52 or existing or requested approvals under 10 CFR part 52, and therefore its issuance cannot be a backfit or forward fit or affect issue finality. Further, as explained in DG–1404, Revision 1, applicants and licensees would not be required to comply with the positions set forth in DG–1404, Revision 1.

IV. Submitting Suggestions for Improvement of Regulatory Guides

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

Dated: September 5, 2023.

For the Nuclear Regulatory Commission.

Harriet Karagiannis,

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

[FR Doc. 2023–19451 Filed 9–7–23; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1822; Project Identifier MCAI–2023–00653–T]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus SAS Model A310 series airplanes. This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This proposed AD 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 23, 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–2023–1822; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–1822.
- 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: Dan Rodina, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3225; email *dan.rodina@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–2023–1822; Project Identifier MCAI–2023–00653–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 Dan Rodina, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3225; email *dan.rodina@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

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0092, dated May 5, 2023 (EASA AD 2023–0092) (also referred to as the MCAI), to correct an unsafe condition on all Airbus SAS Model A310 series airplanes. The MCAI states that new or more restrictive airworthiness limitations have been developed.

EASA AD 2023–0092 specifies that it requires a task (limitation) already in Airbus A310 Airworthiness Limitations Section (ALS), Part 2, Damage Tolerant Airworthiness Limitation Items (DT–ALI), Revision 03, dated December 14, 2018, that is required by EASA AD 2019–0091, dated April 26, 2019 (which corresponds to FAA AD 2019–20–06, Amendment 39–19759 (84 FR 55859) (AD 2019–20–06)), and that incorporation of EASA AD 2023–0092 invalidates (terminates) prior instructions for that task. This proposed AD therefore would terminate the limitations for the corresponding tasks identified in the service information referenced in EASA AD 2023–0092 only, as required by paragraph (g) of AD 2019–20–06.

The FAA is proposing this AD to address fatigue cracking, damage, or corrosion in principal structural elements. The unsafe condition, if not addressed, could result in reduced structural integrity of the airplane. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1822.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0092, which describes new or more restrictive airworthiness tasks for airplane structures. 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 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 require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, which are specified in EASA AD 2023–0092 described previously, as incorporated by reference. Any differences with EASA AD 2023–0092 are identified as exceptions in the regulatory text of this proposed AD.

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

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0092 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0092 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 2023–0092 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 2023–0092. Service information required by EASA AD 2023–0092 for compliance will be available at *regulations.gov* by searching for and locating Docket No. FAA–2023–1822 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 AMOC paragraph under ''Additional AD Provisions.'' This new format includes a ''New Provisions for Alternative Actions and Intervals'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action or interval.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 1 airplane of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the FAA recognizes that this number may vary from operator to operator. In the past, the FAA 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. Therefore, the FAA estimates the total cost per operator 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 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 this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus SAS: Docket No. FAA–2023–1822; Project Identifier MCAI–2023–00653–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 23, 2023.

(b) Affected ADs

This AD affects AD 2019–20–06, Amendment 39–19759 (84 FR 55859, October 18, 2019) (AD 2019–20–06).

(c) Applicability

This AD applies to all Airbus SAS Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address fatigue cracking, damage, or corrosion in principal structural elements. The unsafe condition, if not addressed, could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0092, dated May 5, 2023 (EASA AD 2023–0092).

(h) Exceptions to EASA AD 2023–0092

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0092.

(2) Paragraph (3) of EASA AD 2023–0092 specifies revising ''the 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 2023–0092 is at the applicable ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0092, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in the ''Recording AD compliance'' section of EASA AD 2023–0092.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0092.

(i) Provisions for Alternative Actions and Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (g) 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 2023–0092.

(j) Terminating Action for Certain Tasks Required by AD 2019–20–06

Accomplishing the actions required by this AD terminates the corresponding requirements of AD 2019–20–06 for the tasks identified in the service information referenced in EASA AD 2023–0092 only.

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

(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.

(l) Additional Information

For more information about this AD, contact Dan Rodina, Aviation Safety

Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3225; email *dan.rodina@faa.gov.*

(m) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0092, dated May 5, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0092, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website *ad.easa.europa.eu.*

(4) You may view this material 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.

(5) 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 September 1, 2023.

Victor Wicklund,

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

[FR Doc. 2023–19365 Filed 9–7–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 2022R–17; AG Order No. 5781–2023]

RIN 1140–AA58

Definition of ''Engaged in the Business'' as a Dealer in Firearms

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

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Department of Justice (''Department'') proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF'') regulations to implement the provisions of the Bipartisan Safer Communities Act (''BSCA''), effective June 25, 2022, that broaden the definition of when a person is considered ''engaged in the business'' as a dealer in firearms other than a gunsmith or pawnbroker. This proposed rule incorporates the BSCA's definition of ''predominantly earn a profit,'' creates a stand-alone definition of ''terrorism,'' and amends the definitions of ''principal objective of livelihood and profit'' and ''engaged in the business'' to ensure each conforms with the BSCA's statutory changes and can be relied upon by the public. The proposed rule also clarifies what it means for a person to be ''engaged in the business'' of dealing in firearms, and to have the intent to ''predominantly earn a profit'' from the sale or disposition of firearms. In addition, it clarifies the term ''dealer,'' including how that term applies to auctioneers, and defines the term ''responsible person.'' These proposed changes would assist persons in understanding when they are required to have a license to deal in firearms. Consistent with the Gun Control Act (''GCA'') and existing regulations, the proposed rule also defines the term ''personal collection'' to clarify when persons are not ''engaged in the business'' because they make only occasional sales to enhance a personal collection, or for a hobby, or if the firearms they sell are all or part of a personal collection. This proposed rule further addresses the lawful ways in which former licensees, and responsible persons acting on behalf of such licensees, may liquidate business inventory upon revocation or other termination of their license. Finally, the proposed rule clarifies that a licensee transferring a firearm to another licensee must do so by following the verification and recordkeeping procedures instead of using a Firearms Transaction Record, ATF Form 4473.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before December 7, 2023. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by docket number ATF 2022R–17, by either of the following methods—

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Helen Koppe, Mail Stop 6N–518, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Ave. NE, Washington, DC 20226; *ATTN: ATF 2022R–17.*

Instructions: All submissions received must include the agency name and docket number (ATF 2022R–17) for this notice of proposed rulemaking (''NPRM'' or ''proposed rule''). All properly completed comments received from either of the methods described above will be posted without change to the Federal eRulemaking portal, *www.regulations.gov.* This includes any personal identifying information (''PII'') submitted in the body of the comment or as part of a related attachment. Commenters who submit through the Federal eRulemaking portal and who do not want any of their PII posted on the internet should omit PII from the body of their comment or in any uploaded attachments. Commenters who submit through mail should likewise omit their PII from the body of the comment and provide any PII on the cover sheet only. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Helen Koppe, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–7070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Department is proposing to amend ATF regulations to implement the provision of the Bipartisan Safer Communities Act, Public Law 117–159, sec. 12002, 136 Stat. 1313, 1324 (2022) (''BSCA''), that amended the definition of ''engaged in the business'' in the Gun Control Act of 1968 (''GCA'') at 18 U.S.C. 921(a)(21)(C), and to facilitate compliance with the statute.

The Attorney General is responsible for enforcing the GCA. This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA. *See* 18 U.S.C. 926(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA to the Director of ATF (''Director''), subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 U.S.C. 599A(b)(1)–(2), (c)(1); 28 CFR 0.130(a)(1) and (2); Treasury Department Order No. 221, sec. (2)(a), (d), 37 FR 11696, 11696–97 (June 10, 1972). Accordingly, the Department and ATF have promulgated regulations necessary

to implement the GCA. *See* 27 CFR part 478.

The GCA, at 18 U.S.C. 922(a)(1)(A), makes it unlawful for any person, except a licensed dealer, to ''engage in the business'' of dealing in firearms.[1] The GCA further provides that no person shall engage in the business of dealing in firearms until the person has filed an application with and received a license to do so from the Attorney General (18 U.S.C. 923(a)), who has delegated that function to ATF (28 CFR 0.130(a)(1)). The application contains information necessary to determine eligibility for licensing and must include a photograph, fingerprints of the applicant, and a license application fee. The fee for dealers in firearms other than destructive devices is currently set by the GCA at $200 for the first three-year period and $90 for a renewal period of three years. 18 U.S.C. 923(a)(3)(B); 27 CFR 478.42(c)(2). The Application for Federal Firearms License, ATF Form 7(5310.12)/7CR (5310.16) (''Form 7''), requires the applicant to include a completed Federal Bureau of Investigation (''FBI'') Form FD–258 (''Fingerprint Card'') and a photograph for all responsible persons, including sole proprietors. *See* ATF Form 7, Instruction 6.

Significantly, under the GCA, once licensed, firearms dealers are required to conduct background checks through the FBI's National Instant Criminal Background Check System (''NICS'') on prospective firearm recipients to prevent prohibited persons from receiving firearms, and to maintain firearms transaction records for crime gun tracing purposes. *See* 18 U.S.C. 922(t); 923(g)(1)(A). Persons who willfully engage in the business of dealing in firearms without a license are subject to a term of imprisonment of up to five years, a fine of up to $250,000, or both. *Id.* 922(a)(1)(A); 924(a)(1)(D); 3571(b)(3).

A. Advance Notice of Proposed Rulemaking (1979)

The term ''dealer'' is defined by the GCA, 18 U.S.C. 921(a)(11)(A), and 27 CFR 478.11, to mean ''any person engaged in the business of selling firearms at wholesale or retail.'' However, as originally enacted, the GCA did not define the term ''engaged in the business.'' [2] Nor did ATF define the term ''engaged in the business'' in the original GCA implementing regulations.[3] Although courts had ''continually found that the current situation'' was ''adequate for enforcement purposes,'' ATF published an Advance Notice of Proposed Rulemaking (''ANPRM'') in the **Federal Register** in 1979 in an effort to ''develop a workable, commonly understood definition of ['engaged in the business'].'' *See* 44 FR 75186, 75186–87 (Dec. 19, 1979) (''1979 ANPRM''); 45 FR 20930 (Mar. 31, 1980) (extending the comment period for 30 more days). The ANPRM referenced the lack of a common understanding of that term by the courts and requested comments from the public and industry on how the phrase should be defined and the feasibility and desirability of defining it.

ATF received 844 comments in response, of which approximately 551, or 65.3 percent, were in favor of ATF defining that term.[4] This included approximately 324 firearms dealers in favor of defining the term. However, none of the proposed definitions appeared ''to be broad enough to cover all possible circumstances and still be narrow enough to be of real benefit in any particular case.'' [5] One possible definition ATF considered would have established a threshold number of firearms sales per year to serve as a baseline for when a person would qualify as a dealer. The threshold numbers proposed ranged from ''more than one'' to ''more than 100'' per year. ATF did not adopt that proposal because it would have potentially interfered with tracing firearms by persons who avoided obtaining a license (and therefore kept no records) by selling firearms under the minimum threshold.[6] Ultimately, ATF decided not to proceed further with rulemaking at that time. Congress also had not yet acted on then-proposed legislation—the McClure-Volkmer bill (discussed below)—which, among other provisions, sought to define ''engaged in the business.'' [7] For additional reasons why ATF has not adopted a minimum number of sales, see Section II.D of this preamble.

B. Firearms Owners' Protection Act of 1986

Approximately six years later, the McClure-Volkmer bill was enacted as part of the Firearms Owners' Protection Act (''FOPA''), Public Law 99–308, 100 Stat. 449 (1986). With its passage, FOPA added a statutory definition of ''engaged in the business'' to the GCA. As applied to a person selling firearms at wholesale or retail, it defined the term ''engaged in the business'' in 18 U.S.C. 921(a)(21)(C) as ''a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.'' [8] The term excluded ''a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.'' [9] FOPA further defined the term ''with the principal objective of livelihood and profit'' to mean ''that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.'' [10] Congress amended FOPA a few months later, clarifying that ''proof of profit'' was not required ''as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.'' [11]

Consistent with their text, the definitions' purposes were to clarify that individuals not otherwise engaged in the business of dealing firearms who make only occasional firearms sales for a hobby are not required to obtain a license, and to benefit law enforcement ''by establishing clearer standards for investigative officers and assisting in the prosecution of persons truly intending to flout the law.'' [12] The legislative history also reveals that Congress did not intend to limit the license requirement to only persons for whom selling or disposing of firearms is a principal source of income or a principal business activity. The Committee Report stated, ''[t]hus, this provision would not remove the necessity for licensing from part-time

[1] Persons who engage in the business of manufacturing or importing firearms, including those that are 3D printed or assembled from parts, must also be licensed. 18 U.S.C. 922(a)(1)(A), 923(a). Once licensed, importers and manufacturers may also engage in the business of dealing but only at their licensed premises and only in the same type of firearms their license authorizes them to import or manufacture. *See* 27 CFR 478.41(b).

[2] *See generally* Public Law 90–617, 82 Stat. 1213 (1968).

[3] 33 FR 18555 (Dec. 14, 1968).

[4] Memorandum for Assistant Director, Regulatory Enforcement, ATF, from Chief, Regulations and Procedures Division, ATF, *Re: Evaluation of Comments Received Concerning a Definition of the Phrase ''Engaged in the Business,'' Notice No. 331,* at 1–2 (June 9, 1980) (''ATF Internal Memorandum''), attach. *Summary Sheet on ''Engaged in the Business,'' ANPRM No. 331, Published December 19, 1979,* at 1.

[5] *Id.*

[6] *See id.* at 2.

[7] ATF Internal Memorandum at 4.

[8] Public Law 99–308, sec. 101, 100 Stat. at 450.

[9] *Id.*

[10] *Id.*

[11] Public Law 99–360, sec. 1(b), 100 Stat. 766, 766 (1986).

[12] S. Rep. No. 98–583, at 8 (1984).

businesses or individuals whose principal income comes from sources other than firearms, but whose main objective with regard to firearm transfers is profit, rather than hobby.'' [13]

Two years after enactment, FOPA's definition of ''engaged in the business'' was incorporated into ATF's implementing regulations at 27 CFR 178.11 (now 478.11) in defining the term ''Dealer in firearms other than a gunsmith or a pawnbroker.'' [14] At the same time, consistent with the statutory text and legislative history, ATF amended the regulatory term ''dealer'' to clarify that the term includes ''any person who engages in such business or occupation on a part-time basis.'' [15]

With respect to ''personal collections,'' FOPA included a provision, codified at 18 U.S.C. 923(c), that expressly authorized licensees to maintain and dispose of private firearms collections separately from their business operations. However, under FOPA, as amended, the ''personal collection'' provision was and remains subject to three limitations. 18 U.S.C. 923(c). First, if a licensee records the disposition (*i.e.,* transfer) of any firearm from their business inventory into a personal collection, that firearm legally remains part of the licensee's business inventory until one year has elapsed after the date of transfer. Should the licensee wish to sell or otherwise dispose of any such ''personal'' firearm during that one-year period, the licensee must re-transfer the applicable firearm back into the business inventory at the licensee's business premises ''with appropriate recording.'' [16] A subsequent transfer from the business inventory would then be subject to the recordkeeping and background-check requirements of the GCA applicable to all other firearms in the business inventory. Second, if a licensee acquires or disposes of any firearm for the purpose of willfully evading the restrictions placed upon licensees under the GCA, that firearm always legally remains part of the business inventory. Thus, ''circuitous transfers are not exempt from otherwise applicable licensee requirements.'' [17] Third, even when a licensee has made a bona fide transfer of a firearm from their personal collection, section 923(c) requires the licensee to record the description of the firearm in a bound volume along with the name, place of residence, and date of birth of an individual transferee, or if a corporation or other business entity, the transferee's identity and principal and local places of business.[18] ATF incorporated these provisions into its FOPA implementing regulations in 1988.[19]

Courts interpreting the 1986 FOPA definition of ''engaged in the business'' found a number of factors relevant to assessing whether a person met that standard. For example, in one leading case, the U.S. Court of Appeals for the Third Circuit listed the following nonexclusive factors for consideration to determine whether the defendant's principal objective was livelihood and profit (*i.e.,* economic): (1) quantity and frequency of sales; (2) location of the sales; (3) conditions under which the sales occurred; (4) defendant's behavior before, during, and after the sales; (5) price charged for the weapons and the characteristics of the firearms sold; and (6) intent of the seller at the time of the sales. *United States* v. *Tyson,* 653 F.3d 192, 200–01 (3d Cir. 2011). The court expanded further that, ''[a]s is often the case in such analyses, the importance of any one of these considerations is subject to the idiosyncratic nature of the fact pattern presented.'' *Id.* at 201. In a separate case, the Third Circuit also stated, ''[a]lthough the definition explicitly refers to economic interests as the principal purpose, and repetitiveness as the *modus operandi,* it does not establish a specific quantity or frequency requirement. In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business. This inquiry is not limited to the number of weapons sold or the timing of the sales.'' *United States* v. *Palmieri,* 21 F.3d 1265, 1268 (3d Cir. 1994), *vacated on other grounds,* 513 U.S. 957 (1994).[20]

C. Executive Action To Reduce Gun Violence (2016)

On January 4, 2016, President Obama announced several executive actions to reduce gun violence and to make communities across the United States safer. Among them was a requirement that ATF clarify, in a manner consistent with court rulings on the issue: (1) that a person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted, and (2) that there is no specific threshold number of firearms purchased or sold that triggers the licensure requirement.[21] To provide this clarification, ATF published a guidance document entitled *Do I Need a License to Buy and Sell Firearms?,* ATF Publication 5310.2 (Jan. 2016), *https://www.atf.gov/file/100871/download,* which addressed these topics. The guidance was developed to assist unlicensed persons in understanding when they will likely need to obtain a license as a dealer in firearms. ATF is updating this guidance to conform with the ''engaged in the business'' definition as amended by the BSCA. Further, once a final rule is adopted based on this NPRM, ATF intends to update the guidance to include additional detail as needed to conform with the rule.

D. Bipartisan Safer Communities Act (2022)

Over 35 years after FOPA's enactment, on June 25, 2022, President Biden signed into law the Bipartisan Safer Communities Act, Public Law 117–159, 136 Stat. 1313. Section 12002 of the BSCA broadened the definition of ''engaged in the business'' under 18 U.S.C. 921(a)(21)(C) to all persons who intend to ''predominantly earn a profit'' from wholesale or retail dealing in firearms by eliminating the requirement that a person's ''principal objective'' of purchasing and reselling firearms must include both ''livelihood and profit.'' The statute now provides that, as applied to a dealer in firearms, the term

[13] *Id.* The Committee Report further explained that a statutory reference to pawnbrokers in the definition of ''engaged in the business'' was deleted because ''all pawnbrokers whose business includes the taking of any firearm as security for the repayment of money would automatically be a 'dealer.' '' *Id.* at 9.

[14] 53 FR 10480, 10491 (Mar. 31, 1988).

[15] *Id.* 10490–91.

[16] S. Rep. No. 98–583, at 13.

[17] *Id.*

[18] *See* Public Law 99–360, sec. 1(c), 100 Stat. at 766–67.

[19] *See* 53 FR 10480; 27 CFR 178.125a (now 478.125a).

[20] *See also United States* v. *Brenner,* 481 F. App'x 124, 127 (5th Cir. 2012) (''Needless to say, in determining the character and intent of firearms transactions, the jury must examine all circumstances surrounding the transaction, without the aid of a 'bright-line rule.'''); *United States* v. *Bailey,* 123 F.3d 1381, 1392 (11th Cir. 1997) (''In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business.'' (quotation marks and citation omitted)); *United States* v. *Nadirashvili,* 655 F.3d 114, 119 (2d Cir. 2011) (''[T]he government need not prove that dealing in firearms was the defendant's primary business. Nor is there a 'magic number' of sales that need be specifically proven. Rather, the statute reaches those who hold themselves out as a source of firearms. Consequently, the government need only prove that the defendant has guns on hand or is ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers.'' (*quoting United States* v. *Carter,* 801 F.2d 78, 81–82 (2d Cir. 1986))).

[21] *See* The White House, Office of the Press Secretary, FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer (Jan. 4, 2016), *https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.*

''engaged in the business'' means ''a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms.'' However, the BSCA definition does not include ''a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.'' 18 U.S.C. 921(a)(21)(C).

As now defined by the BSCA, the term ''to predominantly earn a profit'' means that the person who engages in selling or disposing of firearms has a predominant intent of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. The statutory definition further provides that proof of profit is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. 18 U.S.C. 921(a)(22). According to the BSCA's sponsors, the BSCA's change to the definition was driven by ''confusion about the GCA's definition of 'engaged in the business,' as it pertained to individuals who bought and resold firearms repetitively for profit, but possibly not as the principal source of their livelihood.'' [22] The sponsors ''maintain[ed] that these changes clarify who should be licensed, eliminating a 'gray' area in the law, ensuring that one aspect of firearms commerce is more adequately regulated.'' [23] Congress did not make the same amendment to the various definitions of ''engaged in the business'' in 18 U.S.C. 921(a)(21) with respect to licensed gunsmiths, manufacturers, or importers.[24]

E. Executive Order 14092 (2023)

On March 14, 2023, President Biden issued Executive Order 14092, ''Reducing Gun Violence and Making Our Communities Safer.'' That order requires the Attorney General to report actions taken to implement the BSCA and to develop and implement a plan to: (1) clarify the definition of who is engaged in the business of dealing in firearms, and thus required to become Federal firearms licensees (''FFLs''), in order to increase compliance with the Federal background check requirement for firearm sales, including by considering a rulemaking, as appropriate and consistent with applicable law; and (2) prevent former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms.[25]

This NPRM proposes to implement the ''engaged in the business'' provisions of the BSCA [26] and the Department's plan in response to Executive Order 14092 by making conforming changes to the new or amended definitions, by clarifying the updated BSCA definition of ''engaged in the business,'' and by preventing former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms. The rule proposes to accomplish this clarity and deterrence by setting forth specific activities demonstrating when an unlicensed person's buying and selling of firearms presumptively rises to the level of being ''engaged in the business,'' thus requiring that person to obtain a dealer's license, conduct background checks, and abide by the other requirements set forth in the GCA. At the same time, it recognizes that individuals who purchase firearms for the enhancement of a personal collection or a legitimate hobby are permitted by the GCA to occasionally buy and sell firearms for those purposes without the need to obtain a license.

II. Proposed Rule

As stated previously, the BSCA revised 18 U.S.C. 921(a)(21)(C) to change part of the definition of persons ''engaged in the business'' of dealing in firearms. This amendment broadened the definition to reflect that it applies to persons who engage in the business of purchasing and selling firearms at wholesale or retail with the predominant purpose of earning a profit, rather than just to persons whose primary purpose is both livelihood and profit. This means ''that the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.'' 18 U.S.C. 921(a)(22). ''As a result, the BSCA definitional changes could make some, but not all, intrastate, private firearm transfers subject to GCA recordkeeping and background check requirements'' that previously were not subject to those requirements, ''if those transfers are made by profit-oriented, repetitive firearms buyers and sellers.'' [27]

To implement the new statutory language, this proposed rule amends paragraph (c) of the regulatory definition of ''engaged in the business,'' in § 478.11, pertaining to a ''dealer in firearms other than a gunsmith or pawnbroker,'' to conform with 18 U.S.C. 921(a)(21)(C) by removing the phrase ''with the principal objective of livelihood and profit'' and replacing it with the phrase ''to predominantly earn a profit.'' This proposed rule also amends § 478.11 to conform with new 18 U.S.C. 921(a)(22) by adding the statutory definition of ''predominantly earn a profit'' as a new regulatory definition. Additionally, this rule proposes to move the regulatory definition of ''terrorism,'' which currently exists in the regulations under

[22] William J. Krouse, Cong. Research Serv., IF12197, *Firearms Dealers ''Engaged in the Business''* at 2 (Aug. 19, 2022).

[23] *Id.;* 168 Cong. Rec. H5906 (daily ed. June 24, 2022) (Statement of Rep. Jackson Lee) (''[O]ur bill would . . . further strengthen the background check process by clarifying who is engaged in the business of selling firearms and, as a result, is required to run background checks.''); 168 Cong. Rec. S3055 (daily ed. June 22, 2022) (Statement of Sen. Murphy) (''We clarify in this bill the definition of a federally licensed gun dealer to make sure that everybody who should be licensed as a gun owner is. In one of the mass shootings in Texas, the individual who carried out the crime was mentally ill. He was a prohibited purchaser. He shouldn't have been able to buy a gun. He was actually denied a sale when he went to a bricks-and-mortar gun store, but he found a way around the background check system because he went online and found a seller there who would transfer a gun to him without a background check. It turned out that seller was, in fact, engaged in the business, but didn't believe the definition applied to him because the definition is admittedly confusing. So we simplified that definition and hope that will result—and I believe it will result—in more of these frequent online gun sellers registering, as they should, as federally licensed gun dealers which then requires them to perform background checks.''); *see also* Letter for Director, ATF, *et al.,* from Sens. John Cornyn and Thom Tillis at 2–3 (Nov. 1, 2022) (''Cornyn/Tillis Letter'') (''The BSCA provides more clarity to the industry for when someone must obtain a federal firearms dealers license. In Midland and Odessa, Texas, for example, the shooter—who at the time was prohibited form possessing or owning a firearm under federal law—purchased a firearm from an unlicensed firearms dealer.'').

[24] The BSCA retained the existing term ''with the principal objective of livelihood and profit,'' which still applies to persons engaged in the business as manufacturers, gunsmiths, and importers. That definition became 18 U.S.C. 921(a)(23), and Congress renumbered other definitions in section 921 accordingly.

[25] *Reducing Gun Violence and Making Our Communities Safer,* E.O. 14092, secs. 2, 3(a)(i)–(ii), 88 FR 16527, 16527–28 (Mar. 14, 2023).

[26] The Department is also issuing a separate rulemaking to amend ATF's regulations to conform with other provisions in the BSCA.

[27] Krouse, Cong. Research Serv., *Firearms Dealers ''Engaged in the Business''* at 2.

the definition of ''principal objective of livelihood and profit,'' to a new stand-alone definition. This is because the BSCA definitions of ''to predominantly earn a profit'' (18 U.S.C. 921(a)(22)) and ''with the principal objective of livelihood and profit'' (18 U.S.C. 921(a)(23)) both include the same exception to the requirement to prove intent to profit when a licensee engages in the firearms business for the purpose of terrorism.

To further implement these statutory changes, this rule then proposes to clarify when a person is ''engaged in the business'' as a dealer in firearms at wholesale or retail by: (a) clarifying the definition of ''dealer''; (b) defining the terms ''purchase'' and ''sale'' as they apply to dealers; (c) clarifying when a person would not be engaged in the business of dealing in firearms as an auctioneer, or when purchasing firearms for, and selling firearms from, a personal collection; (d) setting forth conduct that is, in civil and administrative proceedings, presumed to constitute ''engaging in the business'' of dealing in firearms and presumed to demonstrate the intent to ''predominantly earn a profit'' from the sale or disposition of firearms, absent reliable evidence to the contrary; (e) adding a single definition for the terms ''personal collection,'' ''personal firearms collection,'' and ''personal collection of firearms''; (f) adding a definition for the term ''responsible person''; (g) clarifying that the intent to ''predominantly earn a profit'' does not require the person to have received pecuniary gain, and that intent does not have to be shown when a person purchases or sells a firearm for criminal or terrorism purposes; (h) addressing how former licensees, and responsible persons acting on behalf of former licensees, may lawfully liquidate business inventory upon revocation or other termination of their license; and (i) clarifying that licensees must follow the verification and recordkeeping procedures in 27 CFR 478.94 and subpart H of title 27, part 478, rather than using a Firearms Transaction Record, ATF Form 4473 (''Form 4473'') when firearms are transferred to other licensees, including transfers by a licensed sole proprietor to that person's personal collection.

A. Definition of ''Dealer''

In enacting the BSCA, Congress expanded the definition of ''engaged in the business'' ''as applied to a dealer in firearms,'' as noted above. 18 U.S.C. 921(a)(21)(C). Consistent with the text and purpose of the GCA, ATF regulations have long defined the term ''dealer'' to include persons engaged in the business of selling firearms at wholesale or retail, or as a gunsmith or pawnbroker, on a part-time basis. 27 CFR 478.11 (definition of ''Dealer'').[28] Due to the BSCA amendments, the Department has further considered what it means to be a ''dealer'' engaged in the firearms business in light of new technologies, mediums of exchange, and forums in which firearms are bought and sold with the predominant intent of obtaining pecuniary gain.

Since 1968, advancements in manufacturing (*e.g.,* 3D printing) and distribution technology (*e.g.,* internet sales) and changes in the marketplace for firearms and related products (*e.g.,* large-scale gun shows) have increased the ways in which individuals shop for firearms, and therefore have created a need for further clarity in the regulatory definition of ''dealer.'' [29] The proliferation of new communications technologies and e-commerce has made it simple for persons to advertise and sell firearms to a large potential market at minimal cost and with minimal effort, using a variety of means, and often as a part-time activity. The proliferation of sales at larger-scale gun shows, flea markets, other similar events, and online has also altered the marketplace since the GCA was enacted in 1968.

Therefore, to provide additional guidance on what it means to be engaged in the business as a ''dealer'' within the diverse modern marketplace, this rule first proposes to amend the regulatory definition of ''dealer'' in 27 CFR 478.11 to clarify that firearms dealing may occur wherever, or through whatever medium, qualifying activities may be conducted. This includes at any domestic or international public or private marketplace or premises. The revised definition provides nonexclusive examples of such marketplaces: a gun show [30] or event,[31] flea market,[32] auction house,[33] or gun range or club; at one's home; by mail order; [34] over the internet; [35] through the use of other electronic means (*e.g.,* an

[28] 53 FR at 10481 (''The final rule retains the sentence [including part-time dealers] since it comports with legislative intent as expressed in committee reports.''); *see also United States* v. *McGowan,* 746 F. App'x 679, 680 (9th Cir. 2018) (''Selling firearms need not have been McGowan's primary source of income.''); *United States* v. *Focia,* 869 F.3d 1269, 1281 (11th Cir. 2017) (''[N]othing in the [FOPA] amendments or the rest of the statutory language indicates that a person violates § 922(a)(1)(A) only by selling firearms as his primary means of income.''); *United States* v. *Valdes,* 681 F. App'x 874, 877 (11th Cir. 2017) (''The government must prove the defendant's activity rose above 'the occasional sale of a hobbyist,' but does not need to show 'the defendant's primary business was dealing in firearms or that [she] necessarily made a profit from dealing.' ''); *United States* v. *Ibarra,* 581 F. App'x 687, 690 (9th Cir. 2014) (''The statute requires that the defendant have a 'principal objective of livelihood and profit,' . . . but nowhere requires a principal objective that that profit be one's *primary* source of income.''); *United States* v. *Shipley,* 546 F. App'x 450, 454 (5th Cir. 2013) (upholding conviction for dealing in firearms as a regular side business to supplement lawful income); *United States* v. *Gray,* 470 F. App'x 468, 472 (6th Cir. 2012) (''[A] defendant need not deal in firearms as his primary business for conviction.''); *Nadirashvili,* 655 F.3d at 119 (*quoting Carter,* 801 F.2d at 81–81, as holding that ''[t]he government need not prove that dealing in firearms was the defendant's primary business''); *United States* v. *Manthey,* 92 F. App'x 291, 297 (6th Cir. 2004) (''[A] defendant need not deal in firearms as his primary business for conviction.''); *United States* v. *Allah,* 130 F.3d 33, 43–44 (2d Cir. 1997) (''[I]t is not a necessary element of the crime [of dealing without a license] that a defendants' only business be that of selling firearms''); *United States* v. *Beecham,* Nos. 92–5147, 92–5399, 1993 WL 188295, at *3 (4th Cir. June 2, 1993) (''The government need not prove that a defendant's primary business was dealing in firearms or that he necessarily made a profit from it.'' (internal quotation marks omitted)).

[29] *See* Cornyn/Tillis Letter at 3 (''Our legislation aims at preventing someone who is disqualified from owning or possessing a firearm from shopping around for an unlicensed firearm dealer.'').

[30] *See* ATF FFL Newsletter, July 2017, at 9 (gun show guidelines); *Important Notice to Dealers and Other Participants at This Gun Show,* ATF Information 5300.23A (Sept. 2010); ATF Ruling 69–59.

[31] *See* ATF Q&A, *How may a licensee participate in the raffling of firearms by an unlicensed organization?, https://www.atf.gov/firearms/qa/how-may-licensee-participate-raffling-firearms-unlicensed-organization* (May 22, 2020); ATF FFL Newsletter, June 2021, at 8–9 (addressing conduct of business at firearm raffles); Letter to Pheasants Forever, from Acting Chief, Firearms Programs Division, ATF at 1–2 (July 9, 1999) (addressing nonprofit fundraising banquets); 1 ATF FFL Newsletter, Feb. 1999, at 4–5 (addressing dinner banquets).

[32] *See* ATF FFL Newsletter, June 2010, at 5–6 (flea market guidelines).

[33] *See Selling firearms—legally: A Q&A with the ATF,* Auctioneer, at 22–27 (June 2010).

[34] *See, e.g., United States* v. *Buss,* 461 F. Supp. 1016 (W.D. Pa. 1978) (holding that mail order sales by unlicensed defendant violated statute proscribing illegally engaging in business of dealing in firearms, even though defendant acted in concert with licensed firearms dealers who recorded the transfers).

[35] *See* ATF FFL Newsletter, June 2021, at 8 (addressing internet sales of firearms); ATF Intelligence Assessment, *Firearms and Internet Transactions* (Feb. 9, 2016); *Felon Seeks Firearm, No Strings Attached: How Dangerous People Evade Background Checks and Buy Illegal Guns Online,* City of New York (Sept. 2013), *https://www.nyc.gov/html/om/pdf/2013/felon_seeks_firearm.pdf; Point, Click, Fire: An Investigation of Illegal Online Gun Sales,* City of New York (Dec. 2011); *Focia,* 869 F.3d at 1274 (affirming defendant's conviction for engaging in the business without a license by dealing firearms through the ''Dark Web'').

online broker,[36] online auction,[37] text messaging service,[38] social media raffle,[39] or website [40]); or at any other domestic or international public or private marketplace or premises. These examples are provided to clarify for unlicensed persons that firearms dealing requires a license in whatever place or through whatever medium the firearms are purchased and sold, including the internet and locations other than a traditional brick and mortar store.[41] However, regardless of the medium or location at which a dealer buys and sells firearms, to obtain a license under the GCA, the dealer must still have a fixed premises in a State from which to conduct business subject to the license, and comply with all applicable State and local laws regarding the conduct of such business.[42] 18 U.S.C. 923(d)(1)(E)–(F).

Even though an applicant must have a business premises in a particular State to obtain a license, under the GCA, firearms purchases or sales requiring a license in the United States may involve conduct outside of the United States. Specifically, 18 U.S.C. 922(a)(1)(A) has long prohibited any person without a license from shipping, transporting, or receiving any firearm in foreign commerce while in the course of being engaged in the business of dealing in firearms,[43] and 18 U.S.C. 924(n) prohibits travelling from a foreign country to a State in furtherance of conduct that constitutes a violation of section 922(a)(1)(A).

Further, as recently amended by the BSCA, the GCA now expressly prohibits a person from smuggling or knowingly taking a firearm out of the United States with intent to engage in conduct that would constitute a felony for which the person may be prosecuted in a court in the United States if the conduct had occurred within the United States. 18 U.S.C. 924(k)(2). Willfully engaging in the business of dealing in firearms without a license is an offense punishable by more than one year in prison, *see* 18 U.S.C. 924(a)(1)(D), and constitutes a felony. Therefore, unlicensed persons who purchase firearms in the United States and smuggle or take them out of the United States (or conspire or attempt to do so) for resale in another country would still be engaging in unlawful dealing in firearms without a license, among other violations of United States law. Accordingly, this rule proposes to clarify in the definition of ''dealer'' that purchases or sales of firearms as a wholesale or retail dealer may occur either domestically or internationally.

B. Definition of ''Engaged in the Business''—''Purchase'' and ''Sale''

To further clarify the regulatory definition of a dealer ''engaged in the business'' with the predominant intent of earning a profit through the repetitive purchase and resale of firearms in 27 CFR 478.11, this rule also proposes to define, based on common dictionary definitions and relevant case law, the terms ''purchase'' and ''sale'' (and derivative terms thereof, such as ''purchases,'' ''purchasing,'' ''purchased,'' and ''sells,'' ''selling,'' or ''sold''). This should help clarify, through examples, how those terms apply to dealing in firearms. Specifically, this rule proposes to define ''purchase'' (and derivative terms thereof) as ''the act of obtaining a firearm in exchange for something of

[36] *See, e.g., Fulkerson* v. *Lynch,* 261 F. Supp. 3d 779, 783–86, 788–89 (W.D. Ky. 2017) (denying summary judgment to applicant whose license was denied by ATF for previously willfully engaging in the business of dealing without a license through an online broker and granting summary judgement to the government). Although some dealers may sell firearms through online services sometimes called ''brokers,'' like a magazine or catalog company that only advertises firearms listed by known sellers and processes orders for them for direct shipment from the distributor to their buyers, these ''brokers'' are not themselves considered ''dealers.'' This is because these online ''brokers'' do not purchase the firearms for valuable consideration (*i.e.,* take or transfer title to them). Rather, they typically only collect a commission or fee for providing contracted services to market and process the transaction for the seller. This is distinguished from a broker who, for example, purchases the firearms from a manufacturer, importer, or other distributor, sells the firearms to the buyer, and has them shipped directly to the buyer from the distributor. Such persons must be licensed as dealers since they are purchasing and selling the firearms with the predominant intent to earn a profit. *See, e.g.,* ATF FFL Newsletter, Sept. 2016, at 3; 2 ATF FFL Newsletter, Mar. 2023, at 6–7.

[37] *See, e.g.,* Press Release, Department of Justice Office of Public Affairs (''OPA''), *Minnesota Man Indicted for Dealing Firearms without a License* (Feb. 18, 2016), *https://www.justice.gov/opa/pr/minnesota-man-indicted-dealing-firearms-without-license* (defendant dealt in firearms through websites such as *gunbroker.com*, an online auction website).

[38] *See, e.g.,* Press Release, OPA, *Odenton, Maryland Man Exiled to 8 Years in Prison for Firearms Trafficking Conspiracy,* DOJ/OPA (Apr. 27, 2017), *https://www.justice.gov/usao-md/pr/odenton-maryland-man-exiled-8-years-prison-firearms-trafficking-conspiracy* (defendant texted photos of firearms for sale to his customer and discussed prices).

[39] *See* ATF FFL Newsletter, June 2021, at 9 (''Social media gun raffles are gaining popularity on the internet. In most instances, the sponsor of the event is not a Federal firearms licensee, but will enlist the aid of a licensee to facilitate the transfer of the firearm to the raffle winner. Often, the sponsoring organization arranges to have the firearm shipped from a distributor to a licensed third party and never takes physical possession of the firearm. If the organization's practice of raffling firearms rises to the level of being engaged in the business of dealing in firearms, the organization must obtain a Federal firearms license.'').

[40] *See, e.g.,* Press Release, Department of Justice United States Attorney's Office (''USAO''), *Snapchat Gun Dealer Convicted of Unlawfully Manufacturing and Selling Firearms* (Oct. 4, 2022), *https://www.justice.gov/usao-edca/pr/snapchat-gun-dealer-convicted-unlawfully-manufacturing-and-selling-firearms;* Press Release, USAO, *Sebring Resident Sentenced to Prison for Unlawfully Dealing Firearms on Facebook* (Nov. 7, 2016), *https://www.justice.gov/usao-sdfl/pr/sebring-resident-sentenced-prison-unlawfully-dealing-firearms-facebook.*

[41] *See* Letter for Outside Counsel to National Association of Arms Shows, from Chief, Firearms and Explosives Division, ATF, *Re: Request for Advisory Opinion on Licensing for Certain Gun Show Sellers* at 1 (Feb. 17, 2017) (''Anyone who is engaged in the business of buying and selling firearms, regardless of the location(s) at which those transactions occur is required to have a Federal firearms license. ATF will issue a license to persons who intend to conduct their business primarily at gun shows, over the internet, or by mail order, so long as they otherwise meet the eligibility criteria established by law. This includes the requirement that they maintain a business premises at which ATF can inspect their records and inventory, and that otherwise complies with local zoning restrictions''); ATF FFL Newsletter, June 2010, at 5 (Unless there is a permanent business premises from which to conduct firearms business (*e.g.,* an identified rented space that can securely hold required records), ''[t]he GCA prohibits any person from engaging in the business of selling, dealing, or trading in firearms at flea markets. The only exceptions would be an unlicensed individual making an occasional firearm sale or for a Federal firearms licensee to display firearms and take orders of firearms.''); Letter for Sen. Dan Coats, from Deputy Director, ATF (Aug. 22, 1990) (an FFL cannot be issued at a table or booth at a temporary flea market); ATF Internal Memorandum #23264 (June 15, 1983) (same); *United States* v. *Allman,* 119 Fed. App'x. 751, 754 (6th Cir. 2005) (''Illegal gun transactions at flea markets are not atypical.''); *United States* v. *Orum,* 106 F. App'x 972 (6th Cir. 2004) (defendant illegally displayed and sold firearms at flea markets and gun shows).

[42] *See Abramski* v. *United States,* 573 U.S. 169, 172, 181 (2014) (''The statute establishes a detailed scheme to enable the dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun. Section 922(c) brings the would-be purchaser onto the dealer's 'business premises' by prohibiting, except in limited circumstances, the sale of a firearm 'to a person who does not appear in person' at that location.''); *National Rifle Ass'n* v. *Brady,* 914 F. 2d 475, 480 (4th Cir. 1990) (holding that FOPA did not eliminate the requirement that a licensee have a business premises from which to conduct business ''so that regulatory authorities will know where the inventory and records of a licensee can be found''); *Meester* v. *Bowers,* No. 12CV86, 2013 WL 3872946 (D. Neb. July 25, 2013) (upholding ATF's denial of license in part because the applicant lacked a means of accessing the premises).

[43] *See, e.g., United States* v. *Baptiste,* 607 F. App'x 950, 953 (11th Cir. 2015) (upholding section 922(a)(1) conviction where firearms purchased in the United States were to be resold in Haiti); *United States* v. *Murphy,* 852 F.2d 1, 8 (1st Cir. 1988) (same with firearms to be resold in Ireland); *United States* v. *Hernandez,* 662 F.2d 289, 291 (5th Cir. 1981) (same with firearms to be resold in Mexico). *But see United States* v. *Mowad,* 641 F.2d 1067 (2d Cir. 1981) (reversing conviction for purchasing firearms for resale in Lebanon on the basis that there was no mention of exporting firearms in the GCA or any suggestion of Congressional concern about firearm violence in other countries).

value,'' [44] and the term ''sale'' (and derivative terms thereof, including ''resale'') as ''the act of providing a firearm in exchange for something of value.'' [45] The term ''something of value'' includes money, credit, personal property (*e.g.,* another firearm [46] or ammunition [47]), a service,[48] a controlled substance,[49] or any other medium of exchange [50] or valuable consideration.'' [51]

Defining these terms to include any method of payment for a firearm would clarify that persons cannot avoid licensing by, for instance, bartering or providing or receiving services in exchange for firearms with the predominant intent to earn pecuniary gain even where no money is exchanged. It would also clarify that a person requires a license to engage in the business of dealing in firearms even when the medium of payment or consideration is unlawful, such as exchanging illicit drugs or performing illegal acts for firearms, and that it is a distinct crime to do so without a license.

C. Definition of ''Engaged in the Business'' as Applied to Auctioneers

Because the definitions of ''purchase'' and ''sale'' broadly include services provided in exchange for firearms, both as defined by common dictionaries and as proposed in this rule, the Department further proposes to make clear that certain persons who provide auctioneer services are not required to be licensed as dealers. ATF has long interpreted the statutory definition of ''engaged in the business'' as excluding auctioneers who provide only auction services on commission by assisting in liquidating a personal collection of firearms at an ''estate-type'' auction.[52] The new definition in the BSCA does not affect that determination. The Department is proposing to incorporate this longstanding interpretation into the regulations while otherwise clarifying the regulatory definition.

In this context, the auctioneer is generally providing services only as an agent of the owner or executor of an estate who is liquidating a personal collection. The firearms are within the estate's control and the sales made on the estate's behalf. This limited exclusion from the definition of ''dealer'' is conditioned on the auctioneer not purchasing the firearms, taking possession of the firearms prior to the auction, or consigning the firearms for sale. If the auctioneer were to engage in any of that conduct, the auctioneer would need to have a dealer's license because that person would be engaged in the business of purchasing and reselling firearms to earn a profit. An ''estate-type'' auction as described above differs from liquidating a personal collection of firearms by means of a ''consignment-type'' auction, in which the auctioneer is paid to accept firearms into a business inventory and then resells them in lots, or over a period of time. In this ''consignment-type'' auction, the auctioneer generally inventories, evaluates, and tags the firearms for identification.[53] Therefore, under ''consignment-type'' auctions, an auctioneer would generally need to be licensed.

D. Presumptions That a Person Is ''Engaged in the Business''

The Department has observed through its enforcement efforts and subject-matter expertise that persons who are engaged in certain firearms purchase-and-sale activities are highly likely to be ''engaged in the business'' of dealing in firearms at wholesale or retail. These activities have been observed through a variety of criminal, civil, and administrative enforcement actions and proceedings brought by the Department, to include: (1) ATF inspections of prospective and existing wholesale and retail dealers of firearms who are engaged, or intend to engage in the business; [54] (2) criminal investigations and prosecutions of persons who engaged in the business of dealing in firearms without a license; [55] (3) civil and administrative actions under 18 U.S.C. 924(d) to seize and forfeit firearms intended to be sold by persons engaged in the business without a license; [56] (4) ATF cease and desist letters issued to prevent section 922(a)(1)(A) violations; [57] and (5) ATF administrative proceedings under 18 U.S.C. 923 to deny licenses to persons who willfully engaged in the business of dealing in firearms without a license, or to revoke or deny renewal of existing

[44] This definition is consistent with the common meaning of ''purchase,'' which is ''to obtain (as merchandise) by paying money or its equivalent.'' Webster's Third New International Dictionary 1844 (1971); *see also* Black's Law Dictionary 1491 (11th Ed. 2019) (The term ''purchase'' means ''[t]he acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction.'').

[45] This definition is consistent with the common meaning of ''sale,'' which is ''a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration).'' Webster's Third New International Dictionary 2003 (1971). The related term ''resale'' is ''the act of selling again.'' *Id.* at 1929.

[46] *See, e.g., United States* v. *Gross,* 451 F.2d 1355, 1360 (7th Cir. 1971) (defendant ''had traded firearms [for other firearms] with the object of profit in mind'').

[47] *See, e.g., United States* v. *Huffman,* 518 F.2d 80 (4th Cir. 1975) (defendant traded large quantities of ammunition in exchange for firearms).

[48] *See, e.g., United States* v. *57 Miscellaneous Firearms,* 422 F. Supp. 1066, 1070–71 (W.D. Mo. 1976) (defendant obtained the firearms he sold or offered for sale in exchange for carpentry work he performed).

[49] *See, e.g., Johnson* v. *Johns,* No. 10–CV–904(SJF), 2013 WL 504446 (E.D.N.Y. Feb. 5, 2013) (on at least one occasion, petitioner, who was engaged in the unlicensed dealing in firearms through straw purchasers, compensated a straw purchaser with cocaine base).

[50] *See, e.g., Focia,* 869 F.3d at 1274 (defendant sold pistol online to undercover ATF agent for 15 bitcoins).

[51] The term ''medium of exchange'' generally means ''something commonly accepted in exchange for goods and services and recognized as representing a standard of value,'' and ''valuable consideration'' is ''an equivalent or compensation having value that is given for something (as money, marriage, services) acquired or promised and that may consist either in some right, interest, profit, or benefit accruing to one party or some responsibility, forbearance, detriment, or loss exercised by or falling upon the other party.'' Webster's Third New International Dictionary 1403, 2530 (1971). *See, e.g., United States* v. *Berry,* 644 F.2d 1034, 1036 (5th Cir. 1981) (defendant sold firearms in exchange for large industrial batteries to operate his demolition business); *United States* v. *Reminga,* 493 F. Supp. 1351, 1357 (W.D. Mich. 1980) (defendant traded his car for three guns that he later sold or traded).

[52] *See* ATF Q&A, *Does an auctioneer who is involved in firearms sales need a dealer's license?, https://www.atf.gov/firearms/qa/does-auctioneer-who-involved-firearms-sales-need-dealer-license* (July 10, 2020); ATF Federal Firearms Regulations Reference Guide, P 5300.4, Q&A L1, at 207 (2014); ATF FFL Newsletter, May 2001, at 3; ATF Ruling 96–2, *Engaging in the Business of Dealing in Firearms (Auctioneers);* 1 ATF FFL Newsletter, 1990, at 7; Letter for Editor, CarPac Publishing Company, from Acting Assistant Director (Regulatory Enforcement), ATF, CC–28,953 (July 26, 1979).

[53] *Id.*

[54] In Fiscal Year 2022, for example, ATF conducted 11,156 qualification inspections of new applicants for a license, and 6,979 compliance inspections of active licensees. *See* ATF, *Fact Sheet—Facts and Figures for Fiscal Year 2022* (Jan. 2023), *https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2022.*

[55] *See* footnotes 62 through 72, *infra.*

[56] *See, e.g., United States* v. *Four Hundred Seventy Seven (477) Firearms,* 698 F. Supp. 2d 890 (E.D. Mich. 2010) (civil forfeiture of firearms intended to be sold from an unlicensed gun store); *United States* v. *One Bushmaster, Model XM15–E2 Rifle,* No. 5:06–CV–156 (WDO), 2006 WL 3497899 (M.D. Ga. Dec. 5, 2006) (civil forfeiture of firearms intended to be sold by an unlicensed person who acquired an unusually large amount of firearms quickly for the purpose of selling or trading them); *United States* v. *Twenty Seven (27) Assorted Firearms,* No. SA–05–CA–407–XR, 2005 WL 2645010 (W.D. Tex. Oct. 13, 2005) (civil forfeiture of firearms intended to be sold at gun shows without a license).

[57] Over the years, ATF has issued numerous letters warning unlicensed persons not to continue to engage in the business of dealing in firearms without a license, also called a ''cease and desist'' letter. *See, e.g., United States* v. *Kubowski,* 85 F. App'x 686, 687 (10th Cir. 2003) (defendant served cease and desist letter after selling five handguns and one rifle to undercover ATF agents).

licenses held by licensees who aided and abetted that misconduct.[58] In addition, numerous courts have identified certain activities or factors they deemed relevant to determining whether a person is ''engaged in the business'' even prior to Congress's decision to expand the definition in the BSCA.[59] This rule, therefore, proposes to establish rebuttable presumptions in certain contexts to help unlicensed persons, industry operations personnel, and others determine when a person is presumed to be ''engaged in the business'' requiring a dealer's license.

These rebuttable presumptions would apply in civil and administrative proceedings. While the criteria set forth in the proposed rule may be useful to a court in a criminal case—for example, to inform appropriate jury instructions regarding permissible inferences[60]—the regulatory text makes clear that the presumptions shall not apply to criminal cases.[61]

The Department has considered, but not proposed in the NPRM, an alternative that would have set a minimum numerical threshold of firearms sold by a person within a certain period of time. That approach has not been proposed for several reasons. First, while selling large numbers of firearms or engaging or offering to engage in frequent transactions may be highly indicative of business activity, neither the courts nor the Department has recognized a set minimum number of firearms purchased or resold that triggers the licensing requirement. Similarly, there is no minimum number of transactions that determines whether a person is ''engaged in the business'' of dealing in firearms. Instead, the established approach for determining whether an individual is ''engaged in the business'' is to look at the totality of circumstances. Thus, even a single firearm transaction, or offer to engage in a transaction, when combined with other evidence, may be sufficient to require a license. For example, even under the previous statutory definition, courts have upheld convictions for dealing without a license when few firearms, if any, were actually sold, provided other factors were also present, such as the person representing to others a willingness and ability to repetitively purchase firearms for resale. *See, e.g., United States* v. *King,* 735 F.3d 1098, 1107 n.8 (9th Cir. 2013) (upholding conviction where defendant attempted to sell one firearm and represented that he could purchase more for resale and noting that ''Section 922(a)(1)(A) does not require an actual sale of firearms'').[62] Second, in addition to the tracing concerns expressed by ATF in response to comments on the 1979 ANPRM, a person could structure their transactions to avoid a minimum threshold by spreading out their sales over time. Finally, the Department does not believe there is a sufficient evidentiary basis, without consideration of additional factors, to support a specific minimum number of firearms bought or sold for a person to be considered ''engaged in the business.''

Rather than establishing a minimum threshold number of firearms purchased or sold, this rule proposes to clarify that, absent reliable evidence to the contrary, a person will be presumed to be engaged in the business of dealing in firearms when the person:

(1) sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms;[63]

(2) spends more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported taxable gross inome during the applicable period of time;[64]

(3) repetitively purchases for the purpose of resale, or sells or offers for sale firearms—

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[58] *See, e.g., In the Matter of Scott,* Application Nos. 9–93–019–01–PA–05780 and 05781 (Seattle Field Division, Apr. 3, 2018) (denied applicant for license to person who purchased and sold numerous handguns within one month; *In the Matter of S.E.L.L. Antiques,* Application No. 9–87–035–01–PA–00725 (Phoenix Field Division, Feb. 21, 2006) (denied applicant who repetitively sold modern firearms from unlicensed storefront).

[59] *See* footnote 20, *supra,* and accompanying text.

[60] While rebuttable presumptions may not be presented to a jury in a criminal case, jury instructions may include, for example, reasonable permissive inferences. *See Francis* v. *Franklin,* 471 U.S. 307, 314 (1985) (''A permissive inference suggests to the jury a possible conclusion to be drawn if the [government] proves predicate facts, but does not require the jury to draw that conclusion.''); *County Court of Ulster County* v. *Allen,* 442 U.S. 140 (1979) (upholding jury instruction that gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion); *Baghdad* v. *Att'y Gen. of the U. S.,* 50 F.4th 386, 390 (3d Cir. 2022) (''Unlike mandatory presumptions, permissive inferences . . . do not shift the burden of proof or require any outcome. They are just an 'evidentiary device . . . [that] allows—but *does not require*—the trier of fact to infer' that an element of a crime is met once basic facts have been proven beyond a reasonable doubt.''); *Patton* v. *Mullin,* 425 F.3d 788 (10th Cir. 2005) (upholding jury instruction that created a permissive inference rather than a rebuttable presumption); *United States* v. *Warren,* 25 F.3d 890, 897 (9th Cir. 1994) (same); *United States* v. *Washington,* 819 F.2d 221 (9th Cir. 1987) (same); *Lannon* v. *Hogan,* 719 F.2d 518 (1st Cir. 1983) (same); *United States* v. *Gaines,* 690 F.2d 849 (11th Cir. 1982) (same); *cf., e.g., United States* v. *Antonoff,* 424 F. App'x 846, 848 (11th Cir. 2011) (district court relied on permissive inference of current drug use in ATF's definition of ''unlawful user'' in 27 CFR 478.11 to conclude that the defendant's drug use was ''contemporaneous and ongoing'' sufficient to apply the 2K2.1 sentencing guideline); *United States* v. *McCowan,* 469 F.3d 386, 392 (5th Cir. 2006) (upholding application of a sentencing enhancement based on the permissive inference of current drug use in 27 CFR 478.11); *United States* v. *Stanford,* No. 11–10211–01–EFM, 2012 WL 1313503 (D. Kan. Apr. 16, 2012) (upholding arrest under 18 U.S.C. 922(g)(3) relying, in part, on ATF's regulatory definition of ''unlawful user'').

[61] *See generally* 2 Handbook of Fed. Evid. § 303:4 (9th ed. 2020) (explaining Federal Rule of Evidence Standard 303(c), which ''provides that whenever the existence of a presumed fact against the accused is submitted to the jury, the court should instruct the jury that it may regard the basic facts as sufficient evidence of the presumed fact but is not required to do so. In addition, if the presumed fact establishes guilt, is an element of the offense, or negatives a defense, the court should instruct the jury that its existence on all the evidence must be proved beyond a reasonable doubt. . . . The applicability and constitutionality of Standard 303(b) must be evaluated in light of the Supreme Court decisions in *County Court of Ulster* v. *Allen, Sandstrom v. Montana,* and *Francis* v. *Franklin.* As a result of these decisions it is clear, if it wasn't before, that it is never permissible to shift to the defendant the burden of persuasion to disprove an element of a crime charged by means of a presumption, and of course, that a conclusive or irrebuttable presumption operating against the criminal defendant is also unconstitutional.'').

[62] *See* Do I Need a License to Buy and Sell Firearms?, ATF Publication 5310.2 (Jan. 2016). *See also Nadirashvili,* 655 F.3d at 120–21 (despite defendants' knowledge of only a single firearms transaction, there was sufficient evidence to prove they had ''engaged in the business'' because they knew co-defendant held himself out generally as a source of firearms, and was ready to procure them for customers); *United States* v. *Shan,* 361 F. App'x 182 (2d Cir. 2010) (defendant sold two firearms within roughly a month and acknowledged he had a source of supply for other weapons); *United States* v. *Shan,* 80 F. App'x 31 (9th Cir. 2003) (sale of weapons in one transaction where the defendant was willing and able to find more weapons for resale); *Murphy,* 852 F.2d at 8 (''[T]his single transaction was sufficiently large in quantity, price and length of negotiation to constitute dealing in firearms.''); *United States* v. *Swinton,* 521 F.2d 1255, 1259 (10th Cir. 1975) (''Swinton's sale [of one firearm] to Agent Knopp, standing alone, without more, would not have been sufficient to establish a violation of section 922(a)(1). That sale, however, when considered in conjunction with other facts and circumstances related herein, established that Swinton was engaged in the business of dealing in firearms. The unrebutted evidence of the Government established not only that Swinton considered himself to be and held himself out as a dealer, but that, most importantly, he was actively engaged in the business of dealing in guns.'' (internal citation omitted)).

[63] *See King,* 735 F.3d at 1107 (defendant attempted to sell one of the 19 firearms he had ordered, and represented to the buyer that he was buying, selling, and trading in firearms and could procure any item in a gun publication at a cheaper price).

[64] *See, e.g., Focia,* 869 F.3d at 1282 (''And finally, despite efforts to obtain Focia's tax returns and Social Security information, agents found no evidence that Focia enjoyed any source of income other than his firearms sales. This evidence overwhelmingly demonstrates that Focia's sales of firearms were no more a hobby than working at Burger King for a living could be described that way.'').

(A) through straw or sham businesses,[65] or individual straw purchasers or sellers; [66] or

(B) that cannot lawfully be purchased or possessed, including:

(i) stolen firearms (18 U.S.C. 922(j)); [67]

(ii) firearms with the licensee's serial number removed, obliterated, or altered (18 U.S.C. 922(k); 26 U.S.C. 5861(i)); [68]

(iii) firearms imported in violation of law (18 U.S.C. 922(l), 22 U.S.C. 2778, or 26 U.S.C. 5844, 5861(k)); or

(iv) machineguns or other weapons defined as firearms under 26 U.S.C. 5845(a) that were not properly registered in the National Firearms Registration and Transfer Record (18 U.S.C. 922(o); 26 U.S.C. 5861(d)); [69]

(4) repetitively sells or offers for sale firearms—

(A) within 30 days after they were purchased; [70]

(B) that are new, or like new in their original packaging; [71] or

(C) that are of the same or similar kind (*i.e.,* make/manufacturer, model, caliber/gauge, and action) and type (*i.e.,* the classification of a firearm as a rifle, shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or other firearm); [72]

(5) who, as a former licensee (or responsible person acting on behalf of the former licensee) sells or offers for sale firearms that were in the business inventory of such licensee at the time the license was terminated (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license), and were not transferred to a personal collection in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a; or

(6) who, as a former licensee (or responsible person acting on behalf of a former licensee) sells or offers for sale firearms that were transferred to a personal collection of such former licensee or responsible person prior to the time the license was terminated, unless: (A) the firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44, title 18, of the United States Code; and (B) one year has passed from the date of transfer to the personal collection.

Any one or a combination of the circumstances above gives rise to a presumption in civil and administrative proceedings that the person is engaged in the business of dealing in firearms and must be licensed under the GCA. The activities set forth in these rebuttable presumptions are not exhaustive of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms. Further, as noted above, while the criteria may be useful to courts in criminal cases when instructing juries regarding permissible inferences, the presumptions outlined above shall not apply to criminal cases.

At the same time, the Department recognizes that certain transactions are not likely to be sufficient to support a presumption that a person is engaging in the business of dealing in firearms. For this reason, the proposed rule also includes examples of when a person is not presumed to be engaged in the business of dealing in firearms. Specifically, under this proposed rule, a person would not be presumed to be engaged in the business requiring a license as a dealer when the person transfers firearms only as bona fide

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[65] *See, e.g., MEW Sporting Goods, LLC.* v. *Johansen,* 992 F. Supp. 2d 665, 674–75 (N.D.W.V. 2014), *aff'd,* 594 F. App'x 143 (4th Cir. 2015) (corporate entity disregarded where it was formed to circumvent firearms licensing requirement); *King,* 735 F.3d at 1106 (defendant felon could not ''immunize himself from prosecution'' for dealing without a license by ''hiding behind a corporate charter.''); *United States* v. *Fleischli,* 305 F.3d 643, 652 (7th Cir. 2002) (''In short, a convicted felon who could not have legitimately obtained a manufacturer's or dealer's license may not obtain access to machine guns by setting up a sham corporation.''); *National Lending Group, L.L.C.* v. *Mukasey,* No. CV 07–0024, 2008 WL 5329888 (D. Ariz. Dec. 19, 2008), *aff'd,* 365 F. App'x 747 (9th Cir. 2010) (straw ownership of corporate pawn shops); *Casanova Guns, Inc.* v. *Connally,* 454 F.2d 1320, 1322 (7th Cir. 1972) (''[I]t is well settled that the fiction of a corporate entity must be disregarded whenever it has been adopted or used to circumvent the provisions of a statute.''); *XVP Sports, LLC* v. *Bangs,* No. 2:11CV379, 2012 WL 4329258, at *5 (E.D. Va. Sept. 17, 2012) (''unity of interest'' existed between firearm companies controlled by the same person); *Virlow LLC* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives,* No. 1:06–CV–375, 2008 WL 835828 (W.D. Mich. Mar. 28, 2008) (corporate form disregarded where a substantial purpose for the formation of the company was to circumvent the statute restricting issuance of firearms licenses to convicted felons); Press Release, OPA, *Utah Business Owner Convicted of Dealing in Firearms without a License and Filing False Tax Returns* (Sept. 23, 2016), *https://www.justice.gov/opa/pr/utah-business-owner-convicted-dealing-firearms-without-license-and-filing-false-tax-returns* (defendant illegally sold firearms under the auspices of a company owned by another Utah resident).

[66] *See, e.g., Bryan* v. *United* States, 524 U.S. 184, 189 (1998) (defendant used straw purchasers to buy pistols in Ohio for resale in New York); *United States* v. *Ochoa,* 726 F. App'x 651, 652 (9th Cir. 2018) (''[W]hile the evidence demonstrated that Ochoa did not purchase and sell the firearms himself, it was sufficient to demonstrate that he had the princip[al] objective of making a profit through the repetitive purchase and sale of firearms, even if those purchases and sales were carried out by others.''); *United States* v. *Hosford,* 843 F.3d 161, 163 (4th Cir. 2016) (defendant purchased firearms through a straw purchaser who bought them at gun shows); *United States* v. *Paye,* 129 F. App'x 567, 570 (11th Cir. 2005) (defendant paid straw purchaser to buy firearms for him to sell); *United States* v. *Bryan,* 122 F.3d 90, 92 (2d Cir. 1997) (defendant enlisted the aid of two straw purchasers to buy guns for resale in another state).

[67] *See, e.g., United States* v. *Simmons,* 485 F.3d 951 (7th Cir. 2007); *United States* v. *Perkins,* 633 F.2d 856 (8th Cir. 1981).

[68] *See, e.g., United States* v. *Ilarraza,* 963 F.3d 1 (1st Cir. 2020); *United States* v. *Fields,* 608 F. App'x 806 (11th Cir. 2015); *United States* v. *Barrero,* 578 F. App'x 884 (11th Cir. 2014); *United States* v. *Teleguz,* 492 F.3d 80 (1st Cir. 2007); *United States* v. *Bostic,* 371 F.3d 865 (6th Cir. 2004); *United States* v. *Kitchen,* 87 F. App'x 244 (3d Cir. 2004); *United States* v. *Ortiz,* 318 F.3d 1030 (11th Cir. 2003); *United States* v. *Jackson,* No. 97–6756, 1997 WL 618902 (4th Cir. Oct. 8, 1997); *United States* v. *Rosa,* 123 F.3d 94 (2d Cir. 1997); *United States* v. *Twitty,* 72 F.3d 228 (1st Cir. 1995); *United States* v. *Collins,* 957 F.2d 72 (2d Cir. 1992).

[69] *See, e.g., United States* v. *Fridley,* 43 F. App'x 830 (6th Cir. 2002) (defendant purchased and sold unregistered machineguns); *United States* v. *Idarecis,* No. 97–1629, 1998 WL 716568 (2d Cir. Oct. 9, 1998) (defendant converted rifles to automatic weapons and obliterated the serial numbers on the firearms he sold).

[70] *See, e.g.,* Press Release, OPA, *Minnesota Man Indicted for Dealing Firearms without a License* (Feb. 18, 2016), *https://www.justice.gov/opa/pr/minnesota-man-indicted-dealing-firearms-without-license#:~:text=U.S.%20Attorney%20Andrew%20M.,least%20nine%20firearms%20transaction%20records* (defendant sold firearms he purchased through online websites, and the average time he actually possessed a gun before offering it for sale was only nine days); Press Release, USAO, *Ex-Pasadena Police Lieutenant Sentenced to One Year in Federal Prison for Unlicensed Selling of Firearms and Lying on ATF Form* (Feb. 25, 2019), *https://www.justice.gov/usao-cdca/pr/ex-pasadena-police-lieutenant-sentenced-one-year-federal-prison-unlicensed-selling* (defendant resold 79 firearms within six days after he purchased them); *United States* v. *D'Agostino,* No. 10–20449, 2011 WL 219008 (E.D. Mich. Jan. 20, 2011) (some of the weapons defendant sold at gun shows were purchased ''a short time earlier'').

[71] *See, e.g., United States* v. *Carter,* 203 F.3d 187, 189 n.1 (2d Cir. 2000) (defendant admitted to willfully shipping and transporting interstate eleven handguns in the course of engaging in the business of dealing in firearms without a license that were contained in their original boxes); *United States* v. *Van Buren,* 593 F.2d 125, 126 (9th Cir. 1979) (defendant's ''gun displays were atypical of those of a collector because he exhibited many new weapons, some in the manufacturers' boxes''); *United States* v. *Powell,* 513 F.2d 1249 (8th Cir. 1975) (defendant acquired and sold six ''new'' or ''like new'' shotguns over several months); *United States* v. *Posey,* 501 F.2d 998, 1002 (6th Cir. 1974) (defendant offered firearms for sale, some of them in their original boxes); *United States* v. *Day,* 476 F.2d 562, 564, 567 (6th Cir. 1973) (60 of the 96 guns to be sold by defendant were new handguns still in the manufacturer's original packages).

[72] *See, e.g.,* Press Release, USAO, *FFL Sentenced for Selling Guns to Unlicensed Dealers* (May 27, 2022), *https://www.justice.gov/usao-ndtx/pr/ffl-sentenced-selling-guns-unlicensed-dealers* (defendant regularly sold large quantities of identical firearms to unlicensed associates who sold them without a license); *Shipley,* 546 F. App'x at 453 (defendant sold mass-produced firearms of similar make and model that were not likely to be part of a personal collection).

gifts,[73] or occasionally [74] sells firearms only to obtain more valuable, desirable, or useful firearms for their personal collection or hobby, unless their conduct also demonstrates a predominant intent to earn a profit.

The rebuttable presumptions set forth above are supported by the Department's investigative and regulatory enforcement experience,[75] as well as conduct that the courts have found to require a license even before the BSCA expanded the definition of ''engaged in the business.'' Moreover, these presumptions are consistent with the case-by-case analytical framework long applied by the courts in determining whether a person has violated 18 U.S.C. 922(a)(1)(A) and 923(a) by engaging in the business of dealing in firearms without a license even under the pre-BSCA definition. The fundamental purpose of the GCA would be severely undermined if persons were allowed to repetitively purchase and resell firearms to predominantly earn a profit without conducting background checks, keeping records, and otherwise complying with the license requirements of the GCA simply because the effort needed to conduct commerce in general has dramatically diminished. The Department is therefore providing objectively reasonable standards for when a person is presumed to be ''engaged in the business'' to strike an appropriate balance that captures persons who should be licensed, without limiting or regulating activity truly for the purposes of a hobby or enhancing a personal collection.

The first presumption stated above—that a person will be presumed to be engaged in the business when the person sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms—reflects that the definition of ''engaged in the business'' in 18 U.S.C. 921(a)(21)(C) does not require that a firearm actually to be sold by a person so long as the person is holding themself out as a dealer. This is because, under the definition of ''engaged in the business'' in 18 U.S.C. 921(a)(21)(C), the ''repetitive purchase and resale of firearms'' is the means through which the person intends to engage in the business even if those firearms are not actually repetitively purchased and resold.

The second presumption above—that a person is engaged in the business when spending more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported taxable gross income during the applicable period of time—reflects that persons who spend more money or its equivalent on purchases of firearms for resale than their reported gross income are likely to be earning livelihood from those sales, which is even stronger evidence of an intent to profit than merely supplementing one's income.[76] Alternatively, the funds the person used to purchase the firearms may have been derived from criminal activities, for example, if they were provided by a co-conspirator to repetitively purchase and resell the firearms without a license or for other criminal purposes, or the funds were laundered from past illicit firearms transactions. Such illicit and repetitive firearm purchase and sale activities do not require proof of profit to prove the requisite intent under 18 U.S.C. 921(a)(22), which states that proof of profit is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

The first presumption underlying the third category listed above—that a person is engaged in the business when repetitively purchasing, reselling, or offering to sell firearms through straw or sham businesses or individual straw purchasers or sellers—reflects that persons who willfully engage in the business of dealing without a license often do so to conceal their transactions by setting up straw or sham businesses or hiring ''middlemen'' to conduct transactions on their behalf.[77] The second presumption under that category—that a person is engaged in the business when repetitively purchasing, reselling, or offering to sell firearms that cannot lawfully be possessed—reflects that such firearms are actively sought by criminals and earn higher profits for the illicit dealer. Such dealers will often buy and sell stolen firearms and firearms with obliterated serial numbers because such firearms are preferred by both sellers and buyers to avoid background checks and crime gun tracing.[78] They sometimes sell unregistered National Firearms Act (''NFA'') weapons [79] and unlawfully imported firearms because those firearms are more difficult to obtain, cannot be traced through the National Firearms Registration and Transfer Record, and may sell for a substantial profit. Although these presumptions do not directly address an individual's intent to profit, they are supported by 18 U.S.C. 921(a)(22), which does not require the government to prove an intent to profit where a person repetitively purchases and disposes of firearms for criminal purposes. This includes willfully engaging in the business of dealing in contraband firearms. These presumptions are also implicitly supported by 18 U.S.C. 923(c), which deems any firearm acquired or disposed of with the purpose of willfully evading the restrictions placed on licensed dealers under the GCA to be business inventory, not part of a personal collection. Indeed, concealing the identity of the seller or buyer of a firearm, or the identification of the firearm, undermines the requirements imposed on legitimate dealers to conduct background checks on actual purchasers (18 U.S.C. 922(t)) and maintain transaction records (18 U.S.C.

[73] The Department interprets the term ''bona fide gift'' to mean a firearm given in good faith to another person without expecting any item, service, or anything of value in return. *See* Form 4473, at 4, Instructions to Question 21.a. (Actual Transferee/Buyer) (''A gift is not bona fide if another person offered or gave the person . . . money, service(s), or item(s) of value to acquire the firearm for him/her, or if the other person is prohibited by law from receiving or possessing the firearm.''); ATF FFL Newsletter, June 2021, at 2 (same).

[74] While the GCA does not define the term ''occasional,'' that term is commonly understood to mean ''of irregular occurrence; happening now and then, infrequent.'' Letter for Borderview LLC, from Chief, Firearms Industry Programs Branch, ATF (Oct. 14, 2015) (citing Collins American English Dictionary (2015)) (addressing persons engaged in the business of importing firearms).

[75] See the discussion at the beginning of Section II.D of this preamble. ''Presumptions that a Person is 'Engaged in the Business.' ''

[76] Webster's Online Dictionary defines the term ''livelihood'' as ''means of support or subsistence.'' *Livelihood, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/livelihood* (last visited Aug. 25, 2023).

[77] *See* footnotes 65 and 6666, *supra; Abramski,* 573 U.S. at 180 (''[C]onsider what happens in a typical straw purchase. A felon or other person who cannot buy or own a gun still wants to obtain one. (Or, alternatively, a person who could legally buy a firearm wants to conceal his purchase, maybe so he can use the gun for criminal purposes without fear that police officers will later trace it to him.)'').

[78] *See* footnote 68, *supra; Twitty,* 72 F.3d at 234 n.2 (defendant resold firearms with obliterated serial numbers, which was ''probably designed in part to increase the selling price of the weapons''); *United States* v. *Hannah,* No. CRIM.A.05–86, 2005 WL 1532534, at *3 (E.D. Pa. 2005) (defendant told buyers to obliterate the serial numbers on the firearms so he would not ''get in trouble'').

[79] The National Firearms Act of 1934, 26 U.S.C. 7801 *et seq.,* restricts certain firearms that Congress determined were particularly dangerous ''gangster-type'' weapons, to include short-barreled rifles and shotguns, machineguns, silencers, and destructive devices. NFA provisions still refer to the ''Secretary of the Treasury.'' *See generally* 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, for ease of reference, this final rule refers to the Attorney General throughout.

923(g)(1)–(2)) through which firearms involved in crime can be traced.

The first presumption under the fourth category listed above—repetitive sales or offers for sale of firearms within 30 days from purchase—reflect that firearms for a personal collection are not likely to be repetitively sold within such a short period of time from purchase.[80] Likewise, under the second and third presumptions under this category, persons who repetitively sell firearms in new condition or in like-new condition in their original packaging, or firearms of the same kind and type, are not likely to be selling such firearms from a personal collection. Individuals who are bona fide collectors are less likely to amass firearms of the same kind and type than amass older, unique, or less common firearms that hold special interest. In contrast, persons engaged in the business can earn the greatest profit by selling firearms in the best (*i.e.,* in a new) condition, or by selling the particular makes and models of firearms (*i.e.,* of the same kind and type) that their customers want the most and would generate the greatest profit.

The presumption under the fifth category listed above—that a former licensee, or responsible person acting on behalf of such former licensee, is engaged in the business when they sell or offer for sale firearms that were in the business inventory upon license termination—recognizes the fact that the licensee likely intended to predominantly earn a profit from the repetitive purchase and resale of those firearms, not to acquire the firearms as a ''personal collection.'' Consistent with the GCA's plain language under section 921(a)(21)(C), this presumption recognizes that former licensees who thereafter intend to predominantly earn a profit from selling firearms that they had previously purchased for resale can still be considered to be ''engaging in the business'' after termination of their license. The GCA does not provide exceptions to the definition of ''engaged in the business'' based on one's prior license status, even if the firearms were purchased while the person had that license.[81]

The final presumption above—that the personal inventory of a former licensee (or responsible person acting on behalf of the former licensee) remains business inventory until one year has passed from license termination or transfer to their personal collection—is consistent with 18 U.S.C. 923(c) of the GCA, which deems firearms transferred from a licensee's business inventory to their personal collection as business inventory until one year after the transfer.[82]

The Department notes that these presumptions may be rebutted in an administrative or civil proceeding with reliable evidence demonstrating that a person is not ''engaged in the business'' of dealing in firearms.[83] If, for example, where there is reliable evidence that a few collectible firearms were purchased from a licensed dealer where ''all sales are final'' and resold back to the licensee within 30 days because the purchaser was not satisfied, the presumption that the unlicensed reseller is engaged in the business may be rebutted. Similarly, the presumption may be rebutted based on evidence that a collector occasionally sells one specific kind and type of curio or relic firearm to buy another one of the same kind and type that is in better condition to ''trade-up'' or enhance the seller's personal collection. Another example in which evidence may rebut the presumption would be the occasional sale, loan, or trade of an almost-new firearm in its original packaging to an immediate family member, such as for their use in hunting, without the intent to earn a profit or to circumvent the requirements placed on licensees.[84]

E. Definition of ''Personal Collection,'' ''Personal Collection of Firearms,'' and ''Personal Firearms Collection''

The statutory definition of ''engaged in the business'' excludes ''a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or

[80] Further support for this 30-day presumption comes from the fact that, while many retailers do not allow firearm returns, some retailers and manufacturers do allow a 30-day period within which a customer who is dissatisfied with a firearm purchased for a personal collection or hobby can return or exchange the firearm. Dissatisfied personal collectors and hobbyists—persons not intending to engage in the business—are more likely to return new firearms rather than incurring the time, effort, and expense to resell them within that period of time. *See, e.g., Cabela's Return Policy: Here's How it Actually Works,* rather-be-shopping.com, *https://www.rather-be-shopping.com/blog/cabelas-return-policy/* (Jan. 31, 2023) (''[I]f they sell you a fully functioning gun, and you take it to the range, and it will not eject a shell or casing or will not perform basic functions, THEY TYPICALLY WILL exchange it. . . . Make sure you fully test the firearm within 30 days of purchase as it will be MUCH more difficult to exchange the gun after 30 days.''); *LEARN ABOUT THE 30 DAY MONEY BACK GUARANTEE! HOW TO RETURN YOUR FIREARM!, Waltherarms.com, https://waltherarms.com/guarantee#:~:text=Walther%20understands%20this%20and%20that,it%20is%20right%20for%20you/*(last visited Aug. 10, 2023); *Retail Policies, centertargetsports.com, https://centertargetsports.com/retail-range/* (last visited Aug. 10, 2023) (''When you purchase any gun from Center Target Sports, we guarantee your satisfaction. Use your gun for up to 30 days and if for any reason you're not happy with your purchase, return it to us within 30 days and receive a store credit for the FULL purchase price.''); *Warranty & Return Policy,* Century Arms (Mar. 6, 2019), *https://www.centuryarms.com/media/wysiwyg/Warranty_and_Return_v02162021.pdf* (''Customer has 30 days to return surplus firearms, ammunition, parts, and accessories for repair/replacement if the firearm does not meet the advertised condition.''); *I Love You PEW 30 Day Firearm Guarantee,* Alphadog Firearms, *https://alphadogfirearms.com/i-love-you-pew/* (last visited Aug. 10. 2023) (''Original purchaser has 30 calendar days to return any new firearm purchased for store credit.''); *Return Exceptions Policy,* Big 5 Sporting Goods, *https://www.big5sportinggoods.com/static/big5/pdfs/Customer-Service-RETURN-EXCEPTIONS-POLICY-d.pdf* (last visited Aug. 10, 2023) (''Firearm purchases must be returned to the same store at which they were purchased. No refunds or exchanges unless returned in the original condition within thirty (30) days from the date of release.'').

[81] The Department is aware of non-binding dicta in *United States* v. *Shumann,* 861 F.2d 1234, 1238 (11th Cir. 1988), in which the court expressed its view that had the FOPA definition of ''engaged in the business'' been applicable (which the court ruled it was not) it would have absolved the petitioner of liability in a forfeiture action if, as he claimed, he was merely closing out his gun business and liquidating his inventory, saying ''[w]hile the government presented evidence of firearms sales by Schumann to undercover BATF agents . . . there was no proof of firearms purchases, much less a proven pattern of 'repetitive purchase and resale.' '' However, none of the amendments to the GCA made by FOPA defined the terms ''collection'' or ''personal collection.'' The fact remains that the firearms to be liquidated were repetitively purchased for resale by the same person while licensed. And whether a person is ''engaged in the business'' under post-BSCA section 921(a)(21)(C) is not dependent on the license status of the person so engaged.

[82] Even if one year has passed from the date of transfer, business inventory transferred to a personal collection of a former licensee (or responsible person acting on behalf of that licensee) prior to termination of the license cannot be treated as part of a personal collection if the licensee received or transferred those firearms with the intent to willfully evade the restrictions placed upon licensees by the GCA (*e.g.,* willful violations as cited in a notice of license revocation or denial of renewal). This is because, under section 923(c), any firearm acquired or disposed of with intent to willfully evade the restrictions placed upon licensees by the GCA is automatically business inventory. Therefore, because the firearms are statutorily deemed to be business inventory under either of these circumstances, a former licensee (or responsible person acting on behalf of such licensee) who sells such firearms is presumed to be engaged in the business, requiring a license.

[83] An example of an administrative proceeding where rebuttable evidence might be introduced would be where ATF denied a firearms license application, pursuant to 18 U.S.C. 923(d)(1)(C) and (f)(2), on the basis that the applicant was presumed under this rulemaking to have willfully engaged in the business of dealing in firearms without a license. An example of a civil case would be an asset forfeiture proceeding, pursuant to 18 U.S.C. 924(d)(1), on the basis that the seized firearms were intended to be involved in willful conduct presumed to be engaging the business without a license under this rulemaking.

[84] *See, e.g., Clark* v. *Scouffas,* No. 99–C–4863, 2000 WL 91411 (N.D. Ill. 2000) (license applicant was not a ''dealer'' who was ''engaged in the business'' as defined under section 921(a)(21)(C) where he only sold a total of three .38 Special pistols—two to himself, and one to his wife, without any intent to profit).

for a hobby, or who sells all or part of his personal collection of firearms.'' 18 U.S.C. 921(a)(21)(C). To clarify this definitional exclusion, this proposed rule would: (1) add a single definition for the terms ''personal collection,'' ''personal collection of firearms,'' and ''personal firearms collection''; (2) explain how those terms apply to licensees; and (3) make clear that licensees must follow the verification and recordkeeping procedures in 27 CFR 478.94 and subpart H, rather than using ATF Form 4473, when they acquire firearms from other licensees, including a sole proprietor who transfers a firearm to their personal collection in accordance with 27 CFR 478.125a.

Specifically, this rule proposes to define ''personal collection,'' ''personal collection of firearms,'' and ''personal firearms collection'' as ''personal firearms that a person accumulates for study, comparison, exhibition, or for a hobby (*e.g.,* noncommercial, recreational activities for personal enjoyment such as hunting, or skeet, target, or competition shooting).'' This reflects a common definition of the terms ''collection'' and ''hobby.'' [85] The phrase ''or for a hobby'' was adopted from 18 U.S.C. 921(a)(21)(C), which excludes from the definition of ''engaged in the business'' firearms acquired ''for'' a hobby. Also expressly excluded from the definition of ''personal collection'' is ''any firearm purchased for resale or made with the predominant intent to earn a profit'' because of their inherently commercial nature. 18 U.S.C. 921(a)(21)(C).

Under the GCA, 18 U.S.C. 923(c), and implementing regulations, 27 CFR 478.125(e) and 478.125a, a licensee who acquires firearms for a personal collection is subject to certain additional requirements before the firearms can become part of such a ''personal collection.'' [86] Accordingly, the proposed rule further explains how that term would apply to firearms acquired by a licensee (*i.e.,* a person engaged in the business as a licensed manufacturer, licensed importer, or licensed dealer under the GCA), by defining ''personal collection,'' ''personal collection of firearms,'' or ''personal firearms collection,'' when applied to licensees, to include only firearms that were: (1) acquired or transferred without the intent to willfully evade the restrictions placed upon licensees by chapter 44, title 18, United States Code; [87] (2) recorded by the licensee as an acquisition in the licensee's acquisition and disposition record in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale); [88] (3) recorded as a disposition from the licensee's business inventory to the person's personal collection in accordance with 27 CFR 478.122(a), 478.123(a), or 478.125(e); (4) stored separately from, and not commingled with the business inventory, and appropriately identified as ''not for sale'' (*e.g.,* by attaching a tag), if on the business premises; [89] and (5) maintained in such personal collection (whether on or off the business premises) for at least one year from the date the firearm was so transferred, in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a.[90] These proposed parameters to define the term ''personal collection'' as applied to licensees reflect the statutory and regulatory requirements for personal collections in 18 U.S.C. 923(c) and 27 CFR 478.122(a), 478.123(a), 478.125(e), and 478.125a.[91] To implement these changes, the rule also would make conforming changes by adding references in 27 CFR 478.125a to the provisions that relate to the acquisition and disposition recordkeeping requirements for importers and manufacturers.

F. Definition of ''*Responsible Person*''

To accompany these changes, this rule also proposes to add a regulatory definition of the term ''responsible person'' in 27 CFR 478.11, to mean ''[a]ny individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and business practices of a corporation, partnership, or association, insofar as they pertain to firearms.'' This definition comes from 18 U.S.C. 923(d)(1)(B), and has long been reflected on the application for license (Form 7) and other ATF publications since enactment of a similar definition in the Safe Explosives Act in 2002.[92] As

[85] *See* Webster's Third New International Dictionary 444, 1075, 1686 (1971) (defining the term ''personal'' to include ''of or relating to a particular person,'' ''collection'' to include ''an assembly of objects or specimens for the purposes of education, research, or interest'' and ''hobby'' as ''a specialized pursuit . . . that is outside one's regular occupation and that one finds particularly interesting and enjoys doing''); Webster's Online Dictionary (2023) (defining the term ''personal'' to include ''of, relating to, or affecting a particular person,'' ''collection'' to include ''an accumulation of objects gathered for study, comparison, or exhibition or as a hobby'', and ''hobby'' as a ''pursuit outside one's regular occupation engaged in especially for relaxation''); *see also United States* v. *Idarecis,* 164 F.3d 620 (2d Cir. 1998) (Table) (''There is no case authority to suggest that there is a distinction between the definition of a collector and of a [personal] collection in the statute.'').

[86] The GCA, 18 U.S.C. 923(c), and implementing regulations, also require that all firearms *disposed of* from a licensee's personal collection, including firearms acquired before the licensee became licensed, that are held for at least one year and that are sold or otherwise disposed of, must be recorded as a disposition in a personal bound book. *See* 18 U.S.C. 923(c); 27 CFR 478.125a(a)(4).

[87] *See* ATF Q&A, *May a licensee create a personal collection to avoid the recordkeeping and NICS background check requirements of the GCA?, https://www.atf.gov/firearms/qa/may-licensee-create-personal-collection-avoid-recordkeeping-and-nics-background-check* (July 15, 2020).

[88] *See* ATF Q&A, *Does a licensee have to record firearms acquired prior to obtaining the license in their acquisition and disposition record?, https://www.atf.gov/firearms/qa/does-licensee-have-record-firearms-acquired-prior-obtaining-license-their-acquisition* (July 15, 2020); *ATF Federal Firearms Regulations Reference Guide,* ATF P 5300.4, Q&A (F2) at 201 (2014) (''All firearms acquired after obtaining a firearms license must be recorded as an acquisition in the acquisition and disposition record as business inventory.''); ATF FFL Newsletter, Feb. 2011, at 7 (''There may be occasions where a firearms dealer utilizes his license to acquire firearms for his personal collection. Such firearms must be entered in his permanent acquisition records and subsequently be recorded as a disposition to himself in his private capacity.''); ATF FFL Newsletter, Mar. 2006, at 7 (''[E]ven if a dealer acquires a firearm from a licensee by completing an ATF Form 4473, the firearm must be entered in the transferee dealer's records as an acquisition.'').

[89] *See* ATF Q&A, *May a licensee store personal firearms at the business premises?, https://www.atf.gov/firearms/qa/may-licensee-store-personal-firearms-business-premises* (July 15, 2020); ATF FFL Newsletter, Feb. 2011, at 7; ATF FFL Newsletter, Mar. 2006, at 6; ATF Industry Circular 72–30, *Identification of Personal Firearms on Licensed Premises Not Offered for Sale* (Oct. 10, 1972).

[90] *See* ATF Q&A, *May a licensee maintain a personal collection of firearms? How can they do so?, https://www.atf.gov/firearms/qa/may-licensee-maintain-personal-collection-firearms-how-can-they-do-so* (July 15, 2020).

[91] The existing regulations, 27 CFR 478.125(e) and 478.125a, which require licensees to record the purchase of all firearms in their business bound books, record the transfer of firearms to their personal collection, and demonstrate that personal firearms obtained before licensing have been held at least one year prior to their disposition as personal firearms were upheld by the Fourth Circuit in *National Rifle Ass'n* v. *Brady,* 914 F.2d 475, 482–83 (4th Cir. 1990) (''The regulations ensure that firearms kept in the personal collection are bona fide personal firearms, and they minimize the opportunity for licensees to evade the statute's recordkeeping requirements for business firearms by simply designating those firearms 'personal firearms' immediately prior to their disposition. . . . In addition, the record-keeping requirements contained in the regulations provide a means for the [Attorney General] to verify that personal firearms were actually held for a year by a licensee prior to sale. Thus, we think the regulations at issue here are both 'rational and consistent with the statute.' ''). *See also United States* v. *Twelve Firearms,* 16 F. Supp. 2d 738, 742 n.4 (S.D. Tex. 1998) (''[T]he United States appears to be correct that Claimant was required to keep records of the firearms no matter whether they were part of his business inventory, under § 923(g)(1)(A), *or* whether they were his own personal property, under § 923(c).).''

[92] *See* 18 U.S.C. 841(s); *Application for Federal Firearms License,* ATF Form 7, Instructions at 6 (5300.12); *Gilbert* v. *ATF,* 306 F. Supp. 3d 776, 781 (D. Md. 2018); *Gossard* v. *Fronczak,* 206 F. Supp. 3d 1053, 1065 (D. Md. 2016), *aff'd,* 701 F. App'x

examples, this definition would not include store clerks or cashiers who cannot make management or policy decisions with respect to firearms (*e.g.,* what company or store-wide policies and controls to adopt, which firearms are bought and sold by the business, and who is hired to buy and sell the firearms), even if their clerical duties include buying or selling firearms for the business.

G. Definition of ''Predominantly Earn a Profit''

The BSCA broadened the definition of ''engaged in the business'' as a dealer by substituting ''to predominantly earn a profit'' for ''with the principal objective of livelihood or profit.'' 18 U.S.C. 921(a)(21)(C). It also defined the term ''to predominantly earn a profit.'' 18 U.S.C. 921(a)(22). This rule is proposing to incorporate those statutory changes, as discussed above.

This rule proposes to further implement these amendments by: (1) clarifying that the ''proof of profit'' proviso also excludes ''the intent to profit,'' thus making clear that it is not necessary for the Federal Government to prove that a person intended to make a profit if the person was dealing in firearms for criminal purposes or terrorism; (2) clarifying that a person may have the predominant intent to profit even if the person does not actually obtain pecuniary gain from selling or disposing of firearms; and (3) establishing a presumption in civil and administrative proceedings that certain conduct demonstrates the requisite intent to ''predominantly earn a profit,'' absent reliable evidence to the contrary.

These proposed regulatory amendments are consistent with the plain language of the GCA. Neither the pre-BSCA definition of ''with the principal objective of livelihood and profit'' nor the post-BSCA definition of ''to predominantly earn a profit'' require the government to prove that the defendant actually profited from firearms transactions. *See* 18 U.S.C. 921(a)(22), (a)(23) (referring to ''the intent underlying the sale or disposition of firearms''); *Focia,* 869 F.3d at 1282 (''The exact percentage of income obtained through the sales is not the test; rather, . . . the statute focuses on the defendant's *motivation* in engaging in the sales.'').[93]

ATF's experience also establishes that certain conduct related to the sale or disposition of firearms presumptively demonstrates that primary motivation. In addition to conducting criminal investigations of unlicensed firearms businesses under 18 U.S.C. 922(a)(1)(A), ATF has for many decades observed through qualification and compliance inspections how dealers who sell or dispose of firearms demonstrate a predominant intent to obtain pecuniary gain, as opposed to other intents, such as improving or liquidating a personal collection.

Based on this decades-long body of experience, the proposed rule provides that, absent reliable evidence to the contrary, a person is presumed to have the intent to ''predominantly earn a profit'' when the person: (1) advertises, markets, or otherwise promotes a firearms business (*e.g.,* advertises or posts firearms for sale, including on any website, establishes a website for selling or offering for sale their firearms, makes available business cards, or tags firearms with sales prices), regardless of whether the person incurs expenses or only promotes the business informally; [94] (2) purchases, rents, or otherwise secures or sets aside permanent or temporary physical space to display or store firearms they offer for sale, including part or all of a business premises, table or space at a gun show, or display case; [95] (3) makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales; [96] (4) purchases or otherwise secures merchant services as a business (*e.g.,* credit card transaction services, digital wallet for business) through which the person makes or offers to make payments for firearms transactions; [97] (5) formally or informally purchases, hires, or otherwise secures business security services (*e.g.,* a central station-monitored security system registered to a business,[98] or guards for security [99]) to

266 (4th Cir. 2017); ATF FFL Newsletter, Sept. 2011, at 6; ATF Letter to Dunham's Sports (May 30, 2003).

[93] *See also Valdes,* 681 F. App'x at 877 (the government does not need to show that the defendant ''necessarily made a profit from dealing'') (*citing United States* v. *Wilmoth,* 636 F.2d 123, 125 (5th Cir. 1981)); *King,* 735 F.3d at 1107 n.8 (Section 922(a)(1)(A) does not require an actual sale of firearms); *Allah,* 130 F.3d at 43–44 (upholding jury instruction that selling firearms need not ''be a significant source of income''); *United States* v. *Mastro,* 570 F.Supp. 1388 (E.D. Pa. 1983) (the government need not show that defendant made or expected to make a profit) (citing cases); *United States* v. *Shirling,* 572 F.2d 532, 534 (5th Cir. 1978) (''The statute is not aimed narrowly at those who profit from the sale of firearms, but rather broadly at those who hold themselves out as a source of firearms.'').

[94] *See, e.g., United States* v. *Caldwell,* 790 F. App'x 797, 799 (7th Cir. 2019) (defendant placed 192 advertisements on a website devoted to gun sales); *Valdes,* 681 F. App'x at 878 (defendant handed out business card); *United States* v. *Pegg,* 542 F. App'x 328 (5th Cir. 2013) (defendant sometimes advertised firearms for sale in the local newspaper); *United States* v. *Crudgington,* 469 F. App'x 823, 824 (11th Cir. 2012) (defendant advertised firearms for sale in local papers, and tagged them with prices); *United States* v. *Dettra,* 238 F.3d 424, at *2 (6th Cir. 2000) (Table) (''Dettra's use of printed business cards and his acceptance of credit payment provide further reason to infer that he was conducting his firearms activity as a profitable trade or business, and not merely as a hobby.''); *United States* v. *Norman,* No. 4–10CR00059–JLH, 2011 WL 2678821, at *3 (E.D. Ark. 2011) (defendant placed advertisements in local newspaper and on a website).

[95] *See, e.g., United States* v. *Wilkening,* 485 F.2d 234, 235 (8th Cir. 1973) (defendant set up a glass display case and displayed for sale numerous ordinary long guns and handguns that were not curios or relics); *United States* v. *Jackson,* 352 F. Supp. 672, 676 (S.D. Ohio 1972), *aff'd,* 480 F.2d 927 (6th Cir. 1973) (defendant set up glass display case, displaying numerous long guns and handguns for sale which were not curios or relics); Press Release USAO, *Asheville Man Sentenced For Dealing Firearms Without A License,* (Jan. 20, 2017), *https://www.justice.gov/usao-wdnc/pr/asheville-man-sentenced-dealing-firearms-without-license-0* (defendant sold firearms without a license from his military surplus store).

[96] *See, e.g., United States* v. *White,* 175 F. App'x 941, 942 (9th Cir. 2006) (''Appellant also created a list of all the firearms he remembers selling and the person to whom he sold the firearm.''); *Dettra,* 238 F.3d 424, at *2 (''Dettra carefully recorded the cost of each firearm he acquired, enabling him to later determine the amount needed to sell the item in a profitable manner.''); *United States* v. *Angelini,* 607 F.2d 1305, 1307 (9th Cir. 1979) (defendant kept sales slips or invoices).

[97] *See, e.g., King,* 735 F.3d at 1106–07 (defendant incorporated and funded firearms business ''on behalf'' of friend whose American citizenship enabled business to obtain Federal firearms license. He then misappropriated company's business account, using falsified documentation to set up credit accounts); *Dettra,* 238 F.3d 424, at *2 (defendant accepted credit card payments).

[98] Numerous jurisdictions require all persons with alarms or security systems designed to seek a police response to be registered with or obtain a permit from local police and pay the requisite fee. *See, e.g.,* Albemarle County (Virginia) Code § 12–102(A); Arlington County (Virginia) Code § 33–10; Cincinnati (Ohio) City Ord. Ch. 807–1–A4 (2); City of Coronado (California) Code § 40.42.050)(A); Irvine (California) Code § 4–19–105; Kansas City (Missouri) Code § 50–333(a); Larimer County (Colorado) Ord. § 3(A); Lincoln (Nebraska) Mun. Code § 5.56.030(a); Los Angeles (California) Mun. Code § 103.206(b); Loudoun County (Virginia) Code § 655.03(a); Mobile (Alabama) Code § 39–62(g)(1); Montgomery County (Maryland) Code § 3A–3; Prince William County (Virginia) Code § 2.5.25(a); Rio Rancho (New Mexico) Mun. Code § 97.04(A); Scottsdale (Arizona) Code § 3–10(a); Tempe (Arizona) Code § 22–76; Washington County (Oregon) Code § 8.12.040; West Palm Beach (Florida) Code § 46–32(a); Wilmington (Delaware) Code § 10–38(c); Woburn (Massachusetts) Code Title 11 § 8–18. Due to the value of the inventory and assets they protect, for profit businesses are more likely to maintain, register, and pay for these types of alarms rather than individuals seeking to protect personal property. *See generally What is a Central Station Alarm Monitoring System?,* agmonitoring.com (July 10, 2019), *https://www.agmonitoring.com/blog/industry-news/what-is-a-central-station-monitoring-system; Central Station Service Certification,* UL.com, *https://www.ul.com/resources/central-station-service-certification#:~:text=Station%20Service%20Certification-,Overview,and%20initiates%20the%20appropriate%20response.*

[99] *See, e.g., United States* v. *De La Paz-Rentas,* 613 F.3d 18, 22–23 (1st Cir. 2010) (defendant hired

Continued

protect business assets or transactions that include firearms; (6) formally or informally establishes a business entity, trade name, or online business account, including an account using a business name on a social media or other website, through which the person makes or offers to make firearms transactions;[100] (7) secures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms; or (8) purchases a business insurance policy, including any riders that cover firearms inventory.[101] Any of these nonexclusive, firearms-business-related activities justifies a rebuttable presumption that the person has the requisite intent to predominantly earn a profit from reselling or disposing of firearms.

This set of rebuttable presumptions that establishes an intent ''to predominantly earn a profit''—one of the elements of the definition of ''engaged in the business''—is separate from the set of presumptions that establishes a person meets the definition of ''engaged in the business.'' This second set of presumptions that addresses only intent ''to predominantly earn a profit'' may be used to independently establish the requisite intent to profit in a particular proceeding. As with the ''engaged in the business'' presumptions, the activities set forth in these intent presumptions are not exhaustive of the conduct that may show that, or be considered in determining whether, a person actually has the requisite intent ''to predominantly earn a profit.'' There are many other fact patterns that do not fall within the specific conduct that presumptively requires a license under this proposed rule (*e.g.,* firearms that were repetitively resold after 30 days from purchase, or that were not in a like-new condition), but that reveal one or more preparatory steps that presumptively demonstrate a predominant intent to earn a profit from firearms transactions. Again, none of these presumptions apply to criminal cases, but could be useful to courts in criminal cases, for example, to inform appropriate jury instructions regarding permissible inferences. These presumptions are supported by the Department's investigative and regulatory efforts and experience as well as conduct that the courts have relied upon in determining whether a person was required to be licensed as a dealer in firearms even before the BSCA expanded the definition.

H. Disposition of Business Inventory After Termination of License

One public safety issue that ATF has encountered over the years relates to former licensees who have improperly liquidated their business inventory of firearms without performing required background checks or maintaining required records after the license was revoked, denied renewal, or otherwise terminated (*e.g.,* license expiration or surrender of license).[102] Sometimes former licensees even continue to acquire more firearms for resale (''restocking'') after license termination, a practice that is clearly inconsistent with the concept of ''liquidation.'' These activities, in turn, have resulted in numerous firearms being sold by former licensees (including those whose licenses have been revoked or denied due to willful GCA violations) to potentially prohibited persons without any ability to trace those firearms if later used in crime.[103]

For this reason, the proposed rule also would revise the regulation's sections on discontinuing business, 27 CFR 478.57 and 478.78, to clarify statutory requirements regarding firearms that remain in the possession of a former licensee (or a responsible person of the former licensee) at the time the license is terminated. Again, firearms that were in the business inventory of a former licensee at the time the license was terminated (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license) and that remain in the possession of the licensee (or a responsible person acting on behalf of the former licensee), are not part of a ''personal collection.'' While 18 U.S.C. 921(a)(21)(C) allows an unlicensed person to ''sell all or part of his personal collection'' without being considered ''engaged in the business,'' in this context, these firearms were purchased by the former licensee as business inventory and were not accumulated by that person for study, comparison, exhibition, or for a hobby.

Also, firearms that were transferred by a former licensee to a personal collection prior to the time the license was terminated cannot be considered part of a personal collection unless one year has passed from the date the firearm was transferred into the personal collection before the license was terminated. This gives effect to 18 U.S.C. 923(c), which requires that all firearms acquired by a licensee be maintained as part of a personal collection for a period of at least one year before they lose their status as business firearms.

Under amended 27 CFR 478.57 (discontinuance of business) and 27 CFR 478.78 (operations by licensee after notice), as proposed, once a license has been terminated (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license), the former licensee will have 30 days, or such additional period designated by the Director for good cause, to either: (1) liquidate any remaining business inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or (2) transfer the remaining business inventory to a personal collection of the former licensee (or a responsible person of the former licensee), provided the recipient is not prohibited by law from receiving or possessing firearms. Except for the sale of remaining inventory to a licensee within the 30-day period (or designated additional period), a former licensee (or responsible person of such licensee)

as bodyguard for protection in an unlawful firearms transaction).

[100] *See, e.g., United States* v. *Gray,* 470 F. App'x at 469 (defendant sold firearms through his sporting goods store, advertised his business using signs and flyers, and displayed guns for sale, some with tags).

[101] *See, e.g., United States* v. *Kish,* 424 F. App'x 398, 404 (6th Cir. 2011) (defendant could only have 200 firearms on display because of insurance policy limitations).

[102] The problem of licensees liquidating a former licensee's business firearms as firearms from their ''personal collections'' without background checks or recordkeeping has been referred to by some advocacy groups and members of Congress as the ''fire-sale loophole.'' *See* Dan McCue, *Booker Bill Takes Aim at Gun Fire Sale Loophole,* The Well News (Sept. 9, 2022), *https://www.thewellnews.com/guns/booker-bill-takes-aim-at-gun-fire-sale-loophole/;* Shira Toeplitz, *Ackerman proposes gun-control bill to close 'firesale loophole',* Politico (Jan. 12, 2011), *https://www.politico.com/blogs/on-congress/2011/01/ackerman-proposes-gun-control-bill-to-close-firesale-loophole-032289;* Annie Linskey, *Closed store is a source of guns,* The Baltimore Sun (Apr. 15, 2008), *https://www.baltimoresun.com/news/bs-xpm-2008-04-15-0804150118-story.html* (after revocation of license, a dealer transferred around 700 guns to his ''personal collection'' and continued to sell them without recordkeeping).

[103] *See, e.g., Dettra,* 238 F.3d 424, at *2 (defendant continued to deal in firearms after license revocation); Press Release OPA, *Gunsmoke Gun Shop Owner and Former Discovery Channel Star Indicted and Arrested for Conspiracy, Dealing in Firearms without a License and Tax Related Charges* (Feb. 11, 2016), *https://www.justice.gov/opa/pr/gunsmoke-gun-shop-owner-and-former-discovery-channel-star-indicted-and-arrested-conspiracy* (defendant continued to deal in firearms at a different address after he surrendered his FFL due to his violations of the Federal firearms laws and regulations); *Kish,* 424 F. App'x at 405 (defendant continued to sell firearms after revocation of license); *Gilbert* v. *Bangs,* 813 F. Supp. 2d 669, 672 (D. Md. 2011), *aff'd* 481 F. App'x 52 (4th Cir. 2012) (license denied to applicant who willfully engaged in the business after license revocation); ATF Letter to AUSA (Mar. 13, 1998) (advising that seized firearms offered for sale were not deemed to be part of a ''personal collection'' after surrender of license).

who resells any such inventory, including business inventory transferred to a personal collection, would be subject to the same presumptions in 27 CFR 478.11 (definition of ''engaged in the business'' as a dealer other than a gunsmith or pawnbroker) that apply to a person who repetitively purchased those firearms for the purpose of resale.

The 30-day period from license termination for a former licensee to transfer the firearms to either another licensee or to a personal collection is derived from the disposition of records requirement in the GCA, 18 U.S.C. 923(g)(4), which is a reasonable period for that person to wind down operations after discontinuance of business without acquiring new firearms.[104] That period of liquidation may be extended by the Director for good cause, such as to allow pawn redemptions if required by State, local, or Tribal law. However, former licensees (or responsible persons of such licensees) who choose not to sell the remaining business inventory to a licensee within the 30-day period (or designated additional period), and who continue to sell those firearms, are not permitted under the GCA to engage in the business of dealing in firearms without a license. Former licensees (or responsible person) who sell business inventory after that period (or within that period to unlicensed persons), or within one year from transfer to a personal collection, have no special legal exemptions that give them greater privileges to conduct business than a licensee.

Moreover, a former licensee is not permitted to continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.,* ''restocking'') without a license. Therefore, a former licensee (or responsible person) is subject to the same presumptions in 27 CFR 478.11 (definition of ''engaged in the business'' as a dealer other than a gunsmith or pawnbroker) that apply to persons who sell firearms that were repetitively purchased with the predominant intent to earn a profit and any sales by such a person will be closely scrutinized by ATF on a case-by-case basis.

I. Transfer of Firearms Between FFLs and Form 4473

Finally, to ensure the traceability of all firearms acquired by licensees from other licensees, the proposed rule would make clear that licensees cannot satisfy their obligations under 18 U.S.C. 923(g)(1)(A) by completing a Form 4473 when selling or otherwise disposing of firearms to another licensed importer, licensed manufacturer, or licensed dealer, or a curio or relic to a licensed collector, including a sole proprietor licensee who transfers the firearm to their personal collection in accordance with 27 CFR 478.125a.[105] Form 4473 was not intended for use by licensees when transferring firearms to other licensees or by a sole proprietor transferring to their personal collection.

Pursuant to 18 U.S.C. 926(a)(1) and 27 CFR 478.94, when a licensee transfers a firearm to another licensee, the transferor must first verify the recipient's identity and license status by examining a certified copy of the recipient's license and recording the transfer as a disposition to that licensee in the bound book record. In turn, the recipient licensee must record the receipt as an acquisition in their bound book record. *See* 27 CFR 478, subpart H. If a recipient licensee were to complete a Form 4473 for the purchase of a firearm, but not record that receipt in their bound book record asserting it is a ''personal firearm,'' then tracing efforts pursuant to the GCA could be hampered if the firearm was later used in a crime.

However, this clarification that FFLs may not satisfy their obligations by completing a Form 4473 to transfer firearms between themselves would not include dispositions by a licensed legal entity such as a corporation, LLC, or partnership, to the personal collection of a responsible person of such an entity. This is because when an individual responsible person does not acquire a firearm as an employee on behalf of the business entity, it results in a change in dominion or control, or ''transfer,'' subject to all GCA requirements.[106] Such an entity, including a corporation or partnership, must therefore use a Form 4473, NICS check, and disposition record entry when transferring a firearm to one of its individual officers (or partners, in the case of a partnership) for their personal use.[107]

III. Statutory and Executive Order Review

A. Executive Orders 12866, 13563, and 14094

Executive Order 12866 (''Regulatory Planning and 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 (''Improving Regulation and Regulatory Review'') emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 14094 (''Modernizing Regulatory Review'') amends section 3(f) of Executive Order 12866.

The Office of Management and Budget (''OMB'') has determined that this proposed rule is a ''significant regulatory action'' under Executive Order 12866, as amended by Executive Order 14094, though it is not a section 3(f)(1) significant action. Accordingly, the proposed rule has been reviewed by OMB. While portions of this proposed rule merely incorporate the BSCA's statutory definitions into ATF's regulations, this rulemaking, if finalized, may result in additional unlicensed persons becoming FFLs if the unlicensed persons intend to regularly purchase and resell firearms to predominantly earn a profit.

1. Need for Federal Regulation

This proposed rule would implement the BSCA by incorporating statutory definitions into ATF's regulations and clarifying the criteria for determining when a person is ''engaged in the business'' requiring a license to deal in firearms. The rulemaking is necessary to implement a new statutory provision on being engaged in the business as a wholesale or retail dealer; to clarify prior regulatory provisions that relate to that topic; and to codify practices and policies on that issue. In addition to establishing specific, easy-to-follow standards regarding when buying and selling firearms presumptively crosses the threshold into being ''engaged in the

[104] *See also* 27 CFR 478.57 (requiring the owner of a discontinued or succeeded business to notify ATF of such discontinuance or succession within 30 days), and 478.127 (requiring discontinued businesses to turn in records within 30 days).

[105] *See* ATF FFL Newsletter, Mar. 2006, at 7 (''A dealer who purchases a firearm from another licensee should advise the transferor licensee of his or her licensed status so the transferor licensee's records may accurately reflect that this is a transaction between licensees. An ATF Form 4473 should not be completed for such a transaction, because this form is used only for a disposition to a nonlicensee.'').

[106] *See* ATF Ruling 2010–1 (permanently assigning a firearm to a specific employee for personal use is considered a ''transfer'' that would trigger the recordkeeping and NICS background check requirements).

[107] *See* ATF Q&A, *Does an officer or employee of an entity that holds a federal firearms license, such as a corporation, have to undergo a NICS check when acquiring a firearm for their own personal collection?, https://ww.atf.gov/firearms/qa/does-officer-or-employee-entity-holds-federal-firearms-license-such-cororation-have* (May 22, 2020); 2 ATF FFL Newsletter, Sept. 2013, at 4.

business,'' the rule also would recognize that individuals are allowed by law to occasionally buy and sell firearms for the enhancement of a personal collection or a legitimate hobby without the need to obtain a license.

2. Population

This proposed rule implements a statutory requirement that affects persons who repetitively purchase and resell (including bartering) firearms and are required to be, but are not currently, licensed. As described in the preamble of this NPRM, these may be persons who purchase, sell, or transfer firearms from places other than traditional brick-and-mortar stores, such as at a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order, or over the internet; through the use of other electronic means (*e.g.,* an online broker, online auction, text messaging service, social media raffle, or website); or at any other domestic or international public or private marketplace or premises. A person may be required to have a license to deal in firearms regardless of where, or the medium through which, they purchase or sell (or barter) firearms, including locations other than a traditional brick and mortar store.

The GCA prohibits ATF from prescribing regulations that establish any ''system of registration'' of firearms, firearms owners, or firearms transactions or dispositions.[108] Furthermore, because those willfully engaged in the business of dealing in firearms without a license are violating Federal law, these individuals often take steps to avoid detection by law enforcement, making it additionally difficult for ATF to precisely estimate the population. Therefore, for purposes of this analysis, ATF used information gleaned from ArmsList, an online broker website that facilitates the sales or bartering of firearms, as a means of estimating a population of unlicensed persons selling firearms using online resources.[109] ATF focused its efforts on estimating an affected population using ArmsList since that website is considered to be the largest source for unlicensed persons to sell firearms on the internet.[110] Out of a total listing of 30,806 entries in the ''private party'' category (unlicensed users) on ArmsList, ATF viewed a sample of 379 listings, and found that a given seller on ArmsList had an average of three listings per seller.[111] Based on approximately 30,806 ''private party'' (unlicensed) sales listings on ArmsList, ATF estimates that there are approximately 12,270 unlicensed persons who sell on that website alone, selling an average of three firearms per user.[112] ATF estimates that ArmsList may hold approximately 50 percent of the market share among websites that unlicensed sellers may frequent. This means the 12,270 estimated unlicensed persons on ArmsList would be about half, and the estimated number of unlicensed sellers on all such websites would be approximately 24,540 nationwide. The estimate of ArmsList's market share is based on ATF Firearms Industry Programs Branch (''FIPB'') subject matter expert (''SME'') opinion, news reports,[113] and public web traffic lists.[114]

To better estimate both online and offline sales, ATF assumed, based on best professional judgment of FIPB SMEs and with limited available information, that the national online marketplace estimate above may represent 25 percent of the total national firearms market, which would also include in-person, local, or other offline transactions like flea markets, State-wide exchanges, or websites within each of the 50 States.

While this would bring the total estimated market to approximately 98,160 unlicensed sellers,[115] this figure would need to be reduced by the estimated subset of this population of persons who occasionally sell their firearms without needing to obtain a license (*e.g.,* as part of their hobby or enhancement of their personal collection). Also, based on limited available information, ATF's best, very conservative assessment from FIPB SMEs is that at least 25 percent of the estimated total number of unlicensed sellers may be considered engaged in the business and would subsequently need to become an FFL in order to continue making their repetitive sales of firearms. The actual number may be higher, but ATF does not have data to support a higher number. Using the information gleaned from ArmsList, this means that 24,540 is the estimated number of unlicensed persons that may be considered engaged in the business and affected by this proposed rule.

Because there is no definitive information, the actual number of total unlicensed sellers may be higher. Therefore, ATF also calculated a second possible estimate using information from a published survey by the Russell Sage Foundation regarding a similar, but differently sourced estimated population of private sellers of firearms.[116] Based on the 2020 U.S. Census, there are 258.3 million adults (over 18).[117] ATF used the U.S. Census as a basis for the population and also percentages from ''The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey,'' published by the Russell Sage Foundation.[118] This survey showed that 22 percent of the U.S. adult population owns at least one firearm (56.84 million adults), and of this, five percent transferred firearms (2.84 million). Of the five percent that transferred, 71 percent sold a firearm (2.02 million). Of those that sold a firearm, 51 percent (1.03 million) sold through various mediums (*e.g.,* online, pawnshop, gun shop) other than through or to a family member or friend (which likely would not be affected by this rulemaking).[119] Of the five percent

[108] 18 U.S.C. 926(a).

[109] *See www.Armslist.com.*

[110] Colin Lecher & Sean Campbell, *The Craigslist of Guns: Inside Armslist, the online 'gun show that never ends',* The Verge (Jan. 16, 2020), *https://www.theverge.com/2020/1/16/21067793/guns-online-armslist-marketplace-craigslist-sales-buy-crime-investigation* (''Over the years, [Armslist] has become a major destination for firearm buyers and sellers.''); Tasneem Raja, Semi-Automatics Without A Background Check Can Be A Click Away, NPR (June 17, 2016), *https://www.npr.org/sections/alltechconsidered/2016/06/17/482483537/semi-automatic-weapons-without-a-background-check-can-be-just-a-click-away* (''Armslist isn't the only site of its kind, though it is considered to be the biggest and most popular.'').

[111] A sample of 379 listings from an estimated population of 30,806 listings (viewed between Mar. 1 and 2, 2023), using a 95 percent confidence level and a confidence interval of 5. *See* Sample Size Calculator- Confidence Level, Confidence Interval, Sample Size, Population Size, Relevant Population, *https://www.surveysystem.com/sscalc.htm.*

[112] 12,270 unlicensed individuals = 30,806 ''private party'' unlicensed listings on ArmsList/ 2.51 average listings per user.

[113] *See* footnote 110, *supra.*

[114] Similar web profile and market share lists are available at *https://www.similarweb.com/website/armslist.com/#overview.*

[115] The online estimate of 24,540 = at least 25 percent of national firearms market. So, 100 percent of the firearms market would be 4 * 24,540 = 98,160.

[116] Azrael, D., Hepburn, L., Hemenway, D., & Miller, M. (2017). The stock and flow of U.S. firearms: Results from the 2015 National Firearms Survey. *The Russell Sage Foundation Journal of the Social Sciences, 3*(5), pp 38–57 (pp. 39 and 51). *https://www.jstor.org/stable/10.7758/rsf.2017.3.5.02?seq=1.*

[117] U.S. Census, Stella U. Ogunwole, *et al.,* U.S. Adult Population Grew Faster Than Nation's Total Population From 2010 to 2020, U.S. Census (Aug. 12, 2021), *https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html.*

[118] Azrael, D., Hepburn, L., Hemenway, D., & Miller, M. (2017). The stock and flow of U.S. firearms: Results from the 2015 National Firearms Survey. *The Russell Sage Foundation Journal of the Social Sciences, 3*(5), pp 38–57 (pp. 39 and 51). *https://www.jstor.org/stable/10.7758/rsf.2017.3.5.02?seq=1.*

[119] The Russell Sage Foundation Survey did not divide those who sold to family or friends on a recurring basis from those who made an occasional sale, or between those who did so with intent to earn a profit and those who did not. As noted

that transferred a firearm, ten percent traded or bartered (284,178). Thus, taking the 51 percent that sold (1.03 million) and the ten percent (284,178) that transferred by trading or bartering, the total number of unlicensed persons that may transfer a firearm, based on this survey, in any given timeframe is 1.31 million. Of the 1.31 million unlicensed persons selling, trading, or bartering firearms, ATF continues to assume, based on the best, very conservative assessment from SME experts, that 25 percent (or 328,296 unlicensed individuals) may be engaged in the business with an intent to profit. In sum, based on these limited sources of information, ATF estimates either 24,540 or 328,296 could represent an estimate of unlicensed persons that may be engaged in the business and affected by this proposed rule.

ATF requests public comments on what sources ATF should look to for accurate estimates of the percentage of the population that would need to obtain a license because they are ''engaged in the business'' of dealing in firearms, compared to those who make occasional sales of firearms (*e.g.,* enhancement of a personal collection or for a hobby) and would not need to obtain a license.

3. Costs for Unlicensed Persons Becoming FFLs

As stated earlier, consistent with the statutory changes in the BSCA, this proposed rule implements a new statutory provision that requires individuals to become licensed dealers if they intend predominantly to earn a profit through the repetitive purchase and resale of firearms (which includes benefits from bartering). Costs to become an FFL include an initial application on a Form 7, along with fingerprints and photographs, and a qualification inspection. This application would require fingerprints and photographs, not only from the person applying, but also, in the case of a corporation, partnership, or association, from any other individual who is a responsible person of that business entity.

For purposes of this analysis, ATF assumes that most, if not all unlicensed persons may be operating alone as sole proprietors because this new requirement would likely affect persons who have other sources of income and do not currently view licensing as a requirement. Besides the initial cost of becoming an FFL, there are recurring costs to maintain a license. These costs include renewing the license on a Federal Firearms License Renewal Application, ATF Form 8 (5310.11) (''Form 8'') every three years, maintaining acquisition and disposition (''A&D'') records, maintaining ATF Forms 4473, and undergoing periodic compliance inspections.

The proposed rule, which further implements the statutory changes in the BSCA, would affect unlicensed persons who purchase and resell firearms with the intent to predominantly earn a profit (as defined), not those who are already licensed. Because affected unlicensed persons would now need a license to continue to purchase and resell firearms, ATF estimates that the opportunity costs of acquiring a license would be based on their free time or ''leisure time.'' Based on the Department of Transportation's (''DOT's'') guidance on the costs for leisure time, ATF attempted to update the leisure wage below based on the methodology outlined in the guidance.[120] The DOT uses median household income as the base for income from the U.S. Census. ATF used the latest median income of a household from the U.S. Census, published September 2021.[121] Table 1 outlines the leisure wage.

TABLE 1—LEISURE WAGE RATE FOR INDIVIDUALS

Inputs for leisure wage rate	Numerical inputs
Median Household Income	$67,521.
DOT Travel Time	2080.
DOT's Value of Travel Time Savings.	50 percent.
Leisure Wage Rate	$16.23.
Rounded Leisure Wage Rate ...	$16.

Based on DOT's methodology for leisure time, ATF attributes a rounded value of $16 per hour for time spent buying and reselling (including bartering) firearms on a repetitive basis. The same hourly cost applies to persons who would now become licensed as a firearms dealer who would not have become licensed without the clarifications provided by this proposed rule. This could include persons who begin selling firearms after the final rule's effective date and understand from the rule that they qualify as firearms dealers (as defined by the statute and regulations), or persons who were previously selling without a license and now realize they must acquire one to continue selling because their firearms transactions qualify them as dealers.

In addition to the cost of time, there are other costs associated with applying to become an FFL. To become an FFL, persons need to apply on a Form 7 and submit payment to ATF for fees associated with the Form 7 application. Furthermore, these unlicensed persons would need to obtain documentation, including fingerprints and photographs, undergo a background investigation, and submit all paperwork via mail. While not a cost attributed towards their first-year application to become an FFL, an FFL will need to reapply to renew their license every three years on a Form 8 renewal application to ensure that that they can continue to sell firearms thereafter. Table 2 outlines the costs to become an FFL and costs to maintain a license.

earlier in the preamble, a person who makes only occasional firearms transfers, such as gifts, to immediate family (without the intent to earn a profit or circumvent requirements placed on licensees), generally does not qualify as a dealer engaged in the business. Although it is possible that some portion of the Russell Sage set of family and friend transferors might qualify as dealers if they engage in actions such as recurring transfers, transfers to others in addition to immediate family, or transfers with intent to profit, ATF was not in a position to make that determination from the Survey. Therefore, ATF erred on the side of assuming, for the purpose of this analysis, that the Russell Sage Foundation data on transfers to family and friends would likely not be affected by this rulemaking, since, in general, such transfers are less likely to be recurring or for profit.

[120] Department of Transportation, The Value of Travel Time Savings: Departmental Guidance for Conducting Economic Evaluations Revision 2 (2016 Update), *https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf.*

[121] U.S. Census, Income and Poverty in the United States: 2020, *https://www.census.gov/library/publications/2021/demo/p60-273.html.*

TABLE 2—COST INPUTS TO BECOME AN FFL AND MAINTAIN A LICENSE

Item	Cost item	Source
Form 7 Application Accompanying Licensing Fees	$200.00	Application for Federal Firearms License, ATF, *https://www.atf.gov/firearms/docs/form/form-7-7-cr-application-federal-firearms-license-atf-form-531012531016/download.*
Fingerprint Cards	0.00	Distribution Center Order Form, ATF, *https://www.atf.gov/distribution-center-order-form* (Apr. 20, 2023).
Fingerprint Cards (Commercial)	23.70	Various Sources.
Average Cost for Fingerprint Cards	12	See above.
Postage	0.63	Mailing and Shipping Prices, USPS, *https://www.usps.com/business/prices.htm* (last visited Aug. 17, 2023).
Photograph	16.99	Passport Photos, CVS, *https://www.cvs.com/photo/passport-photos* (last visited Aug. 17, 2023).
FFL Renewal Application Licensing Fees (Form 8) every three years.	90.00	Federal Firearms Licensing Center (“FFLC”).

For purposes of this proposed rule, ATF assumes that unlicensed persons applying for a license as a result of this rulemaking are likely to file for a Type 01 Dealer license.[122] This license costs $200 and uses a Form 7 application (and every three years thereafter, costs $90 to renew the license using Form 8). Applicants also need to obtain and submit fingerprints in paper format. The unlicensed person can obtain fingerprint cards for free from ATF and travel to select law enforcement offices that perform fingerprinting services (usually also for free). Or the unlicensed person may pay a fee to various market entities that offer fingerprinting services in paper format. The average cost found for market services for fingerprinting on paper cards is $24 (rounded).

Because it is not clear whether an unlicensed person would choose to obtain fingerprint cards from ATF and go to a local law enforcement office that provides fingerprinting services or use commercial services both to obtain cards and fingerprinting services, an average cost of $12 was used. In addition to paper fingerprint cards, the unlicensed person must also submit a photograph appropriate for obtaining passports. The cost for a passport photo is $17 (rounded). Once they complete the application and gather the documentation, unlicensed persons must submit the Form 7 package by mail. ATF rounds the first-class stamp rate of $0.63 to $1 for calculating the estimated mailing cost.

In addition to costs associated with compiling documentation for a Form 7 application, ATF estimates time burdens related to obtaining and maintaining a Federal firearms license. Table 3 outlines the hourly burdens to apply, obtain, and maintain a license.

TABLE 3—HOURLY BURDENS TO APPLY, OBTAIN, AND MAINTAIN A LICENSE

Activity type	Hourly burden	Source
Form 7 Application	1	Application for Federal Firearms License, ATF, *https://www.atf.gov/firearms/docs/form/form-7-7-cr-application-federal-firearms-license-atf-form-531012531016/download.*
Time to Travel to and Obtain Photograph	0.5	N/A.
Time to Travel to and Obtain Fingerprints	1	N/A.
A&D Records	0.05	OMB 1140–0032.
Form 4473	0.5	OMB 1140–0020.
Inspection Times (Qualification or Compliance)	3	Field Operations and OMB 1140–0032.

As stated above, hourly burdens include one hour to complete a Form 7 license application and the time spent to obtain the required documentation. For purposes of this analysis, ATF assumes that places that offer passport photograph services are more readily available than places that provide fingerprinting services; therefore, ATF estimates that it may take 30 minutes (0.5 hours) to travel to and obtain a passport photograph and estimates up to one hour to travel to and obtain fingerprinting services. Other time burdens may range from 0.05 hours (three minutes) to enter and maintain A&D records for each firearm transaction and 0.5 hours for maintaining a Form 4473, to three hours for an inspection (qualification or compliance).

ATF then multiplied the hourly burdens by the $16 leisure wage rate to account for the value of time spent applying for and obtaining a license using a Form 7 (including any other actions related to obtaining a license), then added the cost per item to determine a cost per action taken. Table 4 outlines the first-year costs to apply for an FFL.

[122] The cost for a Type 01 Dealer is used because this license is used to purchase and resell firearms at wholesale or retail.

TABLE 4—FIRST-YEAR COSTS TO OBTAIN A TYPE 01 FFL

Cost item	Hourly burden	Hourly wage rate	Hourly cost	Cost item	Rounded cost for each activity
Form 7	1	$16	$16	$200	$216
Fingerprints	1	16	16	12	28
Passport Photograph	0.5	16	8	17	25
Postage	N/A	16	N/A	0.63	1
Qualification Inspection	3	16	48	N/A	48
Initial Cost					318

Overall, ATF estimates that it would cost an unlicensed person $318 in terms of time spent and fees paid to apply under a Form 7 to become a Type 01 FFL. ATF considers the $318 as an unlicensed person's initial cost. In addition to their initial cost, the newly created FFL would need to maintain a Form 4473 (for each firearm sale), A&D records (two entries per firearm: one entry to purchase and one entry to sell) for every firearms transaction, undergo periodic compliance inspections, and renew their license every three years (ATF Form 8 application). Table 5 outlines the cost per recurring activity to maintain an FFL.

TABLE 5—RECURRING COSTS TO MAINTAIN AN FFL

Item	Number of entries or applications	Hourly burden	Hourly wage rate	Hourly cost per activity	Cost item	Rounded cost for each activity
Form 8 Renewal Application	1 (every three years)	0.5	$16.00	$8.00	$90	$98
Form 4473	3 (firearm sales every year)	0.5	16.00	24.00	N/A	24
A&D Records	6 (two entries per firearm every year)	0.05	16.00	4.80	N/A	5
Compliance Inspections	1 (periodically)	3	16.00	48.00	N/A	48

While renewing a license under a Form 8 application occurs every three years, there are additional costs associated with Form 4473 and A&D records that may occur more often. There are also costs from compliance inspections that may occur periodically. ATF notes that the actual number of firearms sales may range from zero sales to more than three per year, but for purposes of this economic analysis only, ATF uses three firearms (six A&D entries) per year to illustrate the potential costs that a person may incur based on information gleaned from ArmsList. Although a person might not resell a given firearm in the same year they purchase it, for the purposes of these estimates, this analysis includes both ends of the firearm transaction because they could buy and sell the same firearm or buy one and sell a different one in a given year.

As for compliance inspections, based on information gathered from ATF's Office of Field Operations, the frequency of such inspections varies depending on the size of the area of operations and the number of FFLs per area of operations. Overall, ATF estimates that it inspects approximately eight percent of all existing FFLs in any given year. ATF has indicated the cost of an inspection, which would normally not occur more than once in a given year per FFL. ATF performs compliance inspections annually, so while the FFL would not necessarily incur a compliance inspection every year, this analysis includes an annual cost for inspections to account for a subset of the total number of affected FFLs that would be inspected in any given year.

In summary, ATF estimates that it would cost an individual $318 in the first year to become licensed. Furthermore, this individual would incur annually recurring costs that could range from $29 a year to complete Forms 4473 and maintain A&D records to $175 to include Form 8 renewal costs and compliance inspections.[123] In addition, ATF estimates that annual costs would range from $805,884 to $7.8 million, with the $7.8 million being the highest annual cost, occurring in the first year, using the SME estimates. Using the alternative inputs from the Russell Sage Foundation Survey results in annual costs ranging from $10.8 million to $104.4 million. Tables 6 and 7 illustrate the 10-year period of analysis.

TABLE 6—10-YEAR PRIVATE COSTS TO THE PROPOSED RULE USING SME ESTIMATE

Year	Undiscounted	Discounted at 3 percent	Discounted at 7 percent
1	$7,803,720	$7,576,427	$7,293,196
2	805,884	759,623	703,890
3	805,884	737,498	657,841
4	3,210,804	2,852,758	2,449,507
5	805,884	695,163	574,584
6	805,884	674,915	536,995

[123] ATF notes that the high $175 may be higher than actual costs since this high cost assumes that an FFL would simultaneously renew their license (which occurs every three years) in the same year that they perform a compliance inspection, which occurs periodically.

TABLE 6—10-YEAR PRIVATE COSTS TO THE PROPOSED RULE USING SME ESTIMATE—Continued

Year	Undiscounted	Discounted at 3 percent	Discounted at 7 percent
7	3,210,804	2,610,677	1,999,527
8	805,884	636,172	469,032
9	805,884	617,643	438,348
10	3,210,804	2,389,140	1,632,210
Total	22,271,436	19,550,016	16,755,130
Annualized		2,291,858	2,385,554

Overall, the annualized private cost of this proposed rule using SME estimates is $2.3 million at three percent and $2.4 million at seven percent.

TABLE 7—10-YEAR PRIVATE COSTS TO THE PROPOSED RULE USING THE RUSSELL SAGE FOUNDATION SURVEY

Year	Undiscounted	Discounted at 3 percent	Discounted at 7 percent
1	$104,398,128	$101,357,406	$97,568,344
2	10,781,256	10,162,368	9,416,767
3	10,781,256	9,866,377	8,800,716
4	42,954,264	38,164,307	32,769,602
5	10,781,256	9,300,006	7,686,887
6	10,781,256	9,029,132	7,184,006
7	42,954,264	34,925,747	26,749,757
8	10,781,256	8,510,823	6,274,789
9	10,781,256	8,262,935	5,864,289
10	42,954,264	31,962,006	21,835,770
Total	297,948,456	261,541,108	224,150,926
Annualized		30,660,597	31,914,049

Overall, the annualized private cost of this proposed rule, based on alternate inputs from the Russell Sage Foundation Survey, is $30.7 million at three percent and $31.9 million at seven percent.

4. Costs for FFLs After Termination of License

The proposed rule is also designed to enhance compliance by former FFLs who no longer hold their licenses due to license revocation, denial of license renewal, license expiration, or surrender of license but nonetheless engage in the business of dealing in firearms. Such persons sometimes, under existing standards, transfer their inventory to their personal collections instead of selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption. The proposed rule would clarify that such former licensees must sell to other licenses or transfer their personal collection within 30 days, but they may not treat a business firearm that they have transferred to their personal collection as a personal firearm until the firearm has been in their personal collection for a period of one year. Former FFLs who sell any such firearm within one year of the transfer date as a personal firearm may be in violation of existing statutory and regulatory restrictions (18 U.S.C. 922(a)(1)(A) and 923(a),(c)) on unlicensed dealers, and may be deemed to be ''engaged in the business.''

ATF license revocation, denial of license renewal, license expiration, or surrender of license realistically present two categories of affected populations. Group 1, comprising license revocations and denial of license renewals, could be described as former FFLs who have failed to comply with existing regulations and requirements to a degree which resulted in the revocation or denial of their licenses. The proposed rule is likely to have a qualitative impact on this group because a revocation or denial may not provide ample opportunity for an orderly and planned liquidation or transfer of inventory before losing the license, which may therefore be disruptive. Based on data from the FFLC, the number of such FFL license revocations are rare, with an average of 37 licenses revoked by ATF over the past 5 years (with a range between 8 and 79), or a de minimis percentage of 0.05 percent of all active FFLs. Furthermore, the economic impact of transferring inventory to another FFL instead of the former FFL holder retaining the inventory is unclear, as the underlying market value of the inventory is unchanged by this proposed rule's requirements. Additional factors surrounding the potential cost of no longer being able to transfer one's inventory to oneself are also unknown and presumed to similarly be de minimis. Therefore, ATF believes there are no quantitative impacts associated with this population. However, ATF welcomes public comments on these assumptions in general and on the potential impacts on former FFLs with revoked licenses.

Group 2, comprising license expiration or surrender of license, captures those who no longer have a license for discretionary or lawful reasons. This group comprises former FFLs that choose to close or to sell the business to another party. They are similarly excluded from expected impacts attributable to the proposed rule because of the likelihood that, because the closure is planned, the FFL will include reasonable considerations for orderly, lawful liquidation or inventory transfer as part of closing or selling their enterprise. Such considerations are also likely to occur ahead of, rather than subsequent to, the expiration or surrender of their license. As a result, ATF assumes that the

options of transfer to the licensee's personal collection or sale to another FFL that exist under current standards would similarly be freely available to Group 2 FFLs over their expected course of action under the proposed rule. As a result, we are excluding both groups from the affected population.

5. Government Costs

In addition to the private costs to unlicensed persons, ATF would incur additional work due to the increase in Form 7 and Form 8 applications for unlicensed persons who become an FFL which would be offset by the fees incurred with FFL applications ($200) and renewals ($90). Based on information gathered from FFLC, which processes and collects the fees for FFL applications, various contractors and Federal Government employees process Form 7 and 8 applications, verify and correct applications, and further process them for background checks and approval.

Based on information provided by FFLC, the average hourly rate for contracting staff, to include benefits, is $13.29.[124] To determine the wage rates for Federal employees, ATF used the wage rates according to the General Schedule (''GS'') level, step 5 as an average wage rate per activity. Government processing activities range from an entry level Federal employee between a GS–5/7, upwards to a GS–13.[125] To account for fringe benefits such as insurance, ATF estimated a Federal load rate. ATF estimated the Federal load rate using the methodology outlined in the Congressional Budget Office's report comparing Federal benefits to private sector benefits. It states that Federal benefits are 17 percent more than private sector benefits (or a multiplier factor of 1.17).[126] ATF calculated private sector benefits from the Bureau of Labor Statistics (in 2022) and determined that the overall private sector benefits are 41.9 percent in addition to an hourly wage, or a load rate of 1.419. This makes the Federal load rate 1.66 above the hourly wage rate (after applying the 1.17 multiplier).[127] Table 8 outlines the government costs to process a Form 7 application to become an FFL.

TABLE 8—HOURLY BURDEN AND COST TO PROCESS A NEW APPLICATION FOR AN FFL

Government cost to process new FFL applications	Hourly burden	Staffing level	Hourly wage	Loaded hourly wage	Rounded cost
Average Contracting Time to Prepare and Enter Application	0.5	Contracting Staff	$13.29	$13.29	$7
Processing Time for New Applications	1	GS 10	38.85	64.49	64
Processing Time for Fingerprint Cards	2	GS 12	51.15	84.91	170
Qualification Inspection Time (Includes Travel)	5	GS 5/7 to GS 13	37.65	62.50	312
Subtotal					553
Fees Incurred from New Application					−200
Total					353

Based on the hourly burdens and the hourly wage rates for various contract and Federal employees, ATF estimates that it would take on average 8.5 hours to process a Form 7 application, at a cost of $553 per application, offset by the new application fee (Form 7) of $200, for an overall net cost to the government for this rulemaking of $353. Form 8 application renewals are estimated to cost $71 every three years (or $553 less the $312 inspection time and the $170 fingerprint costs). However, the cost to review a Form 8 application ($71) is offset by the renewal fee of $90, making the net cost or overall savings to government for this rulemaking −$19 per FFL renewal.

In addition to processing Form 7 applications, ATF Industry Operations Investigators (''IOIs'') would need to perform qualification and compliance inspections. The qualification inspection occurs once during the application process and is accounted for in table 7 above. But, as discussed above, there is a recurring compliance inspection after the person becomes a licensee. For either the qualification or compliance inspection, ATF notes that the estimated five-hour inspection time for the government is more than the inspection time for the private sector, as discussed above, because ATF is including travel time for an IOI to travel to the person's location. Table 9 outlines the recurring government cost to inspect an FFL.

TABLE 9—RECURRING GOVERNMENT COSTS TO INSPECT AN FFL

Activity	Hourly burden	Staffing level	Hourly wage	Loaded hourly wage	Rounded cost
Compliance Inspection (Includes Travel)	5	GS 5/7 to GS 13	$37.65	$62.50	$312

Based on the hourly burdens and wage rates of IOIs, ATF anticipates that it costs ATF $312 to perform a compliance inspection. To summarize the overall government costs, table 10 outlines the government costs to process

[124] ATF notes that because the contracting salary is a loaded wage rate, a base wage rate (not including benefits) was not included in table 8 below.

[125] Office of Personnel Management, Salary Table 2023–DCB, *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB_h.pdf.*

[126] Congressional Budget Office, Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015, *https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf.*

[127] 1.66 Federal load rate = 1.419 private industry load rate * 1.17 multiplier factor. BLS Series ID CMU2010000000000D,CMU2010000000000P (Private Industry Compensation = $39.34)/BLS Series ID CMU2020000000000D,CMU2020000000000P (Private Industry Wages and Salaries = $27.73) = 1.419. BLS average 2022. U.S. Bureau of Labor Statistics, Database for Employee Compensation, *https://data.bls.gov/cgi-bin/srgate.*

Form 7 applications, process Form 8 renewal applications, and conduct FFL compliance inspections.

TABLE 10—SUMMARY OF GOVERNMENT COST PER LISTED ACTION

Government cost per unlicensed person	Cost
Per Application Cost (including qualification inspection)	$353
Per Renewal Cost	−19
Per Compliance Inspection Cost	312

ATF estimates that the government costs of this proposed rule include the initial application cost that occurs in the first year (including the qualification inspection), renewal costs that occur every three years after the first year, and the cost for the government to conduct a compliance inspection of an FFL in a given year (the government currently conducts compliance inspections of approximately eight percent of FFLs per year). Table 11 illustrates the 10-year government costs this proposed rule.

TABLE 11—TOTAL GOVERNMENT COSTS OF PROPOSED RULE

Year	Undiscounted	3 Percent discount rate	7 Percent discount rate
Year	Undiscounted	3%	7%
1	$8,662,620	$8,662,620	$8,662,620
2	612,456	612,456	612,456
3	612,456	612,456	612,456
4	146,196	146,196	146,196
5	612,456	612,456	612,456
6	612,456	612,456	612,456
7	146,196	146,196	146,196
8	612,456	612,456	612,456
9	612,456	612,456	612,456
10	146,196	146,196	146,196
Total	12,775,944	12,775,944	12,775,944
Annualized		1,497,730	1,819,007

Overall, the annualized government cost of this proposed rule is $1.5 million at three percent and $1.8 million at seven percent.

6. Total Cost

The total costs, therefore, take into account the private and government costs of the proposed rule, as described in sections 3 and 5 above. ATF estimates that the initial application cost (Form 7 and initial inspection) occurs in the first year, renewal costs (Form 8 renewals) occur every three years after the first year, and completion and maintenance of Forms 4473 and A&D records, and compliance inspection costs (for a subset of FFLs affected by this rulemaking), occur annually. Tables 12 and 13 illustrate the 10-year private and government costs of this proposed rule.

TABLE 12—TOTAL PRIVATE AND GOVERNMENT COSTS OF PROPOSED RULE BASED ON SME ESTIMATES [128]

Year	Undiscounted	3 Percent discount rate	7 Percent discount rate
1	$16,466,340	$15,986,738	$15,389,103
2	1,418,340	1,336,921	1,238,833
3	1,418,340	1,297,982	1,157,788
4	3,357,000	2,982,651	2,561,039
5	1,418,340	1,223,473	1,011,257
6	1,418,340	1,187,837	945,100
7	3,357,000	2,729,548	2,090,571
8	1,418,340	1,119,651	825,487
9	1,418,340	1,087,040	771,483
10	3,357,000	2,497,923	1,706,529
Total	35,047,380	31,449,764	27,697,189
Annualized		3,686,872	3,943,457

[128] The ''Undiscounted'' column represents totals from the underlying private and government cost tables. Consistent with guidance provided by OMB in Circular A–4, the ''3 Percent Discount Rate'' and ''7 Percent Discount Rate'' columns result from applying an economic formula to the number in each row of this ''Undiscounted'' column to show how these future costs over time would be valued today; they do not contain totals from other tables.

Overall, the total annualized cost of this proposed rule is $3.7 million at three percent and $3.9 million at seven percent using information based off of SME estimates.

TABLE 13—TOTAL PRIVATE AND GOVERNMENT COSTS OF PROPOSED RULE BASED ON RUSSELL SAGE FOUNDATION SURVEY AND SME ESTIMATES [129]

Year	Undiscounted	Discounted at 3 percent	Discounted at 7 percent
1	$113,060,748	$109,767,717	$105,664,250
2	11,393,712	10,739,666	9,951,709
3	11,393,712	10,426,861	9,300,663
4	43,100,460	38,294,200	32,881,135
5	11,393,712	9,828,316	8,123,559
6	11,393,712	9,542,054	7,592,111
7	43,100,460	35,044,618	26,840,800
8	11,393,712	8,994,301	6,631,244
9	11,393,712	8,732,332	6,197,424
10	43,100,460	32,070,790	21,910,088
Total	310,724,400	273,440,855	235,092,985
Annualized		32,055,610	33,471,952

Overall, using the information from the Russell Sage Foundation Survey and FIPB SME estimates, table 13 represents the upper bound estimate in which the total annualized cost of this proposed rule is $32 million at three percent and $33.4 million at seven percent.

7. Benefits

These proposed revisions will have significant public safety benefits by ensuring that ATF's regulatory definitions conform to the BSCA's statutory changes and can be relied upon by the public, and by clarifying that persons who intend to predominantly earn a profit from the repetitive purchase and resale of firearms are engaged in the business of dealing in firearms and must be licensed, even if they make few or no sales, or if they are conducting such transactions on the internet or through other mediums or forums. As part of the license application, those dealers will undergo a background check. This increases the ability to ensure that persons purchasing and selling (including bartering) firearms with the intent to earn a profit are lawfully able to do so and reduces the risk that they could pose a danger to others by trafficking in illicit firearm sales or otherwise engaging in criminal activities. Additionally, these licensed dealers must take steps to help determine that they are not selling firearms to persons prohibited from receiving or possessing such firearms under Federal, State, local, or Tribal law.

The U.S. Sentencing Commission reports that ''88.8 percent of firearm offenders sentenced under § 2K2.1 [130] [of the United States Sentencing Commission *Guidelines Manual* (Nov. 2021)] were [already] prohibited from possessing a firearm'' under 18 U.S.C. 922(g). These individuals would thus have been flagged in a background check, would have therefore been prohibited from buying a firearm from a licensed dealer after their first offense, and would not have been able to commit the subsequent firearms offense(s) if their seller had been licensed. In addition, the Commission reports that such offenders ''have criminal histories that are more extensive and more serious than other offenders'' [131] and that they are ''more than twice as likely to have a prior conviction for a violent offense compared to all other offenders.'' [132]

In another report, on ''armed career criminals'' (those who have three or more convictions for violent offenses, serious drug offenses, or both), the Commission reports that a substantial share of ''armed career criminals'' (83 percent in fiscal year 2019) had prior convictions for at least one violent offense (as opposed to solely serious drug offense convictions). This includes ''57.7 percent who had three or more [prior violent] convictions.'' [133] In other words, persons who prohibited by law from possessing firearms, as well as the more serious ''armed career criminals'' who are also prohibited, were able to obtain guns and continued to commit more violent offenses after they would have been flagged by a background check and denied a firearm if purchasing from a licensed dealer.

Such violence has a significant adverse effect on public safety. Because licensed dealers are required to conduct background checks on unlicensed transferees, another benefit of this rulemaking is to aid in preventing firearms being sold to felons or other prohibited persons, who may commit crimes and acts of violence or themselves become sources of firearms trafficking. Furthermore, these licensed dealers must also maintain firearms transaction records, which will help with criminal investigations and tracing firearms subsequently used in crimes.

In 2016, ATF distributed and discussed the above-mentioned ''engaged in the business'' guidance at gun shows to ensure that unlicensed dealers operating at gun shows became licensed, and portions of that previous guidance are incorporated in this proposed rule. This guidance was particularly directed at unlicensed persons who sell firearms as a secondary source of income to allow

[129] The ''Undiscounted'' column represents totals from the underlying private and government cost tables. Consistent with guidance provided by OMB in Circular A–4, the ''3 Percent Discount Rate'' and ''7 Percent Discount Rate'' columns result from applying an economic formula to the number in each row of this ''Undiscounted'' column to show how these future costs over time would be valued today; they do not contain totals from other tables.

[130] Section 2K2.1 provides sentencing guidelines for ''Unlawful Receipt, Possessions, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition.''

[131] *What do Federal Firearms Offenses Really Look Like?,* United States Sentencing Commission Report at 2 (July 14, 2022), *https://www.ussc.gov/research/research-reports/what-do-federal-firearms-offenses-really-look.*

[132] *Id.*

[133] *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways,* United States Sentencing Commission, at 9 (March 2021), *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf.*

them to continue to sell firearms, but as licensed dealers. Based on the FFLC, ATF found that there was an increase of approximately 567 ATF Form 7 applications to account for these unlicensed persons selling at gun shows. This prior outcome demonstrates the market response to clarifying licensing requirements and that such a response both increases the likelihood that persons engaged in the business comply with Federal licensing requirements and enhance public safety by denying persons prohibited from purchasing firearms through completion of ATF Forms 4473 and running background checks on prospective purchasers.

Finally, providing a clear option for FFLs to transfer their business inventory to another FFL when their license is terminated helps to ensure that these business inventories of firearms are traceable and do not become sources of trafficked firearms.

8. Alternatives

In addition to the requirements outlined in this proposed rule, ATF considered the following alternative approaches:

Alternative 1. A rulemaking that focuses on a bright-line numerical threshold of what constitutes being engaged in the business as a dealer in firearms. As discussed above, in the past, it has been proposed to ATF that a rulemaking should set a specific threshold or number of sales per year to define ''engaged in the business.'' ATF considered this alternative in the past and again as part of developing this proposed rulemaking.[134] However, ATF chose not to adopt this alternative for a number of reasons stated in detail above. In summary: courts have held even before the passage of the BCSA that the sale of or attempt to sell even one firearm is sufficient to show that a person is ''engaged in the business'' if that person represents to others that they are willing and able to purchase more firearms for resale; a person could structure their transactions to avoid the minimum threshold by spreading out sales over time; and firearms could be sold by unlicensed persons below the threshold number without records, making those firearms unable to be traced when they are subsequently used in a crime. Finally, the Department does not believe there is a sufficient evidentiary basis, without consideration of additional factors, to support a specific minimum number of firearms bought or sold for a person to be considered ''engaged in the business.''

The costs of implementing a specific threshold would be lower than in the primary analysis proposed in this rule. However, the Department believes it would not appropriately address the language regarding the requisite intent predominantly to earn a profit (which can include bartering) and would have unintended effects such as those summarized in the previous paragraph that would impact personal firearms transactions and decrease public safety and law enforcement's ability to trace firearms used in crimes.

Alternative 2. Publishing guidance instead of revising the regulations. Under this alternative, rather than publishing regulations further defining ''engaged in the business,'' ATF would publish only guidance documents to clarify the topics included in this proposed rule. Although ATF has determined that in addition to revising its regulations, it will also update existing guidance documents to answer any questions that the firearms industry may have, the Department has determined that issuing only guidance would be insufficient to address the issues discussed above. ATF did not select the alternative to publish only guidance documents in lieu of regulations because guidance would be insufficient as a means to inform the public in general, rather than solely the currently regulated community; guidance would not have the same legal effect and applicability as a regulation; it would not benefit from the input of public review and comment to aid in accounting for possible unintended impacts or interpretations; and it would not be able to change existing regulatory provisions on the subject of ''engaged in the business'' or impact intersecting regulatory provisions. In addition, ATF can incorporate existing guidance in a proposed rule based on its experience or in response to comments. When an agency establishes or revises legally binding requirements, it must do so through a regulation issued under the Administrative Procedure Act and Executive order provisions flowing from it. Guidance does not meet these requirements. Therefore, although the Department considered this alternative, it determined it was not in the best interest of the public.

Alternative 3. No action. Rather than promulgating a regulation, ATF could instead take no action to further clarify the BSCA's amendments to the GCA. However, the Department considered this alternative and decided against it for a number of reasons. First, as the various enforcement actions and court decisions cited above demonstrate, ATF has observed a significant level of noncompliance with the GCA's licensing requirements even prior to the BSCA. Second, on March 14, 2023, President Biden issued Executive Order 14092, requiring the Attorney General to report on agency efforts to implement the BSCA, develop and implement a plan to clarify the definition of who is engaged in the business of dealing in firearms, ''including by considering a rulemaking,'' and prevent former FFLs whose licenses have been revoked or surrendered from continuing to engage in the business of dealing in firearms.[135] Third, Congress, through the BSCA, determined that there was a need to revise the definition of ''engaged in the business'' for the first time in almost 40 years. While that by itself does not preclude ATF from using its discretion not to promulgate a formal rule, it indicates an important change to the landscape of who must have a license to deal in firearms and warrants consideration of what that means to persons who have been operating under the previous definition. It has potential effects on those who have not considered themselves to fall under the definition before and now would have to have a license. The change to the definition removed any intent to obtain ''livelihood,'' and it is reasonable to expect that those who transact in firearms would have questions about how to interpret and apply this change. This would include how it affects other aspects of existing laws and regulatory provisions that govern such transactions, as well as how other BSCA amendments, such as the new international trafficking provisions, might apply to the dealer requirements. For these reasons, the Department determined this was not a viable alternative.

Although the Department considered this alternative, it does not generate direct monetary costs because it leaves the regulatory situation as it is. Because the costs and benefits of this alternative arise from the statute itself, ATF did not include an assessment of them in this proposed rulemaking.

B. Executive Order 13132

This regulation will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive

[134] See discussion *supra* under Section I.A. ''Advance Notice of Proposed Rulemaking (1979)'' and in more detail in Section II.D. ''Presumptions that a Person is ''Engaged in the Business.''

[135] 88 FR at 16528.

Order 13132 (''Federalism''), the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

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

D. Regulatory Flexibility Act (''RFA'')

ATF performed an initial regulatory flexibility analysis of the impacts on small businesses and other entities on this proposed rule. Based on the information from this analysis, ATF has determined that this proposed rule would impact unlicensed persons who would now have to become licensed dealers to lawfully operate as a small business. Because some of these unlicensed persons may transact in low-volume firearms sales to predominantly earn a profit, the costs to become an FFL could have an impact on their overall profit from firearms transactions.

Initial Regulatory Flexibility Analysis

The RFA establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' Public Law 96–354, section 2(b), 94 Stat. 1164, 1165 (1980) (codified at 5 U.S.C. 601, *et seq.*).

Under the RFA, the agency is required to consider whether this rule would have a significant economic impact on a substantial number of small entities. Agencies must perform a review to determine whether a rule would have such an impact. If the agency determines that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA.

The RFA covers a wide range of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601(3)–(6). ATF determined that the rulemaking affects a variety of large and small businesses (see the ''Description of the Potential Number of Small Entities'' section below). Based on the requirements above, ATF prepared the following initial regulatory flexibility analysis assessing the impact on small entities from the rulemaking.

1. A description of the reasons why action by the agency is being considered.

Congress passed the BSCA, which amended the definition of engaged in the business from a person seeking to transact in firearms for livelihood and profit to a person intending predominantly to earn a profit. Moreover, on March 14, 2023, the President ordered the Attorney General to report on efforts to implement the BSCA and to develop and implement a plan to clarify the definition of ''engaged in the business'' of dealing in firearms and prevent FFLs from continuing to deal after license revocation or surrender.

2. A succinct statement of the objectives of, and legal basis for, the proposed rule.

The Attorney General is responsible for enforcing, among other statutes, the GCA, as amended. The BSCA redefined who is a regulated dealer under the GCA. This proposed rule updates the regulations to ensure the language conforms with the amended statutory provisions, and clarifies for the public how to understand and implement the statutory change and also implements Executive Order 14092.

3. A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

This proposed rule implements a statutory requirement that affects unlicensed persons who purchase and sell firearms, with the intent to profit (including barter), on a recurring basis. As persons who engage in higher-frequency firearms transactions meeting these requirements are typically already licensed as dealers, the persons impacted by this proposed rule will primarily be those who transact in low volume repetitive firearms sales. These persons likely either already are, or would become, small entities.

4. A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

ATF estimates that this proposed rule would affect at least 24,540 unlicensed persons who, as a result of changes enacted in the BSCA, are now required to obtain a Federal firearms license. Such persons would need to file a Form 7 application, pay a licensing fee, undergo a qualification inspection, maintain Form 4473 and A&D records for every firearm transaction, and undergo periodic compliance inspections. If they continue in business after three years, they would need to file a Form 8 renewal application and pay a renewal licensing fee. No professional skills are necessary to prepare or perform application or recordkeeping activities.

5. An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

This proposed rule does not duplicate or conflict with other Federal rules.

6. Descriptions of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

ATF did not find any suitable alternatives that would meet the objectives of this proposed rule that would minimize the economic impact that this rulemaking would have on small entities.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking is likely to have a significant economic impact on a substantial number of small entities under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.* Accordingly, the Department prepared an initial regulatory flexibility analysis.

F. Unfunded Mandates Reform Act of 1995

This rulemaking would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48. *See* 2 U.S.C. 1532(a).

G. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501–21, and its implementing regulations, 5 CFR part 1320, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The collections of information contained in this proposed rule are collections of information which have been reviewed and approved by OMB in accordance with

the requirements of the PRA and have been assigned an OMB Control Number.

As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The collections of information in this rulemaking are mandatory. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering, and maintaining the data needed, and completing and reviewing the collection.

Title: Application for a Federal Firearms License—ATF Form 7(5310.12)/7CR (5310.16)3.

OMB Control Number: OMB 1140–0018.

Summary of the Collection of Information: 18 U.S.C. 922 specifies a number of unlawful activities involving firearms in interstate and foreign commerce. Some of these activities cease to be unlawful when persons are licensed under the provisions of 18 U.S.C. 923. Some examples of activities that are no longer unlawful once a person becomes licensed include: engaging in the business of selling, shipping, receiving, and transporting firearms in interstate or foreign commerce, including the acquisition of curio or relic firearms acquired by collectors from out-of-state for personal collections. This collection of information is necessary to ensure that anyone who wishes to be licensed as required by 18 U.S.C. 923 meets the requirements to obtain the desired license.

Need for Information: Less frequent collection of this information would pose a threat to public safety. Without this information collection, ATF would not be able to issue licenses to persons required by law to have a license to engage in the business of dealing in firearms or shipping or transporting firearms in interstate or foreign commerce in support of that business, or acquire curio and relic firearms from out of state.

Proposed Use of Information: ATF personnel will analyze the submitted application to determine the applicant's eligibility to receive the requested license.

Description of the Respondents: Individuals or entities wishing to engage in the business of selling, shipping, receiving, and transporting firearms in interstate or foreign commerce, as well as acquiring firearms classified as curios and relics for personal collections.

Number of Respondents: 13,000 existing. New respondents due to the rule 24,540.

Frequency of Response: one time.

Burden of Response: one hour.

Estimate of Total Annual Burden: 24,540 hours (incremental change).

Title: Application for a Federal Firearms License—Renewal Application ATF Form 8 (5310.11).

OMB Control Number: OMB 1140–0019.

Summary of the Collection of Information: 18 U.S.C. Chapter 44 provides that no person may engage in the business of importing, manufacturing, or dealing in either firearms, or ammunition, without first obtaining a license to do so. These activities are licensed for a specific period. The benefit of a collector's license is also provided for in the statute. In order to continue to engage in the aforementioned firearms activities without interruption, licensees must renew their FFL by filing Federal Firearms License (''FFL'') RENEWAL Application-ATF F 8 (5310.11) Part II, prior to its expiration.

Need for Information: Less frequent use of this information collection would pose a threat to public safety, since the collected information helps ATF to ensure that the applicants remain eligible to renew their licenses.

Proposed Use of Information: ATF F 8 (5310.11) Part II, is used to identify the applicant and determine their eligibility to retain the license.

Description of the Respondents: Respondents desiring to update the responsible person (RP) information on an existing license must submit a letter in this regard, along with the completed FFL renewal application to ATF.

Number of Respondents: 34,000 existing. New respondents due to the rule 24,540.

Frequency of Response: every three years and periodically.

Burden of Response: 0.5 hours.

Estimate of Total Annual Burden: 12,270 hours (incremental change).

Title: Firearms Transaction Record—ATF Form 4473 (5300.9) and Firearms Transaction Record Continuation Sheet.

OMB Control Number: OMB 1140–0020.

Summary of the Collection of Information: The subject form is required under the authority of 18 U.S.C. 922 and 923 and 27 CFR 478.124. These sections of the GCA prohibit certain persons from shipping, transporting, receiving, or possessing firearms. All persons, including FFLs, are prohibited from transferring firearms to such persons. FFLs are also subject to additional restrictions regarding the disposition of a firearm to an unlicensed person under the GCA. For example, age and State of residence also determine whether a person may lawfully receive a firearm. The information and certification on the Form 4473 are designed so that a person licensed under 18 U.S.C. 923 may determine if the licensee may lawfully sell or deliver a firearm to the person identified in Section B, and to alert the transferee/buyer of certain restrictions on the receipt and possession of firearms. The Form 4473 should only be used for sales or transfers of firearms where the seller is licensed under 18 U.S.C. 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction.

Need for Information: The consequences of not conducting this collection of information, or conducting it less frequently, are that the licensee might transfer a firearm to a person who is prohibited from possessing firearms under Federal law. The collection of this information is necessary for compliance with the statutory requirements to verify the eligibility of a person receiving or possessing firearms under the GCA. There is no discretionary authority on the part of ATF to waive these requirements. Respondents are required to supply this information as often as necessary to comply with statutory provisions. The form is critical to the prevention of criminal diversion of firearms and enhances law enforcement's ability to trace firearms that are recovered in crimes.

Proposed Use of Information: A person purchasing a firearm from an FFL must complete Section B of the Form 4473. The buyer's answers to the questions determine if the potential transferee is eligible to receive the firearm. If those answers indicate that the buyer is not prohibited from receiving a firearm, the licensee completes Section C of the Form 4473 and contacts the FBI's NICS system or the State point of contact to determine if the firearm can legally be transferred to the purchaser.

Description of the Respondents: Unlicensed persons wishing to purchase a firearm.

Number of Respondents: 17,189,101 existing. New respondents due to the rule 24,540.

Frequency *of Response:* periodically.

Burden of Response: 0.5 hours.

Estimate of Total Annual Burden: 12,270 hours (incremental change).

Title: Records of Acquisition and Disposition, Dealers of Type 01/02 Firearms, and Collectors of Type 03

Firearms [Records of Acquisition and Disposition, Collectors of Firearms].

OMB Control Number: OMB 1140–0032.

Summary of the Collection of Information: The recordkeeping requirements as authorized by the GCA, 18 U.S.C. 923, are for the purpose of allowing ATF to inquire into the disposition of any firearm received by a licensee in the course of a criminal investigation.

Need for Information: Less frequent collection of this information would pose a threat to public safety as the information is routinely used to assist law enforcement by allowing them to trace firearms in criminal investigations.

Proposed Use of Information: This collection of information grants ATF Officers the authority to examine a collector's records for firearms traces or compliance inspections, per 27 CFR 478.23(c)(1), (2).

Description of the Respondents: Federal Firearms Licensees.

Number of Respondents: 60,790 existing. New respondents due to the rule 24,540.

Frequency of Response: annually recurring.

Burden of Response: three minutes to maintain A&D records and one hour to perform an inspection.

Estimate of Total Annual Burden: 24,540 hours in inspection time (incremental change) and 3,681 hours maintaining in A&D records (incremental change).

ATF asks for public comment on the proposed collection of information to help determine how useful the information is; whether the public can help perform ATF's functions better; whether the information is readily available elsewhere; how accurate ATF's estimate of the burden of collection is; how valid the methods for determining burden are; how to improve the quality, usefulness, and clarity of the information; and how to minimize the burden of collection.

If you submit comments on the collection of information, submit them following the ''Public Participation'' section under the **SUPPLEMENTARY INFORMATION** heading. You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information become effective, ATF will publish a notice in the **Federal Register** of OMB's decision to approve, modify, or disapprove the proposed collection.

IV. Public Participation

A. Comments Sought

ATF requests comments on the proposed rule from all interested persons. ATF specifically requests comments on:

(1) The clarity of this proposed rule, and how easy it is to understand;

(2) The various definitions and rebuttable presumptions relevant to determining when a person is ''engaged in the business'' of dealing in firearms at wholesale or retail, as described in Section II.D of this preamble, and when a person acts with the intent to ''predominantly earn a profit'' from the sale or disposition of firearms, as described in Section II.G of this preamble.

(3) Whether the rule should use inferences, factors, or some other method of determining when a person is ''engaged in the business'' of dealing in firearms or acting with the intent to ''predominantly earn a profit'', instead of, or in addition to, using presumptions of any kind, including (a) whether the criteria should function as rebuttable presumptions or permissive inferences in the administrative and civil contexts, and (b) whether and how the criteria should function differently in different types of proceedings;

(4) Whether there is additional specific conduct that would provide indicia of whether or when a person is or is not ''engaged in the business'' of dealing in firearms, or acts with the intent to ''predominantly to earn a profit'' from the sale or disposition of firearms;

(5) When and how any presumptions, inferences, or factors can or should be rebutted;

(6) Whether the rule should define ''occasional'' as that term is used in the definition of ''engaged in the business'' under 18 U.S.C. 921(a)(21)(C), and if so, how the term should be defined; and

(7) The costs or benefits of the proposed rule, and appropriate methodology and data for calculating those costs and benefits, including what sources ATF should look to, beyond ATF's own expertise, for accurate estimates of the percentage of this population that would need to obtain a license because they are ''engaged in the business'' of dealing in firearms compared to those who make occasional sales of firearms (*e.g.,* enhancement of a personal collection or for a hobby) and would not need to obtain a license.

All comments must reference this document's docket number, ATF 2022R–17, and be legible. Commenters must also include the commenter's complete first and last name and contact information. If submitting a comment through the Federal eRulemaking portal, as described in Section IV.C of this preamble, commenters should carefully review and follow the website's instructions on submitting comments. If submitting as an individual, any information provided for city, state, zip code, and phone will not be publicly viewable when ATF publishes the comment on *regulations.gov.* If submitting a comment by mail, commenters should review Section IV.B of this preamble regarding proper submission of PII. ATF may not consider, or respond to, comments that do not meet these requirements or comments containing profanity or threatening or abusive language. ATF will retain anonymous comments and those containing excessive profanity as part of this rulemaking's administrative record but will not publish such documents on *www.regulations.gov.* ATF will treat all comments as originals and will not acknowledge receipt of comments. In addition, if your comment cannot be read due to technical difficulties and ATF cannot contact you for clarification, ATF may not be able to consider your comment.

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

B. Confidentiality

ATF will make all comments meeting the requirements of this section, whether submitted electronically or on paper, available for public viewing at *www.ATF.gov,* on the internet through the Federal eRulemaking Portal, and through the Freedom of Information Act (5 U.S.C. 552). Commenters who submit by mail and who do not want their name or other PII posted on the internet should submit their comments by mail along with a separate cover sheet containing their PII. Both the cover sheet and comment must reference this docket number (ATF 2022R–17). For comments submitted by mail, information contained on the cover sheet will not appear when posted on the internet, but any PII that appears within the body of a comment will not be redacted by ATF and it will appear on the internet. Commenters who submit through the Federal eRulemaking portal and who do not want any of their PII posted on the internet should omit such PII from the body of their comment or in any uploaded attachments.

A commenter may submit to ATF information identified as proprietary or confidential business information. The commenter must place any portion of a comment that is proprietary or confidential business information under law on pages that are separated from the balance of the comment, with each page prominently marked ''PROPRIETARY OR CONFIDENTIAL BUSINESS INFORMATION'' at the top of each page.

ATF will not make proprietary or confidential business information submitted in compliance with these instructions available when disclosing the comments that it received, but will disclose that the commenter provided proprietary or confidential business information that ATF is holding in a separate file to which the public does not have access. If ATF receives a request to examine or copy this information, it will treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). In addition, ATF will disclose such proprietary or confidential business information to the extent required by other legal process.

C. Submitting Comments

Submit comments using either of the two methods described below (but do not submit the same comment multiple times or by more than one method). Hand-delivered comments will not be accepted.

• *Federal eRulemaking Portal:* ATF recommends that you submit your comments to ATF via the Federal eRulemaking portal at *www.regulations.gov* and follow the instructions. Comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that is provided after you have successfully uploaded your comment.

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

D. Request for Hearing

In accordance with 18 U.S.C. 926(b), any interested person who desires an opportunity to comment orally at a public hearing should submit a request, in writing, to the Director of ATF within the notice period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this proposed rule and the comments received in response to it will be available through the Federal eRulemaking portal, at *www.regulations.gov* (search for RIN 1140–58), and for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–8740.

Severability

Consistent with the Administrative Procedure Act, the issues raised in this proposed rule may be finalized, or not, independently of each other, after consideration of comments received. The Department intends separate aspects of any final rule that results from this proposed rule to be severable from each other, as demonstrated by the rule's structure. In the event any provision of this rule as finalized is held to be invalid or unenforceable by its terms, the remainder shall not be affected and shall be construed so as to give remaining provisions the maximum effect permitted by law.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

Authority and Issuance

For the reasons discussed in the preamble, the Department proposes to amend 27 CFR part 478 as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 1. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921–931; 44 U.S.C. 3504(h).

■ 2. Amend § 478.11 by:
■ a. Revising the definition of ''Dealer'';
■ b. Revising paragraph (c) of the definition of ''Engaged in the business'';
■ c. Adding the definitions of ''Personal collection, personal collection of firearms, or personal firearms collection'' and ''Predominantly earn a profit'' in alphabetical order;
■ d. Revising the definition of ''Principal objective of livelihood and profit''; and
■ f. Adding the definitions of ''Responsible person'' and ''Terrorism'' in alphabetical order.

The revisions and additions read as follows:

§ 478.11 Meaning of terms.

* * * * *

Dealer. Any person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker. The term shall include any person who engages in such business or occupation on a part-time basis. The term shall include such activities wherever, or through whatever medium, they may be conducted, such as at a gun show or event, flea market, auction house, or gun range or club; at one's home; by mail order; over the internet; through the use of other electronic means (*e.g.,* an online broker, online auction, text messaging service, social media raffle, or website); or at any other domestic or international public or private marketplace or premises.

* * * * *

Engaged in the business—

* * * * *

(c) *Dealer in firearms other than a gunsmith or a pawnbroker.* (1) A person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of the person's personal collection of firearms. The term shall not include an auctioneer who provides only auction services on commission by assisting in liquidating a personal collection of firearms at an estate-type auction, provided the auctioneer does not purchase the firearms, take possession of the firearms prior to the auction, or consign the firearms for sale.

(2) For purposes of this definition—

(i) The term ''purchase'' (and derivative terms thereof) means the act of obtaining a firearm in exchange for something of value;

(ii) The term ''sale'' (and derivative terms thereof, including ''resale'') means the act of providing a firearm in exchange for something of value; and

(iii) The term ''something of value'' includes money, credit, personal property (*e.g.,* another firearm or ammunition), a service, a controlled

substance, or any other medium of exchange or valuable consideration.

(3) Whether a person is engaged in the business of dealing in firearms requiring a license is a fact-specific inquiry. Selling large numbers of firearms or engaging or offering to engage in frequent transactions may be highly indicative of business activity. However, there is no minimum threshold number of firearms purchased or sold that triggers the licensing requirement. Similarly, there is no minimum number of transactions that determines whether a person is ''engaged in the business'' of dealing in firearms. For example, even a single firearm transaction or offer to engage in a transaction, when combined with other evidence (*e.g.,* where a person represents to others a willingness to acquire more firearms for resale or offers more firearms for sale), may require a license. A person shall be presumed to be engaged in the business of dealing in firearms in civil and administrative proceedings, absent reliable evidence to the contrary, when the person—

(i) Sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms;

(ii) Spends more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported gross taxable income during the applicable period of time;

(iii) Repetitively purchases for the purpose of resale, or sells or offers for sale, firearms—

(A) Through straw or sham businesses, or individual straw purchasers or sellers; or

(B) That cannot lawfully be purchased or possessed, including:

(1) Stolen firearms (18 U.S.C. 922(j));

(2) Firearms with the licensee's serial number removed, obliterated, or altered (18 U.S.C. 922(k), 26 U.S.C. 5861(i));

(3) Firearms imported in violation of law (18 U.S.C. 922(l), 22 U.S.C. 2778, or 26 U.S.C. 5844, 5861(k)); or

(4) Machineguns or other weapons defined as firearms under 26 U.S.C. 5845(b) that were not properly registered in the National Firearms Registration and Transfer Record (18 U.S.C. 922(o); 26 U.S.C. 5861(d));

(iv) Repetitively sells or offers for sale firearms—

(A) Within 30 days after the person purchased the firearms;

(B) That are new, or like new in their original packaging; or

(C) Of the same or similar kind (*i.e.,* make/manufacturer, model, caliber/gauge, and action) and type (*i.e.,* rifle, shotgun, revolver, pistol, frame, receiver, machinegun, silencer, destructive device, or 'other' firearm);

(v) Who, as a former licensee (or responsible person acting on behalf of the former licensee) sells or offers for sale firearms that were in the business inventory of such licensee at the time the license was terminated (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license), and were not transferred to a personal inventory in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a; or

(vi) Who, as a former licensee (or responsible person acting on behalf of the former licensee) sells or offers for sale firearms that were transferred to the personal inventory of such former licensee or responsible person prior to the time the license was terminated, unless:

(A) The firearms were received and transferred without any intent to willfully evade the restrictions placed on licensees by chapter 44, title 18, United States Code; and

(B) One year has passed from the date of transfer to the personal collection.

(4) Where a person's conduct does not otherwise demonstrate a predominant intent to earn a profit, the person shall not be presumed to be engaged in the business of dealing in firearms when the person transfers firearms only as bona fide gifts, or occasionally sells firearms only to obtain more valuable, desirable, or useful firearms for the person's personal collection or hobby.

(5) The activities set forth in the rebuttable presumptions in paragraphs (c)(3)(i) through (vi) of this definition are not exhaustive of the conduct that may show that, or be considered in determining whether, a person is engaged in the business of dealing in firearms.

(6) The rebuttable presumptions in paragraphs (c)(3)(i) through (vi) of this definition shall not apply to any criminal case, although they may be useful to courts in criminal cases, for example, when instructing juries regarding permissible inferences.

* * * * *

Personal collection, personal collection of firearms, or personal firearms collection. (1) Personal firearms that a person accumulates for study, comparison, exhibition, or for a hobby (*e.g.,* noncommercial, recreational activities for personal enjoyment, such as hunting, or skeet, target, or competition shooting). The term shall not include any firearm purchased for the purpose of resale or made with the predominant intent to earn a profit.

(2) In the case of a firearm imported, manufactured, or otherwise acquired by a licensed manufacturer, licensed importer, or licensed dealer, the term shall include only a firearm described in paragraph (1) of this definition that was—

(i) Acquired or transferred without the intent to willfully evade the restrictions placed upon licensees under chapter 44, title 18, United States Code;

(ii) Recorded by the licensee as an acquisition in the licensee's acquisition and disposition record in accordance with § 478.122(a), 478.123(a), or 478.125(e) (unless acquired prior to licensure and not intended for sale);

(iii) Recorded as a disposition from the licensee's business inventory to the individual's personal collection in accordance with § 478.122(a), 478.123(a), or 478.125(e);

(iv) Stored separately from, and not commingled with the business inventory, and appropriately identified as ''not for sale'' (*e.g.,* by attaching a tag), if on the business premises; and

(v) Maintained in such personal collection (whether on or off the business premises) for at least one year from the date the firearm was so transferred, in accordance with 18 U.S.C. 923(c) and 27 CFR 478.125a.

* * * * *

Predominantly earn a profit. (1) The intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided,* that proof of profit, including the intent to profit, shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this definition, a person may have the intent to profit even if the person does not actually obtain pecuniary gain from the sale or disposition of firearms.

(2) The intent to predominantly earn a profit is a fact-specific inquiry. A person shall be presumed to have the intent to predominantly earn a profit from the sale or disposition of firearms in civil and administrative proceedings, absent reliable evidence to the contrary, when the person—

(i) Advertises, markets, or otherwise promotes a firearms business (*e.g.,* advertises or posts firearms for sale, including on any website, establishes a website for offering their firearms for sale, makes available business cards, or tags firearms with sales prices), regardless of whether the person incurs expenses or only promotes the business informally;

(ii) Purchases, rents, or otherwise secures or sets aside permanent or

temporary physical space to display or store firearms they offer for sale, including part or all of a business premises, table or space at a gun show, or display case;

(iii) Makes or maintains records, in any form, to document, track, or calculate profits and losses from firearms purchases and sales;

(iv) Purchases or otherwise secures merchant services as a business (*e.g.,* credit card transaction services, digital wallet for business) through which the person makes or offers to make payments for firearms transactions;

(v) Formally or informally purchases, hires, or otherwise secures business security services (*e.g.,* a central station-monitored security system registered to a business, or guards for security) to protect business assets or transactions that include firearms;

(vi) Formally or informally establishes a business entity, trade name, or online business account, including an account using a business name on a social media or other website, through which the person makes or offers to make firearms transactions;

(vii) Secures or applies for a State or local business license to purchase for resale or to sell merchandise that includes firearms; or

(viii) Purchases a business insurance policy, including any riders that cover firearms inventory.

(3) The activities set forth in the rebuttable presumptions in paragraphs (2)(i) through (viii) of this definition are not exhaustive of the conduct that may show that, or be considered in determining whether, a person has the intent to predominantly earn a profit from the sale or disposition of firearms.

(4) The rebuttable presumptions in paragraphs (2)(i) through (viii) of this definition shall not apply to any criminal case, although they may be useful to courts in criminal cases, for example, when instructing juries regarding permissible inferences.

* * * * *

Responsible person. Any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and business practices of a corporation, partnership, or association, insofar as they pertain to firearms.

* * * * *

Terrorism. For purposes of the definitions ''predominantly earn a profit,'' and ''principal objective of livelihood and profit,'' the term ''terrorism'' means activity, directed against United States persons, which—

(1) Is committed by an individual who is not a national or permanent resident alien of the United States;

(2) Involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(3) Is intended—

(i) To intimidate or coerce a civilian population;

(ii) To influence the policy of a government by intimidation or coercion; or

(iii) To affect the conduct of a government by assassination or kidnapping.

■ 3. In § 478.57, designate the introductory text as paragraph (a) and add paragraph (b) to read as follows:

§ 478.57 Discontinuance of business.

* * * * *

(b) Upon termination of a license (*i.e.,* license revocation, denial of license renewal, license expiration, or surrender of license), the former licensee shall within 30 days, or such additional period designated by the Director for good cause:

(1) Liquidate the remaining business inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or

(2) Transfer the remaining business inventory to a personal inventory of the former licensee, or a responsible person of the former licensee, provided the recipient is not prohibited by law from receiving or possessing firearms. Except for the sale of remaining inventory to a licensee within the 30-day period (or designated additional period), a former licensee or responsible person of such licensee who resells any such inventory, including business inventory transferred to a personal inventory, is subject to the presumptions in § 478.11 (definition of ''engaged in the business'' as a dealer in firearms other than a gunsmith or pawnbroker) that apply to a person who repetitively purchased those firearms for the purpose of resale. In addition, the former licensee shall not continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.,* ''restocking'').

■ 4. In § 478.78, designate the introductory text as paragraph (a) and add paragraph (b) to read as follows:

§ 478.78 Operations by licensee after notice.

* * * * *

(b) Upon final disposition of license proceedings to disapprove or terminate a license (*i.e.,* by revocation or denial of renewal), the former licensee shall within 30 days, or such additional period designated by the Director for good cause, either:

(1) Liquidate the remaining business inventory by selling or otherwise disposing of the firearms to a licensed importer, licensed manufacturer, or licensed dealer for sale, auction, or pawn redemption in accordance with this part; or

(2) Transfer the remaining business inventory to a personal inventory of the former licensee, or a responsible person of the former licensee provided the recipient is not prohibited by law from receiving or possessing firearms. Except for the sale of remaining inventory to a licensee within the 30-day period (or designated additional period), a former licensee or responsible person of such former licensee, who resells any such inventory, including business inventory transferred to a personal inventory, is subject to the presumptions in § 478.11 (definition of ''engaged in the business'' as a dealer in firearms other than a gunsmith or pawnbroker) that apply to a person who repetitively purchased those firearms for the purpose of resale. In addition, the former licensee shall not continue to engage in the business of importing, manufacturing, or dealing in firearms by importing or manufacturing additional firearms for purposes of sale or distribution, or purchasing additional firearms for resale (*i.e.,* ''restocking'').

■ 5. In § 478.124, revise paragraph (a) to read as follows:

§ 478.124 Firearms transaction record.

(a) A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearm transaction record, Form 4473: *Provided,* that a firearms transaction record, Form 4473, shall not be required to record the disposition made of a firearm delivered to a licensee for the sole purpose of repair or customizing when such firearm or a replacement firearm is returned to the person from whom received; *provided further,* that a firearms transaction record, Form 4473, shall not be used if the sale or other disposition is being made to another licensed importer, licensed manufacturer, or licensed dealer, or a curio or relic to a licensed collector, including a sole proprietor who transfers a firearm to their personal collection in accordance with § 478.125a. When a licensee transfers a

firearm to another licensee, the licensee shall comply with the verification and recordkeeping requirements in § 478.94 and subpart H of part 478.

* * * * *

■ 6. In § 478.125a, in paragraphs (a)(2) and (3), remove the citation ''§ 478.125(e)'' and add in its place ''§§ 478.122(a), 478.123(a), or 478.125(e)''.

Dated: August 30, 2023.

Merrick B. Garland,

Attorney General.

[FR Doc. 2023–19177 Filed 9–7–23; 8:45 am]

BILLING CODE 4410–FY–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2023–7; Order No. 6659]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is conducting further proceedings and will be accepting further comments with respect to a rulemaking proceeding to consider changes to analytical principles relating to periodic reports (Proposal Two). This document invites further public comment and takes other administrative steps.

DATES: *Comments are due:* October 16, 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:

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I. Introduction

On May 26, 2023, the Postal Service filed a petition pursuant to 39 CFR 3050.11 requesting that the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports.[1] The Petition identified the proposed analytical changes as Proposal Two. In Order No. 6659 the Commission conditionally approved Proposal Two but directed the Postal Service to propose further changes to analytical principles relating to periodic reports to address what the Commission found to be outstanding issues with respect to cost identification and attribution for interagency agreements (IAAs).[2]

II. Proposal Two, Order No. 6659, and Direction for Further Proceedings

Background. The Postal Service Reform Act of 2022 [3] modified and expanded the Postal Service's ability to enter into IAAs to provide property and services to, or on behalf of, other government agencies. Specifically, 39 U.S.C. 3703 for the first time authorizes the Postal Service to enter into agreements with agencies of any state government, local government, or tribal government to provide property or nonpostal services to the public on behalf of such agencies for non-commercial purposes. At the same time, with respect to the Postal Service's pre-existing authority under 39 U.S.C. 411 to provide property and services to other Federal agencies, the PSRA specifies that ''[t]he Postal Service may establish a program to provide property and nonpostal services to other Government [*i.e.,* federal] agencies within the meaning of section 411 [4], but only if such program provides a net contribution to the Postal Service, defined as reimbursement that covers at least 100 percent of the costs attributable . . ..'' 39 U.S.C. 3704.

Under the PSRA, the Postal Service must submit a report to the Commission after the close of each fiscal year that ''analyzes costs, revenues, rates, and quality of service for each agreement or substantially similar set of agreements for the provision of property or nonpostal services under section 3703 or the program as a whole under section 3704, . . . using such methodologies as the Commission may prescribe, and in sufficient detail to demonstrate compliance with the requirements of [Chapter 37 of Title 39 of the United States Code].'' 39 U.S.C. 3705(a). Upon receiving the Postal Service's report and providing an opportunity for public comment, the Commission must make a written determination of compliance. 39 U.S.C. 3705(e).

In the Commission's FY 2022 Annual Compliance Determination,[5] the Commission directed the Postal Service to develop a proposed methodology (or methodologies) for calculating and attributing costs and revenue to IAAs authorized under 39 U.S.C. 3703 and 3704, and to initiate a rulemaking proceeding to establish such methodology (or methodologies) in accordance with 39 CFR 3050.11 by no later than May 31, 2023. *Id.* at 102. As directed, the Postal Service initiated the instant proceeding to propose a categorical approach to identifying costs and revenue for similar types, or groupings, of IAAs. Petition, Proposal Two at 2–3.

Order No. 6659 and direction for further proceedings. In Order No. 6659 the Commission conditionally approved Proposal Two, but directed the Postal Service to propose further changes to analytical principles relating to periodic reports to address specific issues that the Commission found remained unaddressed. First, the Commission directed the Postal Service to develop a proposed change in accepted analytical principles to develop a separate line item (or line items) in the Cost and Revenue Analysis (CRA) and related workbooks to enable the attribution of costs and related revenue to IAAs. Order No. 6659 at 16. Second, for agreements with government agencies that involve the provision of both postal services and property or nonpostal services, the Commission directed the Postal Service to develop a proposed change in analytical principles to separately account for the costs and revenue for those respective portions. *Id.* The Commission directed the Postal Service to file proposals related to these issues by September 29, 2023. *Id.* The Commission will then accept comments on the Postal Service's proposals until October 16, 2023. *Id.* at 18.

[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Two), May 26, 2023 (Petition).

[2] Docket No. RM2023–7, Order on Analytical Principles Used in Periodic Reporting (Proposal Two), Directing the Postal Service's Participation in Further Proceedings, and Providing Notice of Filing Attachment Under Seal, August 31, 2023 (Order No. 6659).

[3] Postal Service Reform Act of 2022 (PSRA), Public Law. 117–108, 136 Stat. 1127 (2022).

[4] Prior to the enactment of the PSRA, the Postal Service's authority for these agreements was governed by 39 U.S.C. 411, which authorizes the Postal Service to ''furnish property and services'' to ''Executive agencies within the meaning of [5 U.S.C. 105] and the Government Publishing Office. . . .'' 39 U.S.C. 411. Section 105 of Title 5 of the United States Code specifies that an '' 'Executive agency' means an Executive department, a Government corporation, and an independent establishment'' of the U.S. Government, as those terms are defined in 5 U.S.C. chapter 1. 5 U.S.C. 105.

[5] Docket No. ACR2022, Annual Compliance Determination Report, FY 2022, March 29, 2023.

III. Notice and Comment

Docket No. RM2023–7 will remain open for consideration of matters raised in Order No. 6659. More information on this docket may be accessed via the Commission's website at *http://www.prc.gov.* Interested persons may submit comments on the Postal Service's proposals no later than October 16, 2023. Pursuant to 39 U.S.C. 505, Manon A. Boudreault shall continue to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. For purposes of periodic reporting to the Commission, the Commission conditionally approves the changes in analytical principles proposed by the Postal Service in Proposal Two.
2. Docket No. RM2023–7 will remain open for consideration of the matters raised in Order No. 6659.
3. The Postal Service shall file information addressing the issues identified in the body of this Order by September 29, 2023.
4. Comments by interested persons on the Postal Service's proposals are due no later than October 16, 2023.
5. Pursuant to 39 U.S.C. 505, Manon A. Boudreault shall continue to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.
6. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2023–19363 Filed 9–7–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2023–9; Order No. 6652]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is acknowledging a recent filing requesting the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports (Proposal Four). This document informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 29, 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:

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I. Introduction

On August 28, 2023, the Postal Service filed a petition pursuant to 39 CFR 3050.11 requesting that the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports.[1] The Petition identifies the proposed analytical changes filed in this docket as Proposal Four.

II. Proposal Four

Background. The Priority Mail Transportation Cost Model is used in financial projections of the expected cost coverage for negotiated service agreements (NSAs). Petition, Proposal Four at 1. The current model was introduced in Docket No. R2006–1 and is updated annually in the Annual Compliance Review (ACR), most recently in Docket No. ACR2022.[2] The Postal Service states that the model disaggregates the product-level transportation costs by zone and the resulting cost per cube and cost per pound by zone are applied to a customer's weight and zone profile in order to generate forward-looking cost projections for Priority Mail included in any NSA. Petition, Proposal Four at 1. These projections rely on prior fiscal year's costs with inflation factors applied to reflect the expected changes in costs due to broader economic conditions during the first full year of the NSA. *Id.* The Postal Service states that, however, these projections do not reflect expected changes in costs due to Postal Service's changing operational conditions during the first full year of the NSA. *Id.* Thus, the Postal Service proposes several changes to the Priority Mail Transportation Cost Model in Proposal Four to reflect these types of changes more accurately in Priority Mail transportation costs.

Proposal. The Postal Service proposes several changes to the Priority Mail Transportation Cost Model.

First, the Postal Service proposes a correction to the base year model to reflect that a portion of zone 6 pieces utilized distance-related surface transportation during fiscal year (FY) 2022. *Id.* at 2. The Postal Service states that the current model assumes that zone 6 pieces are transported entirely by air. *Id.* The Postal Service states that the correction is made by extending the existing methodology used for zones 1–5 up to zone 6. *Id.*

Second, once the correction to the base year model has been made, the Postal Service proposes the following sequence of actions to adjust the transportation costs by zone to reflect changes in the split between air and surface transportation occurring in the subsequent year due to Postal Service's network change. *Id.*

A. Collect the proportions of priority mail on air and surface transportation by zone from the Product Tracking and Reporting (PTR) system, for both the base year and the month most recently ended. *Id.*

B. Compare the base year's data with the most recent month's data and calculate the change in the percentage of Priority Mail transported on air vis-à-vis surface for each zone. *Id.* at 3.

1. If the absolute change from the base year percentage is less than five percentage points for a zone, then no adjustment to the base year costs is made. *Id.*

2. If the absolute change from the base year percentage is more than five percentage points for a zone, then the air and surface costs for that zone are adjusted by the following method:

a. The cube-related costs are divided into air-related, distance-related surface, and non-distance-related surface. *Id.* The Postal Service states that air-related costs include both the air costs and the surface costs associated with a connection to air. *Id.*

b. The weight-related costs are fully air-related. *Id.*

c. The non-distance-related surface costs are excluded from the adjustment and remain unchanged. *Id.* The Postal Service states that these are generally

[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Four), August 28, 2023 (Petition). Proposal Four is attached to the Petition. The Postal Service also filed a notice of filing of non-public material relating to Proposal Four. Notice of Filing of USPS–RM2023–9–NP1 and Application for Nonpublic Treatment, August 28, 2023.

[2] *Id.* (citing Docket No. ACR2022, Library Reference USPS–FY22–NP27, December 29, 2022).

local transportation costs, which would not be affected by a change in the long-distance transportation costs. *Id.*

d. The air-related costs (for both cube-related and weight-related costs) are adjusted based on the percentage change in the proportion of Priority Mail transported on air for that zone. *Id.*

e. The distance-related surface costs are adjusted based on the percentage change in the proportion of Priority Mail transported on surface for that zone. *Id.* at 4.

The Postal Service states that this methodology can be updated and applied monthly to ensure that the transportation costs reflect the most recent operational conditions as operational changes occur throughout the year. *Id.*

The Postal Service also states that there are two exceptions to this methodology. First, for any NSAs filed during January, the transportation adjustment from November will be used instead of the adjustment from December. *Id.* The Postal Service explains that this is because the air and surface proportions during peak season are considerably different from the rest of the fiscal year and would not be predictive of the costs that would be incurred during the first full year of the NSA. *Id.* Second, for Priority Mail Non-Published Rates agreements filed in Docket No. CP2020–170, instead of applying the adjustment every month, the adjustment will only be applied when the price floors are updated every year. *Id.*

The Postal Service notes that this methodology would only be used for forward-looking financial projections, and NSA cost coverage reported during the ACR would still be calculated using the average costs for the FY. *Id.* at 4–5.

Rationale. The Postal Service explains that due to the changes in transportation network in FY 2023, the FY 2022 costs for Priority Mail may no longer be predictive of the expected costs for Priority Mail NSAs being negotiated through the end of calendar year 2023. *Id.* at 5. The Postal Service states that similarly, the FY 2023 costs may also not be predictive of the costs for Priority Mail NSAs being negotiated during calendar year 2024, because of network changes scheduled to take place throughout FY 2024. *Id.* The Postal Service asserts that Proposal Four provides a methodology that uses current census data from PTR to adjust the base FY transportation costs to reflect the most recent operational changes, which will be an improvement in the accuracy of the projected cost coverage of NSAs. *Id.*

Impact. According to the Postal Service, the proposed changes have no impact on any product-level costs such as those that would have been reported in the FY 2022 Public Cost and Revenue Analysis Report, because the proposal concerns only the reporting of Priority Mail transportation costs by zone. *Id.* at 5–6. The Postal Service provides the impact for each component by zone and the combined impact in Library Reference USPS–RM2023–9–NP1 under seal. *Id.* at 5.

III. Notice and Comment

The Commission establishes Docket No. RM2023–9 for consideration of matters raised by the Petition. More information on the Petition may be accessed via the Commission's website at *http://www.prc.gov.* Interested persons may submit comments on the Petition and Proposal Four no later than September 29, 2023. Pursuant to 39 U.S.C. 505, Madison Lichtenstein is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2023–9 for consideration of the matters raised by the Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Four), filed August 28, 2023.

2. Comments by interested persons in this proceeding are due no later than September 29, 2023.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Madison Lichtenstein to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2023–19361 Filed 9–7–23; 8:45 am]

BILLING CODE 7710–FW–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2360

[BLM_HQ_FRN_MO4500173644]

RIN 1004–AE95

Management and Protection of the National Petroleum Reserve in Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management (BLM) is proposing a new rule to govern the management of surface resources and Special Areas in the National Petroleum Reserve in Alaska (NPR–A), consistent with its duties under the Naval Petroleum Reserves Production Act (NPRPA), Federal Land Policy and Management Act (FLPMA), and other authorities. The proposed rule would revise the framework for designating and assuring maximum protection of Special Areas' significant resource values, and would protect and enhance access for subsistence activities throughout the NPR–A. It would also incorporate aspects of the NPR–A Integrated Activity Plan (IAP) approved in April 2022. The proposed rule would have no effect on currently authorized oil and gas operations in the NPR–A. We solicit comments on all aspects of this proposed action.

DATES: Please submit comments on this proposed rule to the BLM on or before November 7, 2023. The BLM is not obligated to consider any comments received after this date in making its decision on the final rule.

Information Collection Requirements: This proposed rule includes existing and a proposed new information-collection requirement that must be approved by the Office of Management and Budget (OMB). If you wish to comment on the information-collection requirements, please note that such comments should be sent directly to the OMB, and that the OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to the OMB on the proposed information-collection revisions is best assured of being given full consideration if the OMB receives it by November 7, 2023.

ADDRESSES:

Mail, Personal, or Messenger Delivery: U.S. Department of the Interior, Director

(630), Bureau of Land Management, 1849 C St. NW, Room 5646, Washington, DC 20240, Attention: 1004–AE95.

Federal eRulemaking Portal: https://www.regulations.gov. In the Searchbox, enter ''RIN 1004–AE95 and click the ''Search'' button. Follow the instructions at this website.

For Comments on Information—Collection Activities

Written comments and suggestions on the information-collection requirements should be submitted by the date specified (see **DATES**) to *www.reginfo.gov/public/do/PRAMain.* Find this specific information-collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. If you submit comments on these information-collection burdens, you should provide the BLM with a copy at one of the addresses shown earlier in this section, so that we can summarize all written comments and address them in the final rulemaking. Please indicate ''Attention: OMB Control Number 1004–XXXX (RIN 1004–AE95) regardless of the method used to submit comments on the information collection burdens. Comments not pertaining to the proposed rule's information-collection burdens should not be submitted to OMB. The BLM is not obligated to consider or include in the Administrative Record for the final rule any comments that are improperly directed to OMB.

FOR FURTHER INFORMATION CONTACT: James Tichenor, Advisor—Office of the Director, at 202–573–0536 or *jtichenor@blm.gov* with a subject line of ''RIN 1004–AE95.'' For questions relating to regulatory process issues, contact Faith Bremner at *fbremner@blm.gov.*

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. 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. For a summary of the proposed rule, please see the proposed rule summary document in docket BLM–2023–0006 on *www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

If you wish to comment on this proposed rule, you may submit your comments to the BLM by mail, personal or messenger delivery during regular hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays, or through *https://www.regulations.gov* (see the **ADDRESSES** section).

Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, explain the reason for any changes you recommend, and include any supporting documentation. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing. The BLM is not obligated to consider or include in the Administrative Record for the proposed rule comments that we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed earlier (see **ADDRESSES**).

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

II. Background

A. Introduction

This proposed rule would revise the management framework for surface resources throughout the NPR–A and Special Areas in the NPR–A. The BLM has not updated this framework in the more than 45 years since the original and still current rule for management of NPR–A surface resources and Special Areas was promulgated in 1977. 42 FR 28721 (June 3, 1977). Currently, the legal standards and procedures that govern the NPR–A are scattered throughout several statutes, regulations, plans, and guidance documents. This proposed rule would provide a more comprehensive guide to managing the NPR–A. It would improve upon the existing regulations' standards and procedures to balance oil and gas activities with the protection of surface resources in the NPR–A; designate and assure maximum protection of Special Areas' significant resource values; and maintain and enhance access for long-standing subsistence activities. The proposed rule would also implement statutory provisions that post-date the current regulations, including the Department of the Interior Appropriations Act, Fiscal Year 1981, which directed the Secretary to ''conduct an expeditious program of competitive leasing of oil and gas'' in the NPR–A, while ''provid[ing] for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on . . . surface resources . . . .'' Public Law 96–514, 94 Stat. 2957 (1980). The proposed rule would not affect existing leases in the NPR–A.

B. Brief Administrative History of the NPR–A

In the early 20th century, the Federal government established several naval petroleum reserves on public land, including the NPR–A, which President Warren G. Harding designated in 1923. Exec. Order 3797–A. The NPR–A extends from the north slope of the Brooks Range to the Arctic Coast and encompasses approximately 23 million acres of public land.

In the decades that followed, the U.S. Navy began exploring for oil and gas in the NPR–A; however, by the 1970s, as Congress began debating the role of the naval petroleum reserves within the context of the nation's changing energy needs, the NPR–A remained ''largely unexplored and almost completely undeveloped.'' H.R. Rep. No. 94–156, at 3 (1975). In 1976, Congress passed the NPRPA, which transferred management of the NPR–A to the Department of the Interior (DOI) and directed the President to prepare a study to ''determine the best overall procedures'' for exploring, developing, and transporting the reserve's oil and gas resources. Public Law 94–258, section 105 (1976) (codified at 42 U.S.C. 6505(b)).

In the NPRPA, Congress sought to strike a balance between exploration and ''the protection of environmental, fish and wildlife, and historical or scenic values'' in the NPR–A. It did so by directing the Secretary to ''promulgate such rules and regulations as he [or she] deems necessary and appropriate for the protection of such values within the reserve.'' 42 U.S.C. 6503(b). The Conference Report explained that the Act would immediately vest responsibility for protection of the NPR–A's ''natural, fish

and wildlife, scenic and historical values . . . in the Secretary of the Interior . . . so that any activities which are or might be detrimental to such values will be carefully controlled.'' H.R. Conf. Rep. No. 94–942 (1976). The report stated the Conference Committee's expectation ''that the Secretary will take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances throughout the reserve.'' *Id.*

In the same Act, Congress directed that ''[a]ny exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.'' 42 U.S.C. 6504(a). The Conference Report elaborated that the Act would ''immediately authorize the Secretary to require that the exploration activities within these designated areas be conducted in a manner designed to minimize adverse impacts on the values which these areas contain.'' H.R. Conf. Rep. No. 94–942 (1976). The ''maximum protection'' standard is an unusually high protective bar in comparison to other statutes granting authority to the BLM. *See, e.g.,* 43 U.S.C. 1632; 16 U.S.C. 7202(c)(2).

1. Special Area Designations

There are currently five Special Areas in the NPR–A that protect a wide range of significant subsistence, recreational, fish and wildlife, historical, and scenic values. Responding to the congressional mandate to protect the values of highly sensitive areas in the NPR–A, particularly Teshekpuk Lake and the Utukok River Uplands, which the NPRPA specifically identified for protection, the Secretary in 1977 delineated the boundaries of those two congressionally designated Special Areas and also designated a third: the Colville River Special Area. 42 FR 28723 (June 3, 1977). The Secretary specifically identified the significant resource values to be protected for each of the three Special Areas:

- *Colville River:* ''The central Colville River and some of its tributaries provide critical nesting habitat for the Arctic peregrine falcon, an endangered species. The bluffs and cliffs along the Colville River provide nesting sites with the adjacent areas being utilized as food hunting areas. . . . A total area of approximately 2,300,000 acres within the reserve is identified for inclusion in the Colville River special area.'' *Id.*
- *Teshekpuk Lake:* ''The Teshekpuk Lake and its watershed are an important nesting, staging, and molting habitat for a large number of ducks, geese, and swans. Because of its importance to these migratory birds and numerous other waterbirds, a total of approximately 1,734,000 acres is identified as the Teshekpuk Lake special area.'' *Id.*
- *Utukok River Uplands:* ''The Utukok River Uplands special area contains critical habitat for caribou. The critical decline in the population level of the western Arctic caribou herd (from 70,000 in 1975 to 35,000 in 1976) necessitates maximum protection of this area, which is ordinarily the calving territory for this herd. . . . Because of the nomadic nature of the caribou, a large area encompassing approximately 4,032,000 acres is included within this area.'' *Id.*

In 1999, the Secretary expanded the Colville River and Teshekpuk Lake Special Areas. The Secretary added ''much of the Kikiakrorak and Kogosukruk Rivers and an area approximately two miles on either side of these rivers'' to the Colville River Special Area, increasing its size to 2.44 million acres.[1] The Secretary also added the 10,000-acre Pik Dunes Land Use Emphasis Area to the Teshekpuk Lake Special Area.[2]

In 2004, the Secretary designated a fourth Special Area, Kasegaluk Lagoon, which encompasses 97,000 acres. 70 FR 9096 (Feb. 24, 2005). The Kasegaluk Lagoon Special Area is located in the northwestern corner of the NPR–A and includes important habitat for marine mammals, among other values.[3]

In 2013, the Secretary made several decisions concerning Special Areas. First, the Secretary designated a fifth Special Area: Peard Bay. The 107,000-acre area was designated to ''protect haul-out areas and nearshore waters for marine mammals and a high use staging and migration area for shorebirds and waterbirds.''[4] Second, the Secretary expanded the Teshekpuk Lake Special Area by 2 million acres ''to encompass all the roughly 30-to-50-mile band of land valuable for bird and caribou habitat between Native-owned lands near Barrow and Native-owned lands near Nuiqsut . . . .''[5] Third, the Secretary expanded the Utukok River Uplands Special Area to 7.1 million acres ''to more fully encompass prime calving and insect-relief habitat within the NPR–A . . . .''[6] Finally, the Secretary broadened the purpose of the Colville River Special Area to include the ''protect[ion of] all raptors, rather than the original intent of protection for arctic peregrine falcons.''[7]

The BLM currently manages all five Special Areas in accordance with the NPR–A IAP Record of Decision (ROD) of April 2022. The IAP provides for the management of the NPR–A, designates areas within the NPR–A for oil and gas leasing, infrastructure, and special protections, and identifies stipulations and required operating procedures to mitigate the impact of oil and gas and other permitted activities.[8] The first IAP, which the BLM finalized in 1998, addressed management of the northeast NPR–A. This IAP superseded a 1983 oil and gas leasing environmental impact statement (EIS), which, until 1998, controlled leasing decisions throughout the NPR–A. In 2004 the BLM issued a separate IAP for the northwest NPR–A, and in 2013, the BLM approved an IAP that addressed activities and resources throughout the NPR–A.

The current IAP, adopted in April 2022, was informed by a Final EIS issued by the agency in 2020. The EIS evaluated a range of alternatives for managing oil and gas activities and resources in the NPR–A. These alternatives were informed and shaped by extensive outreach efforts with the public and stakeholders, including:

- *Scoping:* During the scoping period from November 21, 2018, to February 15, 2019, the BLM held eight public meetings in Alaska and received approximately 56,000 comment submissions, including form letters.
- *Public Review of the Draft IAP/EIS:* During the comment period for the Draft IAP/EIS from November 25, 2019,

[1] BLM, Colville River Special Area (CRSA) Management Plan Environmental Assessment (EA) 1 (July 2008), *available at https://eplanning.blm.gov/public_projects/nepa/5251/160692/196467/Colville_River_Special_Area_EA.pdf;* Designation of Additions to Special Areas in NPR–A; Alaska, 64 FR 16,747 (April 6, 1999).

[2] 64 FR 16747; BLM, NPR–A Final Integrated Activity (IAP) Plan/Environmental Impact Statement (EIS) 355 (Nov. 2012), *available at https://eplanning.blm.gov/public_projects/nepa/5251/41003/43153/Vol1_NPR-A_Final_IAP_FEIS.pdf.*

[3] BLM, Northwest NPR–A IAP/EIS Record of Decision (ROD) 4 (Jan. 2004), *available at https://web.archive.org/web/20041204130751/http://www.ak.blm.gov/affairs/press/pr2003/Final_Northwest_NPR-A_ROD.pdf.*

[4] BLM, NPR–A IAP ROD 4 (Feb. 2013), *available at https://eplanning.blm.gov/public_projects/nepa/5251/42462/45213/NPR-A_FINAL_ROD_2-21-13.pdf.*

[5] *Id.* at 19.

[6] *Id.* at 4.

[7] *Id.*

[8] BLM, NPR–A IAP ROD 2–3 (Apr. 2022), *available at https://eplanning.blm.gov/public_projects/117408/200284263/20058238/250064420/2022_NPRA_IAP_ROD_508.pdf.*

through February 5, 2020, the BLM held eight public meetings in Alaska and received more than 82,000 comments, including form letters and signed petitions.

- Comments received after the Final IAP/EIS was released and prior to the ROD: In reaching the decision in the 2022 ROD, the BLM reviewed and fully considered comments received after distribution of the Final IAP/EIS on June 26, 2020. The comments did not identify any significant new circumstances or information related to environmental concerns bearing upon the proposed action or its impacts. Instead, they generally reflected concerns already raised by comments submitted during scoping and the public's review of the Draft IAP/EIS.

In addition to the above, the current IAP benefited from suggestions and careful review of the analysis in the IAP/EIS by several cooperating agencies: the Bureau of Ocean Energy Management, Iñupiat Community of the Arctic Slope, National Park Service, North Slope Borough, State of Alaska, and U.S. Fish and Wildlife Service. During the IAP/EIS process, the BLM consulted with:

- Tribes as required by a Presidential Executive Memorandum dated April 29, 1994;
- Communities, Tribal organizations, and Native corporations on the North Slope;
- The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration—Fisheries pursuant to the Endangered Species Act; and
- Alaska's State Historic Preservation Office pursuant to the National Historic Preservation Act.

Pursuant to Alaska National Interest Lands Conservation Act (ANILCA) section 810(a)(1) and (2), the BLM also conducted hearings in North Slope communities to gather comments regarding potential impacts to subsistence use resulting from the alternatives considered in the IAP/EIS.

2. Oil and Gas Leasing in the NPR–A

In 1980, Congress authorized competitive leasing of Federal oil and gas resources in the NPR–A. Public Law 96–514 (1980) (codified at 42 U.S.C. 6506a(a)). The BLM held two NPR–A lease sales in 1982 and one each in 1983 and 1984.[9] After receiving no bids during the 1984 lease sale and determining that the oil and gas industry had ''little interest in another lease sale,'' the BLM discontinued sales in the NPR–A for the next 15 years.[10]

In the 1990s, following technological advances and successful development on nearby State lands, industry expressed a desire to resume leasing in the NPR–A.[11] The BLM restarted lease sales in 1999 and, over the next 2 decades, held a total of 15 sales for the NPR–A. These sales initially generated considerable bonus bid revenue for the Federal government and the State of Alaska, as the BLM collected an average of $74 million in bonus bids at sales held in 1999, 2002, and 2004.[12] However, bid revenue dropped off significantly as lands in the NPR–A with the highest potential for development were leased. Between 2006 and 2019, the BLM received an average of just $6 million in bonus bids per sale, and millions of acres offered for lease went unsold. Between 1999 and 2019, the BLM offered nearly 60 million acres of leases in the NPR–A but received bids on just 12 percent of that acreage.[13]

C. Statutory Authority for Managing the NPR–A

1. NPRPA

The NPRPA is the primary source of management authority for the NPR–A. Under the NPRPA, the Secretary must ''assume all responsibilities'' for ''any activities related to the protection of environmental, fish and wildlife, and historical or scenic values'' and ''promulgate such rules and regulations as he [or she] deems necessary and appropriate for the protection of such values within the reserve.'' 42 U.S.C. 6503(b).

Congress has also directed the Secretary to ''conduct an expeditious program of competitive leasing of oil and gas'' in the NPR–A. *Id.* at 6506a(a). But the Secretary must ensure that all activities taken pursuant to the NPRPA ''include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources'' throughout the NPR–A. *Id.* at 6506a(b).

The NPRPA also authorizes the Secretary to designate Special Areas to protect ''significant subsistence, recreational, fish and wildlife, or historical or scenic value[s]'' in the NPR–A and provides that any ''exploration'' in Special Areas ''shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.'' *Id.* at 6504(a). Congress enacted that provision in 1976, prior to its authorization of competitive leasing in 1980. As a result, that provision expressly references only ''exploration'' and not leasing or other oil and gas activities. Nonetheless, the BLM has long interpreted that language to require maximum protection of Special Areas' significant resource values from the impacts of all oil and gas activities.[14] In 1980, when Congress authorized the Secretary to lease oil and gas in the NPR–A, it expressly required the BLM to ''mitigate reasonably foreseeable and significantly adverse effects on surface resources'' throughout the NPR–A. 42 U.S.C. 6506a(b). That mandate mirrored the 1976 Conference Committee's statement that ''it . . . expected . . . the Secretary will take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances throughout the reserve'' and not solely in Special Areas. H.R. Rep. 94–942, at 21 (1976). The 1980 Act also provided that ''any exploration or production undertaken pursuant to this section be in accordance with section 104(b) of the Naval Petroleum Reserves Production Act of 1976.'' 90 Stat. 2965. The referenced section of the NPRPA is the maximum protection provision codified at section 6504(a), and thus the maximum protection provision applies to production activities as well as exploration. In any event, it would make little sense for Congress to require maximum protection of surface values from exploration while requiring lesser protection from the greater impacts of oil and gas development. Accordingly, in the BLM's longstanding view, reading

[9] U.S. Geological Survey, The NPR–A Data Archive 2 (Mar. 2001), *available at https://pubs.usgs.gov/fs/fs024-01/fs024-01.pdf.*

[10] BLM, Northeast NPR–A Final IAP/EIS (Aug. 1998), *available at https://web.archive.org/web/20001018022001/http:/aurora.ak.blm.gov/npra/final/html/contents_vol1.html.*

[11] *Id.*

[12] BLM, NPR–A Sale Statistics 1999 to Present, *available at https://www.blm.gov/sites/blm.gov/files/documents/files/Oil_Gas_Alaska_NPR-A_LeaseSale_Statistics_1999toPresent.pdf.*

[13] *Id.*

[14] *See, e.g.,* BLM, NPR–A Final IAP/EIS at 3–338 (June 2020), *available at https://eplanning.blm.gov/public_projects/117408/200284263/20020421/250026625/Volume%202_Appendices%20B-Y.pdf;* BLM, Northeast NPR–A IAP/EIS ROD 13 (Oct. 1998) BLM, Amendment to the Northeast NPR–A IAP/EIS ROD 22 (Jan. 2006) (''Maximum protection of important surface resources is provided in Special Areas designated by the Secretary through a combination of prohibitions, restrictions, and stipulations restricting oil and gas facilities and other activities that might adversely impact wildlife habitat and subsistence use areas.''), *available at https://web.archive.org/web/20170212030656/https://www.blm.gov/style/medialib/blm/ak/aktest/planning/ne_nprа_final_supplement.Par.62144.File.dat/nprа_final_app_l.pdfhttps://web.archive.org/web/20170301153536/https:/www.blm.gov/style/medialib/blm/ak/aktest/planning/ne_nprа.Par.77875.File.dat/nerod_122205final.pdf.*

those two provisions (42 U.S.C. 6504(a) and 6506a(b)) together, Congress intended that BLM would provide for heightened (*i.e.,* maximum) protection from the impacts of all oil and gas activities in Special Areas, but provide for lesser protection (mitigating reasonably foreseeable significant impacts) elsewhere throughout the Reserve. Interpreting the special areas provision (6504(a)) to apply *only* to exploration activities—when Congress chose *not* to repeal that provision when it authorized leasing,—would lead to the illogical result that BLM is required to apply a higher standard of protection for exploration, only to allow the greater impacts of oil and gas development to harm those same resources. That is, in the BLM's longstanding view, inconsistent with Congressional intent.

2. Other Authorities

Other authorities that guide management of the NPR–A include FLPMA and the ANILCA. Although Congress in 1980 exempted the NPR–A from FLPMA's land use planning and wilderness study requirements, 42 U.S.C. 6506a(c), it did not exempt the NPR–A from FLPMA's other mandates. Hence, the BLM must still ''take any action necessary to prevent unnecessary or undue degradation'' of all BLM-administered public lands, including within the NPR–A. 43 U.S.C. 1732(b).

Under section 810 of ANILCA, the BLM must ''evaluate the effect'' of proposed oil and gas activities ''on subsistence uses and needs . . . .'' 16 U.S.C. 3120(a). If such activities will ''significantly restrict subsistence uses,'' then the BLM must hold hearings in affected communities, limit activities to ''the minimal amount of public lands necessary,'' and take ''reasonable steps . . . to minimize adverse impacts upon subsistence uses and resources . . . .'' *Id.* Fulfilling section 810's requirements is of crucial importance for the NPR–A, as over 40 communities utilize its resources for subsistence purposes.[15]

D. Current Conditions

Conditions in the NPR–A are changing rapidly, as the Arctic continues to warm more than twice as fast as the rest of the Earth.[16] This is causing disruptions to natural ecosystems, Native communities, and subsistence use patterns throughout the NPR–A. Notable changes include accelerating permafrost degradation; impairment of sensitive wildlife habitat and movement corridors, particularly for caribou; alterations in plant communities; and impacts on subsistence activities.[17] From a management standpoint, climate change is ''introduc[ing] substantial uncertainty,'' particularly ''in predicting demographic trends of species in the area[,] and will make the predicted impacts of development more difficult to accurately assess.'' [18]

At the same time, oil and gas development is continuing in the NPR–A, and this proposed rule would have no effect on existing activities. Approximately 2.5 million acres of the NPR–A are currently leased. The bulk of existing leases are clustered within an area of high development potential between Teshekpuk Lake and the Colville River.[19] Outside of this area, the NPR–A's development potential is medium and low.[20] Production is occurring on two pads in the Greater Mooses Tooth (GMT) Unit immediately west of the community of Nuiqsut. Additional development is planned in the Beartooth Unit, including under the Willow Master Development Plan (MDP), which the BLM approved on March 12, 2023. When fully built out, the Willow project will include three pads with up to 199 wells, a network of roads and pipelines, a central processing facility, and an operations center.[21] In conjunction with the approval of the Willow MDP, the project proponent voluntarily agreed to relinquish approximately 68,000 acres of leases in the NPR–A, including approximately 60,000 acres in the Teshekpuk Lake Special Area.[22] This relinquishment, along with additional provisions adopted in the Willow MDP ROD, will create an additional buffer from exploration and development activities near the calving grounds and migratory routes for the Teshekpuk Lake caribou herd, an important subsistence resource for nearby Alaska Native communities.[23] Significant surface resources are found throughout the NPR–A, but are concentrated in the Teshekpuk Lake Special Area and the other Special Areas. These resources include:

- *Caribou:* Because caribou exhibit high fidelity to calving grounds, herds are identified based on the location of those grounds.[24] The NPR–A contains extensive calving grounds for two herds: the Teshekpuk Caribou Herd and the Western Arctic Caribou Herd.[25] During most years, the highest density of calving and post-calving use for the Teshekpuk herd occurs southeast of Teshekpuk Lake. Based on the results of a 2022 photo-census, the Teshekpuk herd population appears stable in spite of low birth rates and high harvest levels.[26] The principal calving grounds of the Western Arctic herd are located in the Utukok River Uplands Special Area. After reaching a recorded peak population of 243,000 animals in the 1970s, the Western Arctic herd has declined in recent years.[27] According to the Alaska Department of Fish & Game, the Western Arctic herd population now stands at roughly 164,000 animals. For this reason, the Western Arctic Caribou Herd Working Group recently designated the herd as ''Preservative, Declining''—a management designation that triggers harvest and other restrictions—and recommended strengthening protections for the Western Arctic's calving grounds in the NPR–A.[28]
- *Birds:* Concentrations of shore and waterbirds in the NPR–A are among the highest in the Arctic coastal plain. In recognition of this, the National Audubon Society has identified seven Important Bird Areas in the NPR–A, including three within the Colville River, Kasegaluk Lagoon, and Teshekpuk Lake Special Areas. The East

[15] BLM, Determination of NEPA Adequacy (DNA): NPR–A IAP 2020 Final EIS Evaluation 9 (Apr. 2022), *available at https://eplanning.blm.gov/public_projects/117408/200284263/20058231/250064413/NPRA%20IAP%20DNA%20signed%20508.pdf.*

[16] National Oceanic and Atmospheric Administration, 2022 Arctic Report Card, *available at https://www.arctic.noaa.gov/Report-Card/Report-Card-2022.*

[17] BLM, Willow Master Development Plan (MDP) Supplemental EIS (SEIS) 37–38, 148–49, 415–16, 422 (Jan. 2023), *available at https://eplanning.blm.gov/public_projects/109410/200258032/20073121/250079303/Willow%20FSEIS_Vol%201_Ch%201-Ch%205.pdf.*

[18] *Id.* at 413–14.

[19] 2020 NPR–A IAP Final EIS at B–3 (June 2020).

[20] *Id.* at B–5.

[21] BLM, Willow MDP ROD 3 (Mar. 2023), *available at https://eplanning.blm.gov/public_projects/109410/200258032/20075029/250081211/2023%20Willow%20MDP%20Record%20of%20Decision.pdf.*

[22] DOI, Interior Department Substantially Reduces Scope of Willow Project (Mar. 13, 2023), *available at https://doi.gov/pressreleases/interior-department-substantially-reduces-scope-willow-project.*

[23] *Id.*

[24] Willow MDP SEIS at 224.

[25] 2020 NPR–A IAP Final EIS at 3–180.

[26] Willow MDP SEIS at 224.

[27] 2020 NPR–A IAP Final EIS at 3–181–82; *see also* Western Arctic Caribou Herd Working Group, Draft—2022 Meeting Summary 16–17, *available at https://westernarcticcaribou.net/wp-content/uploads/2023/02/2022-WACH-WG-Meeting-Summary-DRAFT-for-WACHWG-approval-at-2023-2.14.2023.pdf.* ''Primary causes of mortality are predation, 'unknown'. . . . Since 2005, the herd has had more years of decline than increase or stability, with cow mortality higher and calf recruitment lower.''

[28] Western Arctic Caribou Herd Working Group, Draft—2022 Meeting Summary 16–17, *available at https://westernarcticcaribou.net/wp-content/uploads/2023/02/2022-WACH-WG-Meeting-Summary-DRAFT-for-WACHWG-approval-at-2023-2.14.2023.pdf.*

Asian-Australasian Flyway Partnership (EAAFP) has also designated the Qupałuk EAAFP Flyway Network Site within the Teshekpuk Lake Special Area.[29] The lake contains an ''exceptional'' breeding and molting ground for geese and other waterfowl, as an estimated 573,000 birds breed at the lake. The NPR–A also provides habitat for two threatened species—the spectacled eider and the Alaska breeding population of Steller's eider—and 11 BLM Alaska special status species. Many of the bird populations breeding in the Arctic have been in decline since the 1980s; shorebirds as a group have declined by about half and land-birds by about 20 percent.[30]

- *Fish:* Fish are widely distributed in the NPR–A's extensive network of lakes, ponds, alluvial and beaded streams, and adjacent wetlands. The most common fish species are Arctic grayling, broad whitefish, burbot, least cisco, Arctic cisco, Arctic flounder, round whitefish, humpback whitefish, and ninespine stickleback. The NPR–A also provides ''essential'' habitat for several species of Pacific salmon.[31] Many fish species, particularly anadromous species, migrate both locally and extensively between major drainages to access habitats that support various life history stages.[32] Most of these habitats currently exhibit few, if any, impacts from human activities.[33]
- *Marine mammals:* Eleven species of marine mammals are found in or near the NPR–A, including six cetaceans (bowhead whales, minke whales, gray whales, killer whales, beluga whales, and narwhals), four pinnipeds (pacific walrus, bearded seals, spotted seals, and ringed seals), and the polar bear; four of these species are listed as threatened or endangered under the ESA. Special Areas provide important habitat for many marine mammals, including spotted seals and walruses, which utilize haul-out areas in the Kasegaluk Lagoon and Peard Bay Special Areas, and polar bears, which are increasingly using terrestrial habitats in the Teshekpuk Lake Special Area due to receding sea ice. Overall, the implications of climate change for marine mammals in the Arctic are substantial. Continued arctic warming and the resulting deterioration of sea ice pose a major threat to marine mammals and their prey in the Arctic.[34]
- *Cultural resources:* Although less than 3 percent of the NPR–A has been surveyed for cultural resources, nearly 2,000 sites have been identified. Additionally, there are 925 documented Traditional Land Use Inventory sites in the NPR–A, which are important place names, landmarks, traditional land use sites, travel routes, and other places of cultural importance to the North Slope Iñupiat. These sites have ongoing spiritual and cultural importance to residents of the North Slope. Protecting cultural resources sites, both documented and undocumented, is of concern to the Iñupiat. However, early exploration and development projects on the North Slope had a greater potential to affect cultural resources due to the less stringent regulations and identification requirements than those in place today. For example, oil exploration trails have been associated with some damage to the Qalluvuk site, a traditional fishing and hunting area that also served as a trading station in the 1930s. Other observations, testimony, and traditional knowledge from local residents have documented experiences associated with cultural resource impacts, including the potential disturbance of gravesites and camps from winter seismic exploration activities.[35]
- *Recreation resources:* The NPR–A offers numerous unique and primitive recreational opportunities, including backpacking, boating, sight-seeing, hunting, fishing, tourism, and off-highway vehicle use. Because most of the NPR–A is considered an unmodified natural environment, individual users rarely, if ever, encounter other recreationists. Guided expeditions for backpacking, sight-seeing, and hunting primarily occur in the Utukok River Uplands. Similar recreational activities also occur in the vicinity of Teshekpuk Lake and Umiat.[36]

Over 40 communities harvest subsistence resources from the NPR–A, including many of the resources described earlier. Six communities in particular—Anaktuvuk Pass, Atqasuk, Nuiqsut, Point Lay, Utqiagvik, and Wainwright—harvest all or nearly all of their subsistence resources from the NPR–A, including large land mammals (primarily caribou or moose), furbearers and small land mammals, non-salmon fish, waterfowl, upland game birds, and vegetation. Marine mammals and salmon harvesting is less common in the NPR–A; instead, they are harvested in nearshore areas, such as Peard Bay, Elson Lagoon, and Kasegaluk Lagoon.[37]

Subsistence harvesting is the cornerstone of the traditional relationship of the Iñupiat people with their environment. Residents of communities in and around the NPR–A rely on subsistence harvests of plant and animal resources for nutrition and their cultural, economic, and social well-being. Activities associated with subsistence—processing; sharing; redistribution networks; cooperative and individual hunting, fishing, whaling, and gathering; and ceremonial activities—strengthen community and family social ties, reinforce community and individual cultural identity, and provide a link between contemporary Alaska Natives and their ancestors. These activities are guided by traditional knowledge based on a long-standing relationship with the environment.

Traditional Iñupiaq values remain strong on the North Slope and include respect for nature, humility, love and respect for elders, cooperation, hunting traditions, knowledge of language, and family and kinship. These values are embedded within all facets of Iñupiaq society, including subsistence hunting and harvesting traditions. The ability to pass on these values through the continuation of traditional subsistence activities in traditional places is critical to maintaining Iñupiat cultural identity. Sharing is one of the core values of Iñupiaq society and culture, which serves to maintain and strengthen familial and social ties both within and between communities on the North Slope. Traditional feasts such as Nalukataq (the spring Whale Festival) and Kivgiq (the Messenger Feast) revolve around the bringing together of communities and the distribution of subsistence foods throughout the community and region. Extensive sharing networks exist between North Slope communities, and between the North Slope and other regions in Alaska. Iñupiaq people continue to identify with the places of their ancestors and return to these places to hunt, fish, camp, gather, and process wild foods. Subsistence activities help maintain the relationship between Iñupiaq people and the land, as do stories, Iñupiaq place names, trails and travel routes, and landmarks. Thus, to the Iñupiat, protection of traditional lands, waters, and the wild resources that inhabit them is essential to

[29] East Asian-Australasian Flyway Partnership, Qupałuk Flyway Network Site [EAAF133]—East Asian-Australasian Flyway Partnership, available at *https://www.eaaflyway.net/qupaluk-flyway-network-site-eaaf133-east-asian-australasian-flyway-partnership/*.

[30] 2020 NPR–A IAP Final EIS at 3–137–46.

[31] 2020 NPR–A IAP Final EIS at 3–122, M–2, M–3.

[32] Willow MDP SEIS at 165.

[33] 2020 NPR–A IAP Final EIS at 3–119.

[34] *Id.* at 3–208–222.

[35] *Id.* at 3–249–51.

[36] *Id.* at 3–319.

[37] *Id.* at 3–262.

maintaining cultural traditions, traditional knowledge, and identity.[38]

Impacts on subsistence are occurring on the North Slope with greater frequency as development expands across the region. Nuiqsut, the community closest to current oil and gas development on the North Slope, has experienced the most impacts. Subsistence impacts and concerns have also been documented for Point Lay, Wainwright, Utqiagvik, Atqasuk, and Anaktuvuk Pass. Many of these concerns are related to effects of development, including seismic activity and oil and gas-related research, pipelines, and traffic, on caribou and other terrestrial species.

Overall, future infrastructure, oil and gas development, and other activities in the NPR–A area could have lasting effects on cultural practices, values, and beliefs. The potential impacts of development could result in reduced harvests, changes in uses of traditional lands, and decreased community participation in subsistence harvesting, processing, consuming, sharing, and associated rituals and feasts. Because of this, communities could experience a loss of cultural and individual identity associated with subsistence, a loss of traditional knowledge about the land, damaged social and kinship ties, and effects on spirituality associated with degradation of the NPR–A.[39]

The BLM solicits comments on this section. Specifically, BLM welcomes comment from the regulated community including industry, residents of communities in and around the NPR–A, and Alaskan natives and indigenous Tribes who may benefit or bear costs from this proposed rule.

E. Need for the Rule

The BLM is proposing this revision because the regulatory framework governing the management and protection of surface resources and Special Areas in the NPR–A needs updating. Conditions throughout the Arctic have changed dramatically since 1977, when the BLM issued the current regulations for management of surface resources and Special Areas in the NPR–A. As discussed in greater detail in Section II.D, the impacts of climate change on the NPR–A's natural environment and Native communities are intensifying. Conditions are changing rapidly in the Arctic, making it necessary and appropriate for the BLM to develop new regulations that account for and respond to these changing conditions. Thus, the proposed rule would direct the BLM to regularly address changing conditions. Among other things, it would require the BLM to conduct an evaluation of Special Areas at least once every 5 years and update Special Area designations to include new resource values. It also would require the BLM to account for any uncertainty concerning the effects of proposed activities.

New and revised standards and procedures are also needed to ensure that the BLM is fulfilling its statutory duties under the NPRPA, FLPMA, and other authorities to the best of its ability. For example, the BLM has a responsibility to ''provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects [of oil and gas activities] on the surface resources'' throughout the NPR–A.'' 42 U.S.C. 6506a(b). The current regulations, however, provide little detail on the standards and procedures the BLM should use to implement these important requirements.

The BLM also has an obligation to ''assure the maximum protection of . . . surface values'' within Special Areas ''to the extent consistent with the requirements of [the NPRPA] for the exploration of the reserve.'' 42 U.S.C. 6504(a). The proposed rule would improve upon the standards and procedures that implement this requirement. For example, the current regulations identify specific measures the BLM may take to assure maximum protection but provide no further guidance on the evaluation and selection of such measures.

In addition, the current regulations do not reflect the full management regime for the NPR–A. This proposed rule would provide a more comprehensive guide to managing the NPR–A. Currently, the applicable legal standards and procedures are scattered throughout several statutes, regulations, plans, and guidance documents. For example, the existing regulations do not integrate with the use of IAPs, which BLM has used either on a regional or area wide basis for the NPR–A for over two decades. Although the BLM is not required to plan for the use of the NPR–A, see 42 U.S.C. 6506a(c), it has chosen to produce the IAP through a public process and has analyzed it in an Environmental Impact Statement. The IAP allocates land uses in the NPR–A and details oil and gas lease stipulations and infrastructure restrictions for Special Areas. The overlay of a regulatory regime to govern the NPR–A, including the development and use of IAPs, would enhance consistency and certainty, particularly with respect to protection of surface resources and Special Areas.

III. Section-by-Section Discussion

The proposed rule would change the section designations from the current regulations to implement Office of the Federal Register requirements. Some provisions of the existing regulations would not change; we do not discuss those provisions here.

Section 2361.1 Purpose

Section 2361.0–1 would be redesignated to § 2361.1. The existing provision states that the purpose of the regulations is ''to provide procedures for the protection and control of environmental, fish and wildlife, and historical or scenic values'' in the NPR–A. As proposed, § 2361.1 would establish a two-part purpose for the rule to more accurately and completely reflect the scope of the regulations. The first purpose would be to provide standards and procedures to implement 42 U.S.C. 6506a(b), which requires the Secretary to ensure that ''[a]ctivities undertaken pursuant to this Act include or provide for such conditions, restrictions, and prohibitions as [she] deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [NPR–A].''

The second purpose outlined in this section would be to provide standards and procedures to implement 42 U.S.C. 6504(a), under which any exploration in Special Areas ''shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the [NPR–A].'' The standards and procedures to implement these two provisions would also fulfill BLM's mandate to take action necessary to prevent unnecessary or undue degradation under FLPMA, 43 U.S.C. 1732(b).

Section 2361.0–2 Objectives

The existing § 2361.0–2 states the objectives of the regulations. We propose to remove this section because our proposed revision of § 2361.1 would make it redundant.

Section 2361.3 Authority

Section 2361.0–3 would be redesignated to § 2361.3. The existing provision lists the NPRPA as the statutory authority for the regulations. We propose to add the Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. 96–514), which

[38] Willow MDP SEIS at 303.

[39] 2020 NPR–A IAP Final EIS at 3–265–66, 3–280.

amended the NPRPA and instructed the Secretary to mitigate reasonably foreseeable and significantly adverse effects on the surface resources in the NPR–A.

Section 2361.4 Responsibility

Section 2361.0–4 would be redesignated to § 2361.4. This section would modify the existing statement that, under the NPRPA, the BLM is responsible for managing surface resources in the NPR–A to add that BLM is now also responsible for managing the subsurface mineral resources in the NPR–A. It would also add that the BLM is responsible for assuring maximum protection of Special Areas' significant resource values. Paragraph (b) would be deleted because the U.S. Geological Survey is no longer responsible for managing exploration in the NPR–A. Secretarial Order 3071, 47 FR 4751 (Feb. 2, 1982); Secretarial Order 3087, 48 FR 8982–83 (Mar. 2, 1983).

Section 2361.5 Definitions

Section 2361.0–5 would be redesignated to § 2361.5. In this section, the BLM would update the definition for ''exploration'' to ensure consistency with NPRPA's definition of ''petroleum.'' 42 U.S.C. 6501. The BLM would also update the definition of ''Special Areas'' for consistency with other proposed changes to the regulations. Finally, the BLM would also incorporate a new definition for ''Indigenous Knowledge,'' consistent with the guidance set forth in the Memorandum issued by the Council on Environmental Quality's Office of Science and Technology Policy on November 30, 2022.[40] New definitions would also be added for ''Integrated Activity Plan,'' ''infrastructure,'' and ''significant resource value.''

Section 2361.6 Effect of Law

Section 2361.0–7 would be redesignated to § 2361.6. The BLM is proposing to update this section to conform to existing legal authorities, including adding provisions to implement the Department of the Interior Appropriations Act, Fiscal Year 1981, Public Law 96–514 (Dec. 12, 1980), 94 Stat. 2957, 2964, in revised paragraph (a), and the Barrow Gas Field Transfer Act of 1984, Public Law 98–366 (July 17, 1984), 98 Stat. 468, 470, in new paragraph (b)(4).

Section 2361.7 Severability

This proposed new section would establish that if any provision of part 2360 is invalidated, then all remaining provisions would remain in effect. The various components of the proposed rule are distinct. For example, many of the proposed provisions would simply update the regulations to bring them more into line with the BLM's statutory duties. Those updates would function independently of the rest of the proposed rule. The procedural requirements in proposed § 2361.10(b) for protecting surface resources in the NPR–A also would stand alone, as would the codification of existing Special Areas in § 2361.20, the procedural requirements in § 2361.30, and other provisions.

Section 2361.10 Protection of Surface Resources

Section 2361.1 would be redesignated to § 2361.10, and the title would be changed from ''protection of the environment'' to ''protection of surface resources'' to more closely track with the BLM's statutory authority under 42 U.S.C. 6506a(b), which directs the BLM to ''provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [NPR–A].''

The proposed rule would establish new standards and procedures for managing and protecting surface resources in the NPR–A from the reasonably foreseeable and significantly adverse effects of oil and gas activities. In 1980, Congress authorized the Secretary to mitigate those effects through ''necessary or appropriate'' ''conditions, restrictions, and prohibitions.'' 42 U.S.C. 6506a(b). Existing paragraph (a) requires the authorized officer to take action ''to mitigate or avoid unnecessary surface damage and to minimize ecological disturbance throughout the reserve to the extent consistent with the requirements of the Act for the exploration of the reserve.'' We propose to amend paragraph (a) to mirror the statutory language. As amended, paragraph (a) also would provide further clarification by recognizing that, in some circumstances, the BLM may delay or deny proposed activities that would cause reasonably foreseeable and significantly adverse effects on surface resources.

Existing paragraph (b) would be deleted. It concerns coordination between the BLM and the U.S. Geological Survey, which is no longer relevant because the Geological Survey is no longer responsible for managing exploration in the NPR–A.

Paragraph (b) in the proposed rule would spell out new procedures for protecting surface resources in the NPR–A. As explained above, Congress assigned the BLM the duty to protect the surface resources in the NPR–A, but BLM regulations do not fully explain the scope of that duty. The proposed rule would fill that gap.

In paragraph (b)(1), the proposed rule would direct the BLM to manage oil and gas activities in accordance with the IAP. In doing so, the proposed rule would enshrine longstanding BLM practice into regulations. As explained above, the NPR–A is exempt from FLPMA's planning requirements. Nonetheless, since 1998, the BLM has prepared several IAPs to primarily govern oil and gas activities in the NPR–A. The IAP is a form of land use plan that ''addresses a narrower range of multiple use management than a resource management plan.'' [41] In the BLM's experience, the IAP provides an invaluable means of evaluating management options, engaging the public, and guiding decision-making, consistent with the BLM's duties under NPRPA and the National Environmental Policy Act. Accordingly, the proposed rule would require the BLM to maintain an IAP, which would help guide BLM use authorizations in the NPR–A but would give way to the regulations in the event of a conflict.

Paragraph (b)(2) would require the BLM, in each decision concerning oil and gas activity in the NPR–A, to adopt measures to mitigate the reasonably foreseeable and significantly adverse effects on surface resources, taking particular care with surface resources that support subsistence. The BLM would do so by documenting for each decision its consideration of effects and how those effects informed the choice of mitigation measures. Paragraphs (b)(3) and (4) would specify that the BLM's effects analysis would include any reasonably foreseeable effects, including indirect effects (those that are ''later in time or farther removed in distance''), cumulative effects (those ''that result from the incremental effects of proposed activities when added to the effects of other past, present, and reasonably foreseeable actions''), and ''any uncertainty concerning the nature, scope, and duration of potential effects.'' For example, if the BLM determined that a proposed lease sale's effects on subsistence resources—when

[40] Council on Environmental Quality, Guidance for Federal Departments and Agencies on Indigenous Knowledge (Nov. 30, 2022), *available at https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf.*

[41] 2013 NPR–A IAP ROD at 17.

added to the effects of other past, present, and reasonably foreseeable actions—could be significantly adverse, then under this proposed section, the BLM would need to adopt measures to mitigate those effects.

Existing paragraphs (c) and (d) would be deleted. Existing paragraph (c) requires the BLM to take maximum protection measures on all actions within Special Areas and identify the boundaries of Special Areas on maps. It also describes some requirements that may constitute ''maximum protection measures.'' Existing paragraph (d) concerns designation of new Special Areas. This material would be addressed in §§ 2361.20, 2361.30, and 2361.40. Moving this material to those new sections would provide clarification by focusing § 2361.10 on protection of surface resources throughout the NPR–A.

Proposed new paragraph (c) would clarify that for surface resources in Special Areas, the BLM also would have to comply with the provisions governing Special Areas in §§ 2361.20 through 2361.60. Moving the provisions concerning Special Areas to different sections makes that cross-reference necessary.

Proposed new paragraph (d) would require the BLM to include in each oil-and gas-related decision or authorization, ''such terms and conditions that provide the Bureau with sufficient authority to fully implement the requirements of this subpart.'' That provision would ensure that the BLM incorporates into decision documents whatever language is necessary to enable it to implement any final rule.

Existing paragraph (e)(1) provides that ''the authorized officer may limit, restrict, or prohibit use of and access to lands within the Reserve, including special areas.'' The existing rule conditions that authority by requiring it to be exercised ''consistent with the requirements of the Act and after consultation with appropriate Federal, State, and local agencies and Native organizations.'' The proposed rule would specify that the authorized officer has that authority ''regardless of any existing authorization.'' That added language would clarify that existing authorizations would not prevent the BLM from limiting, restricting, or prohibiting access to the NPR–A consistent with the requirements of the Act. The proposed rule would retain the condition that exercises of that authority must be consistent with the NPRPA, and it would add ''and applicable law'' to clarify that the authorized officer cannot contradict other legal requirements. Instead of requiring the authorized officer to consult with ''Native organizations,'' the proposed rule would provide more specificity by requiring consultation with federally recognized Tribes and Alaska Native Claims Settlement Act corporations. Consistent with the BLM's duty under NPRPA and ANILCA, paragraph (e)(1) would also be amended to allow the authorized officer to limit, restrict, or prohibit use of and access to the NPR–A to protect subsistence uses and resources.

Existing paragraph (f) would be amended to recognize the breadth of Federal laws that apply to the management and protection of historical, cultural, and paleontological resources in the NPR–A.

Section 2361.20 Existing Special Areas

The existing regulations only identify the Colville River, Teshekpuk Lake, and Utukok River Uplands Special Areas by name (43 CFR 2361.1(c)); they do not account for the Kasegaluk Lagoon and Peard Bay Special Areas. Further, the current regulations do not identify or describe the significant resource values associated with each Special Area. Under the NPRPA, the BLM must assure maximum protection of each of these values consistent with exploration of the Reserve. In pursuit of that obligation, this new § 2361.20 would incorporate all five of the existing Special Areas into part 2360 and would identify the significant subsistence, recreational, fish and wildlife, historical, and scenic values that are associated with each of them. The proposed rule would require any lands designated as a Special Area to continue to be managed as such for the already-identified values and any additional values identified through the process set forth in new § 2361.30. The existing regulations (43 CFR 2361.1(c)) require the boundaries of the Special Areas to be depicted on maps available for public inspection in the BLM's Fairbanks District Office. New § 2361.20 would specify that a map of each Special Area is available at the Arctic District Office, which is now the BLM office that oversees the NPR–A. The BLM would also publish and maintain copies of these maps on its website.

The following briefly summarizes the existing Special Areas:

- *Colville River Special Area:* The Colville River Special Area covers 2.44 million acres along the southeastern boundary of the NPR–A. The Special Area encompasses the Colville River and two of its main tributaries—the Kogosukruk and Kikiakrorak rivers—which collectively provide ''one of the most significant regional habitats for raptors in North America'' and ''the North Slope's single most important area of raptor nesting habitat.'' [42] Many other bird species utilize the river corridors, including shorebirds, loons, waterfowl, inland dwelling sea birds, and several unique trans-Beringian migrant passerines.[43] The Special Area also ''support[s] the highest concentration of . . . moose on Alaska's North Slope,'' [44] ''contains world-class paleontological deposits[,] and is an important corridor for subsistence and recreational activities.'' [45] Finally, the Special Area includes ''numerous sites from prehistoric and historic era human activity.'' [46]
- *Kasegaluk Lagoon Special Area:* The Kasegaluk Lagoon Special Area, which encompasses approximately 97,000 acres, borders the Chukchi Sea in the northwestern corner of the NPR–A. It is ''rich in wildlife, including migratory birds'' and has especially ''high values for marine mammals.'' [47] The Special Area also ''features tidal flats that are rare on the North Slope.'' [48] These natural resources contribute to an ecosystem that is ''unique . . . for the arctic coast.'' [49] Subsistence activities take place in the lagoon, which also ''offer[s] primitive recreation experiences, including kayak and small boat paddling along the coast.'' [50]
- *Peard Bay Special Area:* The Peard Bay Special Area also borders the Chukchi Sea along the northern boundary of the NPR–A. The Special Area covers 107,000 acres and includes ''haul-out areas and nearshore waters for marine mammals and a high use staging and migration area for shorebirds and waterbirds.'' [51]
- *Teshekpuk Lake Special Area:* The Teshekpuk Lake Special Area includes 3.65 million acres in the northeastern corner of the NPR–A. Teshekpuk Lake provides ''important nesting, staging, and molting habitat for a large number of ducks, geese, and swans,'' ''prime calving and insect-relief habitat'' for the Teshekpuk Caribou Herd, and ''overwintering habitat for fish.'' [52] ''Of

[42] 2013 NPR–A IAP Final EIS at 270, 355.
[43] CRSA EA at 19.
[44] 2013 NPR–A IAP Final EIS at 355.
[45] 1998 Northeast NPR–A IAP Final EIS.
[46] CRSA EA at 25.
[47] 2013 NPR–A IAP Final EIS at 17.
[48] *Id.*
[49] *Id.*
[50] 2004 Northwest NPR–A IAP ROD at 4.
[51] 2013 NPR–A IAP ROD at 4.
[52] 43 FR 28723; BLM, Northeast NPR–A Final Amended IAP/EIS 3–29 (Jan. 2005), *available at https://web.archive.org/web/20060303123155/http://www.ak.blm.gov/nenpraeis/FinalAmendedIAPEIS/Volume%201/Chapter%203%20Affected%20Environment.pdf;* 2022 NPR–A IAP ROD at 5.

particular sensitivity are lands nearest Teshekpuk Lake that are the most heavily used by calving caribou and molting geese. . . .'' [53] The Special Areas ''is of special importance to subsistence users because of the caribou and fish resources in the area and long-standing subsistence use of the area.'' [54] Additionally, the Special Area includes the Pik Dunes—''an unusual geologic feature'' that ''provide (1) insect-relief habitat for caribou, (2) habitat for several uncommon plant species, and (3) data critical to understanding major climatic fluctuations over the last 12,000 years.'' [55]

• *Utukok River Uplands Special Area:* The Utukok River Uplands encompasses 7.1 million acres in the southwestern corner of the NPR–A. The Special Area includes ''prime calving and insect-relief habitat'' and ''the most intensely used summer movement area'' for the Western Arctic Caribou Herd.[56] ''This large herd disperses widely in the winter, wandering within reach of subsistence hunters from over forty villages in northwest Alaska.'' [57] The Special Area also includes ''grizzly bear habitat'' and ''important wilderness characteristics.'' [58]

Section 2361.30 Special Areas Designation and Amendment Process

While the existing regulations anticipate that the Secretary may identify new Special Areas, they do not specify procedures for designating and amending Special Areas. In the past, the BLM has typically designated Special Areas, and received Special Area recommendations from the public and stakeholders, through the IAP revision and amendment process. Enumerating procedures for designating and amending Special Areas in the regulations would provide clarity for stakeholders and ensure that the BLM fulfills its statutory obligation to assure maximum protection of Special Areas' significant resource values.

This proposed new section would, for the first time, provide standards and procedures for designating and amending Special Areas. Paragraph (a) would require the BLM, at least once every 5 years, to evaluate lands in the NPR–A for significant resource values and designate new Special Areas or update existing Special Areas by expanding their boundaries, recognizing the presence of additional significant resource values, or requiring additional measures to assure maximum protection of significant resource values. The BLM believes that a 5-year timeframe is reasonable considering how rapidly conditions across the Arctic are changing; it is also consistent with the agency's timeframe for similar land use planning evaluations.[59] Paragraph (a)(2) would allow, but not require, the BLM to conduct this evaluation through the IAP amendment process. Paragraph (a)(3) would require the BLM to rely on the best available scientific information, including Indigenous Knowledge, and the best available information concerning subsistence uses and resources. Paragraph (a)(4) would require the BLM to provide meaningful opportunities for public participation in the evaluation process, including review and comment periods and, as appropriate, public meetings.

Existing § 2361.1(d) concerns the submission, content, and public review of recommendations for additional Special Areas. Proposed paragraph (a)(4) would retain the basic contours of that provision but provide additional specificity. It would allow the public to participate in the evaluation process, including by recommending new Special Areas, new significant resource values for existing Special Areas, and measures to assure maximum protection of Special Areas' significant resource values. The proposed rule would require the BLM to evaluate and respond to such recommendations. Similar to existing § 2361.1, proposed paragraph (a)(4) would specify that Special Area recommendations should describe the size and location of the lands, significant resource values, and measures necessary to assure maximum protection of those values.

Paragraph (a)(5) would allow the authorized officer to implement interim measures to assure maximum protection of significant resource values in lands under consideration for designation as a Special Area. This provision would assist the BLM in fulfilling its statutory duty to protect Special Areas.

Paragraph (a)(6) would require that the BLM base decisions to designate Special Areas solely on whether significant resource values are present and would prohibit the BLM from considering the existence of measures to protect or otherwise administer those values. For example, if lands not within a Special Area contained important caribou calving habitat and those lands were already subject to certain protections under the IAP, the BLM would not be permitted to consider those protections during the decision-making process for the proposed designation or update. This change is needed to align the regulations with the NPRPA, which authorizes the Secretary to designate Special Areas based on the presence of ''any significant subsistence, recreational, fish and wildlife, or historical or scenic value . . . .'' 42 U.S.C. 6504(a).

Paragraph (a)(7) would require the BLM, when designating a Special Area or recognizing the presence of additional significant resource values in an existing Special Area, to adopt measures to assure maximum protection of significant resource values. That provision mirrors the BLM's statutory responsibility under the NPRPA. 42 U.S.C. 6504(a). Paragraph (a)(7) would provide needed clarification by specifying that those measures would supersede any inconsistent provisions in the IAP.

Paragraph (a)(8) would incorporate the requirement of existing § 2361.1(c) that the BLM publish in the **Federal Register** a legal description of any new Special Area. The proposed rule also would require the BLM to publish in the **Federal Register** a summary of the significant resource values supporting the Special Area designation. Rather than requiring publication in local newspapers as the current regulations require, the proposed rule would require the BLM to maintain maps of the Special Areas on its website. We believe those proposals would provide more effective public notice.

Section 2361.30(b) would establish a framework for removing lands from Special Area designations. Because Congress identified the Utukok River Uplands and Teshekpuk Lake Special Areas in the NPRPA and required them to be managed to protect surface resources, the BLM cannot remove lands from those Special Area designations absent statutory authorization. See Public Law 94–258, sec. 104(b), 90 Stat. 304 (1976). For other Special Areas, the proposed rule would allow the BLM to remove lands from a Special Area designation only when the significant resource values that supported the designation are no longer present (*e.g.,* if important wildlife habitat that supported the designation was no longer present). That provision is consistent

[53] 2013 NPR–A IAP ROD at 20.

[54] BLM, Northeast NPR–A IAP/EIS ROD (Oct. 1998), *available at https://web.archive.org/web/20001210191000/http:/aurora.ak.blm.gov/npra/final/html/rodtitle.html.*

[55] Northeast National Petroleum Reserve Alaska Draft IAP/EIS, 62 FR 65440 (Dec. 12, 1997); Northeast NPR–A Final Amended IAP/EIS at 2–7.

[56] 2013 NPR–A IAP ROD at 21; 2022 NPR–A IAP ROD at 5.

[57] 2013 NPR–A IAP ROD at 22.

[58] 1998 Northeast NPR–A IAP Final EIS; 2013 NPR–A IAP ROD at 22.

[59] *See* BLM Land Use Planning Handbook H–1601–1 34 (Mar. 2005) (directing the BLM to evaluate land use plans ''at a minimum every five years''), *available at https://www.ntc.blm.gov/krc/uploads/360/4_BLM%20Planning%20Handbook%20H-1601-1.pdf.*

with the BLM's statutory duty to ''assure the maximum protection of such surface values consistent with the requirements of [the NPRPA] for the exploration of the reserve.'' *Id.*

Before removing lands from a Special Area designation, paragraph (b) would require the BLM to provide the public with the opportunity to review and comment on its proposed decision and consult with federally recognized Tribes and Alaska Native Claims Settlement Act corporations. Finally, the proposed rule would require the BLM to document its consideration of those comments. Those requirements would assure public participation in the de-designation process.

Section 2361.40 Management of Oil and Gas Activities in Special Areas

As noted above, the proposed rule would enhance the specificity of the current regulations on the mechanisms for assuring maximum protection of significant resource values in Special Areas. The current regulations paraphrase the maximum protection requirement of the NPRPA and provide examples of measures that the BLM could potentially take to assure maximum protection. See 43 CFR 2361.1(c). This proposed new section would establish new standards and procedures for achieving maximum protection of Special Areas' significant resource values, with a specific focus on addressing the impacts of oil and gas activities. Of note, this section would affirmatively establish that assuring maximum protection of significant resource values is the management priority for Special Areas. Under proposed paragraph (a), the BLM would need to comply with this standard and adopt maximum protection measures for each significant resource value associated with a Special Area. Paragraph (b) would require the BLM take such steps to avoid the adverse effects of proposed oil and gas activities on the significant resource values of Special Areas, including by conditioning, delaying action on, or denying proposals for activities.

Paragraph (c) of this section would require oil and gas leasing and new infrastructure to conform to the land use allocations and restrictions identified on maps 2 and 4 of the 2022 IAP ROD that are published along with the final rule, unless the BLM makes revisions in accordance with § 2361.30 of these regulations. Map 2 shows the areas of the NPR–A that are open and closed to oil and gas leasing. The map reflects that approximately 11.8 million acres are open to leasing subject to the terms and conditions detailed in the IAP, while approximately 11 million acres are closed, including most of the Teshekpuk Lake and Utukok River Uplands Special Areas. The map also shows areas that are open to leasing, but subject to no surface occupancy and areas that are outside the BLM's subsurface authority.

Map 4 shows the areas of the NPR–A that are available and unavailable for new infrastructure. The map shows that new infrastructure is prohibited on approximately 8.3 million acres of the NPR–A, limited to ''essential'' infrastructure on approximately 3.3 million acres, and permitted on approximately 10.8 million acres. The BLM is considering including in the final rule the following definition for the term ''essential,'' which resembles provisions of Lease Stipulation K–12 from the 2022 IAP ROD: ''*Essential* means the proposed infrastructure is necessary for development and production on a valid existing onshore or offshore lease and no other feasible and prudent option is available.'' The BLM requests feedback on this approach, as well as any additional recommendations on defining this term.

The restrictions identified on Maps 2 and 4 that would apply to new oil and gas leases and infrastructure are detailed in the 2022 IAP ROD and summarized in the following table.[60]

Stipulation	Objective
K–1—River Setbacks	Minimize the disruption of natural flow patterns and changes to water quality; the loss of spawning, rearing, and over-wintering habitat for fish; and impacts to subsistence cabins and campsites, among other purposes.
K–2—Deep Water Lakes	Minimize the disruption of natural flow patterns and changes to water quality; the loss of spawning, rearing or over wintering habitat for fish; and the disruption of subsistence activities, among other purposes.
K–4—Kogru River, Dease Inlet, Admiralty Bay, Elson Lagoon, Peard Bay, Wainwright Inlet/Kuk River, and Kasegaluk Lagoon, and their associated islands.	Protect fish and wildlife habitat; preserve air and water quality; and minimize impacts to subsistence activities and historic travel routes on the major coastal waterbodies.
K–5—Coastal Setback Areas	Protect coastal waters and their value as fish and wildlife habitat; minimize hindrance or alteration of caribou movement within caribou coastal insect-relief areas; and prevent impacts to subsistence resources and activities, among other purposes.
K–6—Goose Molting Area	Minimize disturbance to molting geese and loss of goose molting habitat in and around lakes in the Goose Molting Area.
K–8—Brant Survey Area	Minimize the loss or alteration of habitat for, or disturbance of, nesting and brood rearing brant in the Brant Survey Area.
K–9—Teshekpuk Lake Caribou Habitat Area	Minimize disturbance and hindrance of caribou, or alteration of caribou movements through portions the Teshekpuk Lake Caribou Habitat Area that are essential for all season use, including calving and rearing, insect-relief, and migration.
K–10—Teshekpuk Lake Caribou Movement Corridor.	Minimize disturbance and hindrance of caribou, or alteration of caribou movements (that are essential for all season use, including calving and rearing, insect-relief, and migration) in the area extending from the eastern shore of Teshekpuk Lake eastward to the Kogru River.
K–11—Southern Caribou Calving Area	Minimize disturbance and hindrance of caribou, or alteration of caribou movements (that are essential for all season use, including calving and post calving, and insect-relief) in the area south/southeast of Teshekpuk Lake.
K–12—Colville River Special Area	Prevent or minimize loss of raptor foraging habitat.
K–13—Pik Dunes	Retain unique qualities of the Pik Dunes, including geologic and scenic uniqueness, insect-relief habitat for caribou, and habitat for several uncommon plant species.

[60] 2022 NPR–A IAP ROD at A–6 to A–21.

Stipulation	Objective
K–14—Utukok River Uplands Special Area	Minimize disturbance and hindrance of caribou, or alteration of caribou movements through the Utukok River Uplands Special Area that are essential for all season use, including calving and rearing, insect-relief, and migration.

Several of the restrictions utilize the term ''permanent oil and gas facilities,'' which is defined on page A–3 of the 2022 IAP ROD to mean:

> Permanent Facilities include production facilities, pipelines, roads, airstrips, production pads, docks and other bottom-founded structures, seawater-treatment plants, and other structures associated with an oil and gas operation that occupy land for more than one winter season; also included are material sites such as sand and gravel, and ''temporary platforms'' if those platforms are used for production rather than exploration. Exploration wellheads and seasonal facilities such as ice roads and ice pads are excluded, even when the pads are designed for use in successive winters. This definition does not include over-summering ice pads for exploration purposes.

The BLM is considering incorporating this definition into the rule and requests feedback on this approach.

The purpose of requiring leasing and infrastructure in Special Areas to conform to IAP maps 2 and 4 is to codify the existing protections and restrictions from the 2022 IAP ROD. As explained above, the BLM developed that land use plan through a lengthy public planning process involving all stakeholders, which stretches back to the development of the 2013 IAP ROD. The 2022 IAP ROD, which is based in large part on the framework set forth in the 2013 IAP ROD, incorporates aspects of the 2020 IAP ROD, and reflects now-settled expectations about the use of the NPR–A. It also reflects what the BLM views as the floor of protections for the NPR–A that grew out of the public planning process. By incorporating the two maps into any final rule, the BLM intends to incorporate the land use allocations, restrictions, and stipulations from the 2022 IAP ROD into the rule without reprinting a lengthy text. We seek public comment in particular on whether this approach accomplishes that goal effectively and efficiently. Do the maps convey sufficient information? Are there additional definitions that should be included in the rule? Is there a better way to accomplish our goal?

Paragraph (c) also would establish a presumption against leasing and new infrastructure on lands in Special Areas that are allocated as available for those activities. That presumption could be overcome if specific information is available to the BLM that clearly demonstrates that those activities can be conducted with no or minimal adverse effects on the significant resource values of the Special Area. The intensive process that led to the IAP resulted in a comprehensive plan for protection of the Special Areas in the NPR–A. To fulfill the BLM's statutory duty to assure maximum protection for those areas' significant resource values, the BLM believes that plan should be treated as a regulatory floor, and additional activities should only be allowed when maximum protection is assured.

The proposed definition of ''infrastructure'' in § 2361.5(g) would exclude ''exploratory wells that are drilled in a single season; infrastructure in support of science and public safety; and construction, renovation, or replacement of facilities on existing gravel pads at previously disturbed sites where the facilities will promote safety and environmental protection.'' These exceptions were specifically analyzed and adopted in the 2022 IAP ROD. Proposed § 2361.40(d) would establish three additional exceptions to the oil and gas leasing and new infrastructure prohibitions in paragraph (c). The first exception would permit leasing and infrastructure solely to address drainage of Federal oil and gas resources. Drainage occurs ''when a well that is drilled or is in production adjacent to Federal or Indian leases or unleased lands is potentially draining Federal or Indian oil and gas resources.'' BLM MS–3160. Surface disturbing activities would be prohibited on any lease tract issued for this purpose. The exception for drainage of Federal oil and gas resources is included because the regulations expressly provide for leasing of tracts that are subject to drainage in order to prevent loss of United States oil and gas resources and potential royalties. See 43 CFR 3130.3. No-surface-occupancy leases are an option the BLM may elect to use when the surface management agency has determined that surface oil and gas facilities and operations would pose an unacceptable risk to the surface resources. The second exception would permit the construction of new infrastructure, including roads, transmission lines, and pipelines, that would primarily benefit communities in and around the NPR–A or would support subsistence activities. The BLM would still need to adopt measures to assure maximum protection of any significant resource values affected by that infrastructure. We propose to include that exception because communities in and around the NPR–A must have some infrastructure to survive and thrive. The third exception would allow the BLM to approve new infrastructure if essential to support exploration or development of a valid existing lease and no practicable alternatives exist that would have less adverse impact on significant resource values of the Special Area. That exception is necessary to accommodate the rights of current leaseholders.

Proposed paragraph (e) would require the BLM to document and consider any uncertainty regarding potential adverse effects on Special Areas and ensure that its actions account for such uncertainty. That provision will help fulfill the BLM's statutory mandate to assure maximum protection for Special Areas' significant resource values.

Proposed paragraph (f) would require the BLM to prepare a Statement of Adverse Effect whenever it cannot avoid adverse effects on a Special Area. In each statement, the BLM would need to describe the significant resource values that may be affected; the nature, scope, and duration of the effects; measures the BLM evaluated to avoid those effects; a justification for not requiring those measures; and measures it would require to minimize and mitigate the adverse effects on significant resource values. The BLM will require mitigation of adverse effects on significant resource values of Special Areas that cannot be avoided or minimized. Measures the BLM may require include compensatory mitigation. Such measures will be developed, evaluated, and, as necessary, adopted in project-specific analyses. Proposed paragraphs (g) and (h) would require the BLM to provide the public with an opportunity to review and comment on any Statement of Adverse Effect and consult with federally recognized Tribes and Alaska Native Claims Settlement Act corporations that have ties to the area.

Finally, proposed paragraph (i) would require the BLM to include in each oil-and gas-related decision or authorization ''terms and conditions that provide the Bureau with sufficient authority to fully implement the requirements of this section.'' That

provision would ensure that the BLM incorporates into decision documents the necessary language to implement any final rule.

The BLM seeks feedback on whether this proposed rule would ''assure the maximum protection'' of significant resource values in Special Areas ''to the extent consistent with the requirements of [the NPRPA] for the exploration of the reserve.'' See 42 U.S.C. 6504(a).

Section 2361.50 Management of Subsistence Uses Within Special Areas

The BLM recognizes the overriding importance of subsistence resources to communities in and around the NPR–A. There are over 40 communities that use the NPR–A or the resources it supports for subsistence purposes, including six with significant connections: Anaktuvuk Pass, Atqasuk, Nuiqsut, Point Lay, Utqiagvik, and Wainwright.[61] All of these communities ''rely on . . . subsistence resources for their physical, traditional, and social existence,'' and many of these resources, including caribou, fish, and waterfowl, are concentrated in Special Areas.[62]

Accordingly, this new section would require the BLM to manage Special Areas to protect and support fish and wildlife and their habitats and the associated subsistence use of those areas by rural residents as defined in 50 CFR 100.4, the Department of the Interior's subsistence management regulations for public lands in Alaska. Additionally, this section would require the BLM to provide appropriate access to and within Special Areas for subsistence purposes while still assuring maximum protection of the significant resource values of the Special Areas.

Section 2361.60 Co-Stewardship Opportunities in Special Areas

This proposed new section would encourage the BLM to explore co-stewardship opportunities for Special Areas, including co-management, collaborative and cooperative management, and Tribally led stewardship. This provision would advance the Federal government's commitment to strengthening the role of Tribal governments in Federal land management. (Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021; Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403, November 15, 2021.)

[61] 2022 NPR–A IAP DNA at C–3–4.

[62] 2022 NPR–A IAP ROD at 11.

Section 2361.70 Use Authorizations

Section 2361.2 would be redesignated to § 2361.70. Existing paragraph (a) states that all use authorizations require approval from the authorized officer ''[e]xcept for petroleum exploration which has been authorized by the Act.'' The proposed rule would omit that exception. The NPRPA of 1976 authorized the Federal government to conduct exploration activities; those activities did not require approval by an authorized officer. Since the 1980 amendments initiated a competitive oil and gas leasing program, all oil and gas activities are conducted by oil and gas companies and require authorization from a BLM authorized officer.

No substantive changes are proposed to § 2361.70(b). The BLM would modify § 2361.70(c) for clarity purposes, and would update § 2361.70(d) to recognize its duties to protect surfaces resources and assure maximum protection of Special Areas' significant resource values in the NPR–A.

Section 2361.80 Unauthorized Use and Occupancy

Section 2361.3 would be redesignated to § 2361.80. No substantive changes would be made to this section.

IV. Procedural Matters

Regulatory Planning and Review (Executive Orders (E.O.) 12866, as Amended by E.O 14094, and 13563)

E.O. 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) within the OMB will review all significant regulatory actions. OIRA has determined that this proposed rule is significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act

This proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The BLM is not required to prepare an Initial Regulatory Flexibility Analysis with this proposed rule. The BLM welcomes public comments on the impact of this proposed rule on small businesses.

The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act. The size standards can be found in 13 CFR 121.201. For a specific industry identified by the North American Industry Classification System (NAICS), small entities are defined by the SBA as an individual, limited partnership, or small company considered at ''arm's length'' from the control of any parent company, which meet certain size standards.

The proposed rule is most likely to affect business currently operating in the oil and gas sector in the NPR–A. There are eight active lessees in NPR–A. SBA size standards identify small business in the crude petroleum extraction (NAICS 211120) and natural gas extraction (NAICS 211130) industries to be those with 1,250 or fewer employees. Some of the eight active lessees meet the SBA criteria for small businesses, which is less than a substantial number of small entities potentially affected. Further, the proposed rule will not affect existing leases and therefore would not have a significant economic impact on small businesses holding these leases.

Unfunded Mandates Reform Act (UMRA)

The proposed rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector. The proposed rule contains no requirements that would apply to State, local, or Tribal governments. The costs that the proposed rule would impose on the private sector are below the monetary threshold established at 2 U.S.C. 1532(a). A statement containing the information required by the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531 *et seq.*) is therefore not required for the proposed rule. This proposed rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments, because it contains no requirements that apply to such

governments, nor does it impose obligations upon them.

Takings (E.O. 12630)

This proposed rule would not affect a taking of private property or otherwise having taking implications under E.O. 12630, as it recognizes and is consistent with valid existing rights, including oil and gas leases. This proposed rule would revise the BLM's current management framework for surface resources and Special Areas in the NPR–A. The BLM has not substantially updated this framework since the early 1980s. A takings implication assessment is not required.

Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism impact statement is not required. We welcome public comments on the impact this proposed rule could have on the State of Alaska.

The proposed rule would not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the levels of government. It would not apply to States or local governments or State or local governmental entities. The proposed rule would affect the relationship between operators, lessees, and the BLM, but it does not directly impact the States. Therefore, in accordance with Executive Order 13132, the BLM has determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of E.O. 12988. More specifically, this proposed rule meets the criteria of section 3(a), which requires agencies to review all regulations to eliminate errors and ambiguity and to write all regulations to minimize litigation. This proposed rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

Consultation and Coordination With Indian Tribal Governments (E.O. 13175 and Departmental Policy)

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty.

The BLM evaluated this proposed rule under the Department's consultation policy and under the criteria in E.O. Order 13175 to identify possible effects of the rule on federally recognized Indian Tribes. Since the BLM is responsible for balancing the reserve's oil and gas resources with the protection of surface resources in the NPR–A, the proposed rule may have significance to Alaska Native Tribes and Alaska Native Claims Settlement Corporations.

On August 25, 2023, the BLM sent a letter to each federally registered Alaska Tribe and Alaska Native Corporation informing them of the rulemaking effort. The letter recognized the unique and vital input of Alaska Natives and offered opportunities for participation throughout the rulemaking process. The BLM will continue to engage in outreach efforts to ensure Alaska Natives are advised of the mechanisms by which they can participate, including opportunities for individual government-to-government consultation regarding the proposed rule.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3521) generally provides that an agency may not conduct or sponsor, and notwithstanding any other provision of law, a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Collections of information include requests and requirements that an individual, partnership, or corporation obtain information, and report it to a Federal agency. See 44 U.S.C. 3502(3); 5 CFR 1320.3(c) and (k).

This proposed rule contains an information collection requirement that is subject to review by OMB under the PRA. This information collection is located in § 2361.30(a)(4). One of the key principles of the proposed rule is the inclusion of stakeholder and public notice and participation in the designation and removal of lands to be included in a Special Area. To help ensure that the BLM receives the information needed to inform its decision to include lands in a Special Area, § 2361.30(a)(4) includes a list of criteria that should be addressed when a member of the public recommends lands for such a designation. This information includes the following:

- The size and location of the recommended lands;
- The significant subsistence, recreational, fish and wildlife, historical, or scenic resource values that are present within or supported by the recommended lands;
- Measures that may be necessary to assure maximum protection of those values; and
- Any other pertinent information.

The BLM has submitted a request to OMB for this information collection requirement under the requirements of 5 CFR 1320.11, *Clearance of collections of information in proposed rules.* The estimated burden associated with this information-collection is outlined as follows.

OMB Control Number: 1004–XXXX.

Title of Collection: Management and Protection of the National Petroleum Reserve in Alaska—Recommendations for Special Reserve Areas (43 CFR 2361.30).

Form Number: None.

Type of Review: New collection (Request for new OMB Control Number).

Respondents/Affected Public: Persons who wish to recommend lands to be designated as a SA in the NPR–A.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion; at least once every 5 years.

Number of Respondents: 100.

Annual Responses: 100.

Estimated Average Response time: 15 hours.

Annual Burden Hours: 1,500.

Annual Burden Cost: None. If you want to comment on the information-collection requirements of this proposed rule, please send your comments and suggestions on this information collection by the date indicated in the **DATES** and **ADDRESSES** sections as previously described.

National Environmental Policy Act (NEPA)

This proposed rule meets the criteria set forth at 43 CFR 46.210(i) for a Departmental categorical exclusion in that this proposed rule is ''of an administrative, financial, legal, technical, or procedural nature.'' They do not involve any of the extraordinary circumstances listed in 43 CFR 46.215.

Effects on the Energy Supply (E.O. 13211)

Under Executive Order 13211, agencies are required to prepare and submit to OMB a Statement of Energy Effects for significant energy actions. This statement is to include a detailed statement of ''any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increase use of foreign supplies)'' for the action and reasonable alternatives and their effects.

Section 4(b) of Executive Order 13211 defines a ''significant energy action'' as

''any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under E.O. 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by OIRA as a significant energy action.''

This proposed rule would not have a significant effect on the Nation's energy supply. It would restate existing statutory standards and establish a procedural framework for ensuring that the BLM meets those standards. It also would codify land use restrictions that already are legally binding in the 2022 IAP ROD. Further, the proposed rule would presume, in proposed § 2361.40(c), that oil and gas leasing or infrastructure on lands allocated as available for such activities ''should not be permitted unless specific information available to the Bureau clearly demonstrates that those activities can be conducted with no or minimal adverse effects on significant resource values.'' That presumption merely implements the BLM's existing statutory duty to assure maximum protection of the significant resource values in Special Areas. 42 U.S.C. 6504(a). Therefore, the proposed rule would not change the supply, distribution, or use of energy. The BLM welcomes public comments on the impact of this proposed rule on future energy production.

Clarity of This Regulation (E.O.s 12866, 12988, and 13563)

We are required by E.O.s 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1988, to write all rules in plain language. This means that each rule must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use common, everyday words and clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help the BLM revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Laura Daniel-Davis,

Principal Deputy Assistant Secretary, Land and Minerals Management.

List of Subjects in 43 CFR Part 2360

Alaska, Oil and gas activity, Protection of surface resources, Tribes, Special Areas.

■ For the reasons set out in the preamble, the Bureau of Land Management proposes to revise 43 CFR part 2360 as follows:

PART 2360—NATIONAL PETROLEUM RESERVE IN ALASKA

Subpart 2361—Management and Protection of the National Petroleum Reserve in Alaska

Sec.

Subpart 2362 [Reserved]

Authority: 42 U.S.C. 6501 *et seq.* and 43 U.S.C. 1701 *et seq.*

§ 2361.1 Purpose.

The purpose of the regulations in this subpart is to provide procedures for protection and control of the environmental, fish and wildlife, and historical and scenic values of the National Petroleum Reserve in Alaska, including mitigating the significantly adverse effects of oil and gas activities on the surface resources of the Reserve and assuring maximum protection of significant resource values in Special Areas pursuant to and consistent with the provisions of the Naval Petroleum Reserves Production Act of 1976 (90 Stat. 303; 42 U.S.C. 6501 *et seq.*), Alaska National Interest Lands Conservation Act (94 Stat. 2371, 16 U.S.C. 3101 *et seq.*), and other applicable authorities.

§ 2361.3 Authority.

The statutory authority for these regulations is the Naval Petroleum Reserves Production Act of 1976, as amended by the Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. 96–514).

§ 2361.4 Responsibility.

The Bureau of Land Management is responsible for the surface and subsurface management of the Reserve, including protecting surface resources from environmental degradation and assuring maximum protection of significant resource values in Special Areas. The Act authorizes the Bureau to prepare rules and regulations necessary to carry out surface management and protection duties.

§ 2361.5 Definitions.

As used in this subpart, the term:

Act means the Naval Petroleum Reserves Production Act of 1976 (as amended and codified at 42 U.S.C. 6501–6508).

Authorized officer means any employee of the Bureau of Land Management who has been delegated the authority to perform the duties of this subpart.

Bureau means the Bureau of Land Management.

Exploration means activities conducted on the Reserve for the purpose of evaluating petroleum resources, including crude oil, gases (including natural gas), natural gasoline, and other related hydrocarbons, oil shale, and the products of any such resources.

Indigenous Knowledge (IK) means a body of observations, oral and written knowledge, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment. It is applied to phenomena across biological, physical, social, and cultural systems. IK can be developed over millennia, continues to develop, and includes understanding based on evidence acquired through direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation. IK is developed by Indigenous Peoples including, but not limited to, Tribal Nations, American Indians, and Alaska Natives.

Integrated Activity Plan (IAP) means a land use management plan that governs the management of all BLM-administered lands and minerals throughout the Reserve.

Infrastructure means a structure or improvement that is not built for use by subsistence hunters, trappers, fishers, berry-pickers, and other subsistence users to facilitate subsistence activities and that is not ephemeral, such as snow or ice roads. Infrastructure includes

pipelines, gravel drilling pads, and other improvements built to support commercial oil and gas activities, but it does not include exploratory wells that are drilled in a single season; infrastructure in support of science and public safety; and construction, renovation, or replacement of facilities on existing gravel pads at previously disturbed sites where the facilities will promote safety and environmental protection.

Reserve means those lands within the National Petroleum Reserve in Alaska (prior to June 1, 1977, designated Naval Petroleum Reserve No. 4) which was established by Executive order, dated February 27, 1923, except for tract Numbered 1 as described in Public Land Order 2344 (the Naval Arctic Research–Laboratory—surface estate only) dated April 24, 1961.

Secretary means the Secretary of the Interior.

Significant resource value means any subsistence, recreational, fish and wildlife, historical, or scenic value identified by the Bureau as supporting the designation of a Special Area.

Special Areas means areas within the Reserve identified by the Secretary or by statute as having significant resource values and that are managed to assure maximum protection of such values, to the extent consistent with the requirements of the Act for the exploration of the Reserve.

Use authorization means a written approval of a request for use of land or resources.

§ 2361.6 Effect of law.

(a) Subject to valid existing rights, and except as provided by the Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. 96–514), all lands within the exterior boundaries of the Reserve are reserved and withdrawn from all forms of entry and disposition under the public land laws, including the mining and mineral leasing laws, and all other acts.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Secretary is authorized to:

(1) Make dispositions of mineral materials pursuant to the Act of July 31, 1947 (61 Stat. 681), as amended (30 U.S.C. 601), for appropriate use by Alaska Natives and the North Slope Borough.

(2) Make such dispositions of mineral materials and grant such rights-of-way, licenses, and permits as may be necessary to carry out the Secretary's responsibilities under the Act.

(3) Convey the surface of lands properly selected on or before December 18, 1975, by Native village corporations pursuant to the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

(4) Grant such rights-of-way to the North Slope Borough, under the provisions of title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761 *et seq.*) or section 28 of the Mineral Leasing Act, as amended (30 U.S.C. 185), as may be necessary to permit the North Slope Borough to provide energy supplies to villages on the North Slope.

(c) All other provisions of law heretofore enacted and actions heretofore taken reserving such lands as a Reserve shall remain in full force and effect to the extent not inconsistent with the Act.

(d) To the extent not inconsistent with the Act, all other public land laws are applicable.

§ 2361.7 Severability.

If a court holds any provision of the regulations in this part or their applicability to any person or circumstances invalid, the remainder of these regulations and their applicability to other people or circumstances will remain unaffected.

§ 2361.10 Protection of surface resources.

(a) In administering the Reserve, the Bureau must protect surface resources by adopting whatever conditions, restrictions, and prohibitions it deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects of proposed activities. Such conditions, restrictions, or prohibitions may involve conditioning, delaying action on, or denying some or all aspects of proposed activities, and will fully consider community access and other infrastructure needs, after consultation with the North Slope Borough and consistent with § 2361.6.

(b) The Bureau will use the following procedures to protect surface resources from the reasonably foreseeable and significantly adverse effects of proposed activities:

(1) The Bureau will maintain an Integrated Activity Plan (IAP) addressing management of all BLM-administered lands and minerals throughout the Reserve. When issuing a use authorization, the Bureau must conform to the IAP and these rules. To the extent there is any inconsistency between the IAP and these rules, the rules govern;

(2) In each decision concerning proposed activity in the Reserve, the Bureau will document consideration of, and adopt measures to mitigate, reasonably foreseeable and significantly adverse effects on fish and wildlife, water, cultural, paleontological, scenic, and any other surface resource. The Bureau will take particular care to account for, and mitigate adverse effects on, surface resources that support subsistence uses and needs;

(3) In assessing effects of a decision concerning proposed activity in the Reserve, the Bureau will identify and evaluate any reasonably foreseeable effects of its decision, including effects that are later in time or farther removed in distance, and effects that result from the incremental effects of the proposed activities when added to the effects of other past, present, and reasonably foreseeable actions; and

(4) The Bureau will document its consideration of any uncertainty concerning the nature, scope, and duration of potential effects on surface resources of the Reserve and shall ensure that any conditions, restrictions, or prohibitions on proposed activities account for and reflect any such uncertainty.

(c) When affected surface resources are located in Special Areas, the Bureau must comply with the procedures and requirements of §§ 2361.20 through 2361.60.

(d) The Bureau must include in each decision and authorization related to proposed activity in the Reserve such terms and conditions that provide the Bureau with sufficient ability to fully implement the requirements of this subpart.

(e)(1) To the extent consistent with the requirements of the Act, the terms of any applicable existing authorization, and applicable law, and after consultation with appropriate Federal, State, and local agencies, federally recognized Tribes, and Alaska Native Claims Settlement Act corporations, the authorized officer may limit, restrict, or prohibit the use of or access to lands within the Reserve, including Special Areas. Upon proper notice, as determined by the authorized officer, such actions may be taken to protect fish and wildlife breeding, nesting, spawning, lambing or calving, or migrations; subsistence uses and resources; and other environmental, scenic, or historic values.

(2) The consultation requirement in § 2361.1(e)(1) is not required when the authorized officer determines that emergency measures are required.

(f) No site, structure, object, or other values of historical, cultural, or paleontological character, including, but not limited to, historic and prehistoric remains, fossils, and artifacts, shall be injured, altered, destroyed, or collected without authorization under an appropriate Federal permit and without

compliance with applicable law governing cultural items, archaeological resources, and historic properties.

§ 2361.20 Existing Special Areas.

Any lands within the Reserve designated as a Special Area as of [EFFECTIVE DATE OF THE FINAL RULE], will continue to be managed as a Special Area except as modified pursuant to § 2361.30, including:

(a) *Colville River Special Area.* The Colville River Special Area encompasses the area within the boundaries depicted on maps that are published as of [EFFECTIVE DATE OF THE FINAL RULE], and available for public inspection at the Arctic District Office. The Colville River Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Important habitat for raptor species, including, but not limited to, the Arctic peregrine falcon;

(2) Important habitat for other bird species, including, but not limited to, neotropical migratory birds, shorebirds, loons, waterfowl, inland dwelling sea birds, and passerines;

(3) Important habitat for moose;

(4) Important habitat for fish;

(5) Important subsistence activities;

(6) Important recreational activities;

(7) World-class paleontological deposits; and

(8) Significant cultural resources, including numerous sites from the prehistoric and historic eras.

(b) *Kasegaluk Lagoon Special Area.* The Kasegaluk Lagoon Special Area encompasses the area within the boundaries depicted on maps that are published as of [EFFECTIVE DATE OF THE FINAL RULE], and available for public inspection at the Arctic District Office. The Kasegaluk Lagoon Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Important habitat for marine mammals;

(2) Unique ecosystem for the Arctic Coast;

(3) Opportunities for primitive recreational experiences;

(4) Important habitat for migratory birds; and

(5) Important subsistence activities.

(c) *Peard Bay Special Area.* The Peard Bay Special Area encompasses the area within the boundaries depicted on maps that are published as of [EFFECTIVE DATE OF THE FINAL RULE], and available for public inspection at the Arctic District Office. The Peard Bay Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Haul-out areas and nearshore waters for marine mammals; and

(2) High-use staging and migration areas for shorebirds and waterbirds.

(d) *Teshekpuk Lake Special Area.* The Teshekpuk Lake Special Area encompasses the area within the boundaries depicted on maps that are published as of [EFFECTIVE DATE OF THE FINAL RULE], and available for public inspection at the Arctic District Office. The Teshekpuk Lake Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Important nesting, staging, and molting habitat for a large number of migratory and other waterbirds;

(2) Important caribou habitat;

(3) Important shorebird habitat;

(4) Subsistence hunting and fishing activities;

(5) Pik Dunes; and

(6) Overwintering habitat for fish.

(e) *Utukok River Uplands Special Area.* The Utukok River Uplands Special Area encompasses the area within the boundaries depicted on maps that are published as of [EFFECTIVE DATE OF THE FINAL RULE], and available for public inspection at the Arctic District Office. The Utukok River Uplands Special Area shall be managed to assure maximum protection of the following significant resource values, as well as additional values identified through the process set forth in § 2361.30:

(1) Important habitat for the Western Arctic Caribou Herd;

(2) Subsistence hunting activities;

(3) Grizzly bear habitat; and

(4) Important wilderness values.

§ 2361.30 Special Areas designation and amendment process.

(a) The Bureau must evaluate lands within the Reserve for the presence of significant subsistence, recreational, fish and wildlife, historical, or scenic values and shall designate lands as Special Areas containing such values in accordance with the following procedures:

(1) At least once every 5 years, the Bureau must evaluate and determine whether to:

(i) Designate new Special Areas;

(ii) Expand existing Special Areas;

(iii) Recognize the presence of additional significant resource values in existing Special Areas; or

(iv) Require additional measures to assure maximum protection of significant resource values within existing Special Areas.

(2) The Bureau may, but is not required to, conduct the evaluation and otherwise designate and amend Special Areas through amendment of the IAP.

(3) Throughout the evaluation process, the Bureau must rely on the best available scientific information, including Indigenous Knowledge, as well as the best available information concerning subsistence uses and resources within the Reserve.

(4) The Bureau must provide the public and interested stakeholders with notice of, and meaningful opportunities to participate in, the evaluation process, including the opportunity to recommend lands that should be considered for designation as a Special Area, significant resource values that the Bureau should consider recognizing for existing Special Areas, and measures that the Bureau should consider requiring to assure maximum protection of significant resource values within Special Areas. The Bureau will evaluate and respond to recommendations that are made in completing its evaluation. Such recommendations should identify and describe:

(i) The size and location of the recommended lands;

(ii) The significant resource values that are present within or supported by the recommended lands;

(iii) Measures that may be necessary to assure maximum protection of those values; and

(iv) Any other pertinent information.

(5) If, at any point during the evaluation process, the authorized officer determines that interim measures are required to assure maximum protection of significant resource values in lands under consideration for designation as a Special Area, the authorized officer may implement such measures during the period for which the lands are under consideration.

(6) The Bureau must base its decisions to designate lands as Special Areas solely on the presence of significant resource values and must not consider the existence of measures that have been or may be adopted to protect or otherwise administer those values.

(7) When the Bureau designates lands as Special Areas or recognizes the presence of additional significant resource values in existing Special Areas, the Bureau must adopt measures to assure maximum protection of significant resource values. Once adopted, these measures become part of and supersede inconsistent provisions of the IAP then in effect for the Reserve.

(8) For any lands designated as a Special Area, the Bureau will publish a legal description of those lands in the **Federal Register,** along with a concise summary of the significant resource values that support the designation. The Bureau will also maintain a map of the Special Area on its website.

(b) The Bureau may not remove lands from the Teshekpuk Lake and Utukok River Uplands Special Areas unless directed to do so by statute. The Bureau may remove lands within other Special Areas only when all of the significant resource values that support the designation are no longer present. When determining whether to remove lands from a Special Area designation, the Bureau must:

(1) Prepare a summary of its proposed determination, including the underlying factual findings;

(2) Provide the public and interested stakeholders with the opportunity to review and comment on the proposed determination;

(3) Consult with any federally recognized Tribes and Alaska Native Claims Settlement Act corporations that use the affected Special Area for subsistence purposes or have historic or cultural ties to the Special Area; and

(4) Issue a determination that documents how the views and information provided by the public, federally recognized Tribes, Alaska Native Claims Settlement Act corporations, federally qualified subsistence users, and other interested stakeholders have been considered.

§ 2361.40 Management of oil and gas activities in Special Areas.

Assuring maximum protection of significant resource values is the management priority for Special Areas. The Bureau must fulfill this duty at each stage in the decision-making process for oil and gas activities in the Reserve and in accordance with the following procedures:

(a) The Bureau will identify and adopt maximum protection measures for each significant resource value that is present in a Special Area.

(b) The Bureau must, to the extent consistent with the Act, take such steps as are necessary to avoid the adverse effects of proposed oil and gas activities on the significant resource values of Special Areas. This includes, but is not limited to, conditioning, delaying action on, or denying proposals for activities, either in whole or in part.

(c) Subject to any revisions made pursuant to § 2361.30, oil and gas leasing and authorization of new infrastructure in Special Areas will conform to the land use allocations and restrictions identified on the maps published as of [EFFECTIVE DATE OF THE FINAL RULE], and available for public inspection at the Arctic District Office. On lands allocated as available for future oil and gas leasing or new infrastructure, the Bureau will presume that those activities should not be permitted unless specific information available to the Bureau clearly demonstrates that those activities can be conducted with no or minimal adverse effects on significant resource values.

(d) The following exceptions apply within lands identified as closed to leasing or unavailable to new infrastructure:

(1) The Bureau may issue oil and gas leases in Special Areas if drainage is occurring. Any lease issued for drainage purposes will include provisions that prohibit surface-disturbing oil and gas activities on the entire lease tract.

(2) The Bureau may approve new roads, pipelines, transmission lines, and other types of infrastructure in Special Areas provided that:

(i) The infrastructure will primarily be used by and provide a benefit to communities located within or in close proximity to the Reserve or will support subsistence activities; and

(ii) Appropriate measures are adopted to assure maximum protection of significant resource values.

(3) The Bureau may approve new permanent infrastructure related to existing oil and gas leases only if such infrastructure is essential for exploration or development activities and no practicable alternatives exist which would have less adverse impact on significant resource values of the Special Area, but only if necessary to comport with the terms of a valid existing lease.

(e) The Bureau must document and consider any uncertainty concerning the nature, scope, and duration of potential adverse effects on significant resource values of Special Areas and shall ensure that any actions it takes to avoid, minimize, or mitigate such effects account for and reflect any such uncertainty.

(f) If the Bureau determines that it cannot avoid adverse effects on a Special Area's significant resource values, then it must prepare a Statement of Adverse Effect, which must describe the:

(1) Significant resource values that may be adversely affected;

(2) Nature, scope, and duration of those adverse effects;

(3) Measures the Bureau evaluated to avoid the adverse effects;

(4) Justification for not requiring those measures;

(5) Measures the Bureau will require to minimize, to the maximum extent possible, adverse effects on significant resource values of the Special Area; and

(6) Measures the Bureau will require to mitigate any residual adverse effects that cannot be avoided or minimized, including compensatory mitigation, along with an explanation of how those measures will assure maximum protection of significant resource values.

(g) The Bureau must provide the public with a meaningful opportunity to review and comment on any Statement of Adverse Effect prepared under this section and must consider and respond to any relevant matter it receives.

(h) The Bureau must consult with any federally recognized Tribes and Alaska Native Claims Settlement Act corporations that use the affected Special Area for subsistence purposes or have historic or cultural ties to the Special Area.

(i) The Bureau must include in each decision and authorization related to oil and gas activity in the Reserve terms and conditions that provide the Bureau with sufficient authority to fully implement the requirements of this section.

§ 2361.50 Management of subsistence uses within Special Areas.

(a) The Bureau will ensure that Special Areas are managed to protect and support fish and wildlife and fish and wildlife habitat and associated subsistence use of such areas by rural residents as defined in 50 CFR 100.4.

(b) The Bureau will provide appropriate access to and within Special Areas for subsistence purposes to the extent consistent with assuring maximum protection of all significant resource values that are found in such areas.

§ 2361.60 Co-stewardship opportunities in Special Areas.

In accordance with the Bureau's co-stewardship guidance, the Bureau will seek opportunities to engage Tribes in co-stewardship for Special Areas. Co-stewardship opportunities may include co-management, collaborative and cooperative management, and Tribally-led stewardship, and can be implemented through cooperative agreements, memoranda of understanding, self-governance agreements, and other mechanisms. The Bureau may also partner with Alaska Native Claims Settlement Act corporations, local governments, or organizations as provided by law.

§ 2361.70 Use authorizations.

(a) Use authorizations must be obtained from the authorized officer

prior to any use within the Reserve. Only uses that are consistent with the purposes and objectives of the Act and these regulations will be authorized.

(b) Except as may be limited, restricted, or prohibited by the authorized officer pursuant to §§ 2361.1 and 2361.2 or otherwise, use authorizations are not required for:

(1) Subsistence uses (*e.g.,* hunting, fishing, and berry-picking); and

(2) Non-commercial recreational uses (*e.g.,* hunting, fishing, backpacking, and wildlife observation).

(c) Applications for use authorizations shall be filed in accordance with applicable regulations in this chapter. In the absence of such regulations, the authorized officer may consider and act upon applications for uses allowed under the Act.

(d) In addition to other statutory or regulatory requirements, approval of applications for use authorizations shall be subject to such terms and conditions as the authorized officer determines to be necessary to protect the environmental, subsistence, recreational, fish and wildlife, historical, and scenic values of the Reserve and to assure maximum protection of significant resource values within Special Areas.

§ 2361.80 Unauthorized use and occupancy.

Any person who violates or fails to comply with regulations of this subpart is subject to prosecution, including trespass and liability for damages, pursuant to the appropriate laws.

Subpart 2362 [Reserved]

[FR Doc. 2023–18990 Filed 9–7–23; 8:45 am]

BILLING CODE 4331–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2023–0065; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BG18

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for Brawleys Fork Crayfish and Designation of Critical Habitat

Correction

In proposed rule document 2023–17666 appearing on pages 57292–57327 in the issue of Tuesday, August 22, 2023, make the following correction:

On page 57301, beginning at the top of the page, Figure 1 is corrected to appear as set forth below:

BILLING CODE 0099–10–P

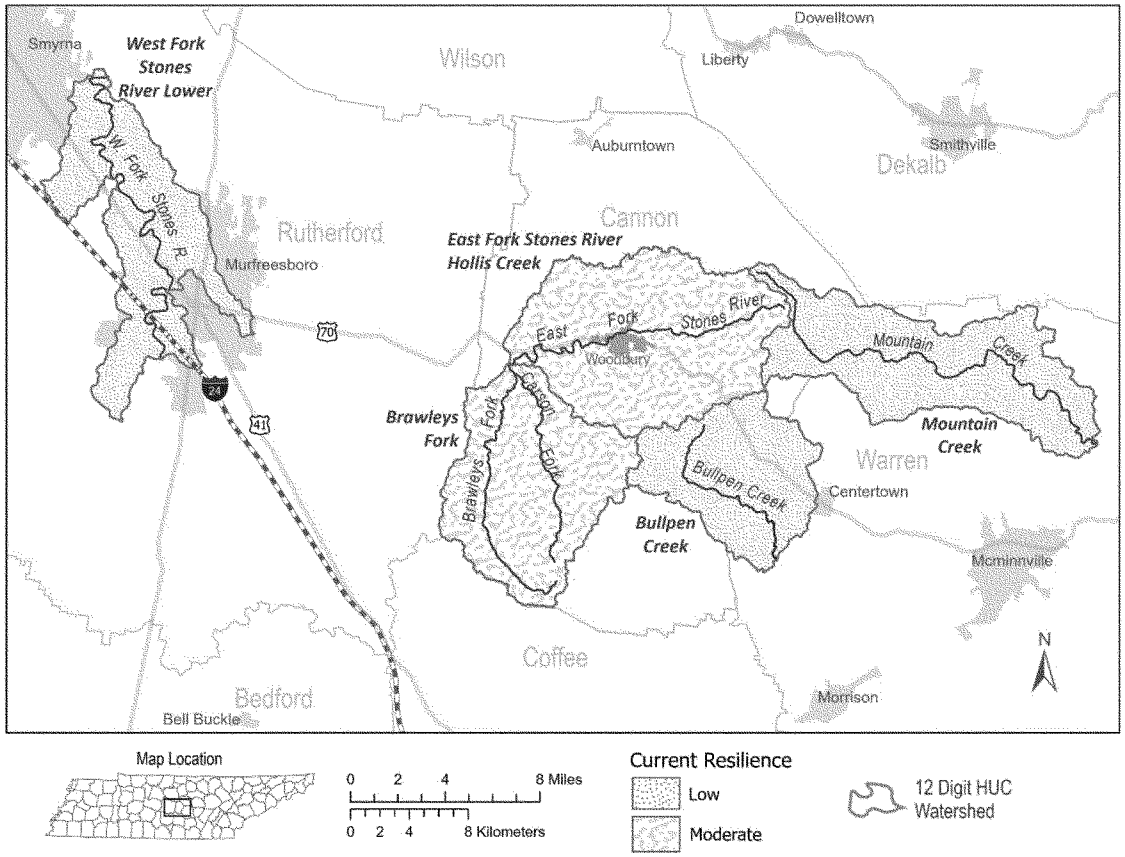

Figure 1: Current resiliency for the five delineated analysis units for Brawleys Fork crayfish. The two central units (East Fork Stones River Hollis Creek and Brawleys Fork) exhibit moderate current resiliency and the western unit (West Fork Stones River Lower), and eastern units (Mountain Creek and Bullpen Creek) exhibit low current resiliency.

[FR Doc. C1–2023–17666 Filed 9–7–23; 8:45 am]

BILLING CODE 0099–10–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 230419–0106]

RIN 0648–BI10

Atlantic Highly Migratory Species; 2006 Consolidated Highly Migratory Species Fishery Management Plan; Amendment 15

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

ACTION: Proposed rule; extension of comment period; notice of rescheduled public hearing.

SUMMARY: On May 5, 2023, NMFS published the proposed rule for Draft Amendment 15 to the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) regarding spatial fisheries management and electronic monitoring (EM) cost allocation. In the proposed rule, NMFS announced a comment period ending on September 15, 2023. Due to requests from multiple constituents, NMFS is extending the comment period for this action to October 2, 2023. Furthermore, NMFS canceled the Amendment 15 public hearing originally scheduled for August 29, 2023, in Panama City, Florida due to Hurricane Idalia and reschedules it for September 18, 2023.

DATES: The comment period on Draft Amendment 15 to the 2006 Consolidated HMS FMP has been extended from September 15, 2023, as published on May 5, 2023 (88 FR 29050), to October 2, 2023. The Amendment 15 public hearing originally scheduled on August 29, 2023 is rescheduled for September 18, 2023. See **SUPPLEMENTARY INFORMATION** for the meeting date and time.

ADDRESSES: You may submit comments on the proposed rule, as published on May 5, 2023 (88 FR 29050), identified by ''NOAA–NMFS–2019–0035,'' by electronic submission. Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov/docket/NOAA-NMFS-2019-0035,* click the ''Comment'' icon, complete the required fields, and enter or attach your comments. Comments sent by any other method, to any other address or individual, or received after the close of the comment period, may not be considered by NMFS. All comments received are a part of the public record and generally will be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may also be submitted via *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

The location of the rescheduled Amendment 15 public hearing has not changed. The Amendment 15 public hearing will be held in Panama City, FL. See **SUPPLEMENTARY INFORMATION** for the meeting date and time.

Copies of the supporting documents—including the draft environmental impact statement (DEIS), Regulatory Impact Review (RIR), Initial Regulatory Flexibility Analysis (IRFA), the Three-Year Review of the IBQ Program, and the 2006 Consolidated HMS FMP and amendments are available from the HMS website at *https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species* or by contacting Steve Durkee (*steve.durkee@noaa.gov*).

FOR FURTHER INFORMATION CONTACT: Steve Durkee (*steve.durkee@noaa.gov*), Larry Redd, Jr. (*larry.redd@noaa.gov*), or Karyl Brewster-Geisz (*karyl.brewster-geisz@noaa.gov*) at 301–427–8503.

SUPPLEMENTARY INFORMATION: On May 5, 2023, NMFS published a proposed rule (88 FR 29050) for Draft Amendment 15 to the 2006 Consolidated HMS FMP. Draft Amendment 15 and its proposed rule considers changes to Atlantic HMS fishery management measures regarding four commercial longline spatial management areas and the administration and funding of the HMS pelagic longline EM program. In the proposed rule, NMFS announced a 133-day comment period ending on September 15, 2023. During the public comment period, NMFS received requests from multiple constituent groups, including the Billfish Foundation and Blue Water Fishermen's Association, to extend the public comment period. Constituents noted the complexity and length of the Amendment and the use of a spatial modeling tool, HMS Predictive Spatial Modeling (PRiSM), as reasons for needing more time to read, understand, and provide relevant public comments. Furthermore, forecasted impacts from Hurricane Idalia necessitated canceling a previously scheduled public hearing in Panama City, Florida. The extended comment period provides additional time to the hold the rescheduled hearing. After considering the request, NMFS has determined that it is reasonable to extend the comment period to allow sufficient time for HMS Advisory Panel members and other constituents to fully consider the analyses, data, and conclusions relevant to the proposed management measures and to allow additional opportunities for public comment. Therefore, NMFS is extending the comment period until October 2, 2023, for a total of 150 days for public input on the proposed rule. Comments received during the comment period will assist NMFS in determining final management measures, consistent with the Magnuson-Stevens Fishery Conservation and Management Act, the Atlantic Tunas Convention Act, and the 2006 Consolidated HMS FMP.

Due to forecasted impacts from Hurricane Idalia, NMFS canceled the Amendment 15 public hearing originally scheduled for August 29, 2023 in Panama City, FL. NMFS has rescheduled the Amendment 15 public hearing at the same location on September 18, 2023 (Table 1).

TABLE 1—DATES, TIMES, AND LOCATIONS OF UPCOMING PUBLIC HEARINGS AND CONFERENCE CALLS

Venue	Date/time	Street address/webinar information
Public Hearing	September 18, 2023, 5 p.m.–8 p.m	National Marine Fisheries Service, Southeast Fisheries Science Center, 3500 Delwood Beach Road, Panama City, FL 32408.

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

Dated: September 1, 2023.

Samuel D. Rauch, III,

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

[FR Doc. 2023–19400 Filed 9–5–23; 4:15 pm]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 88, No. 173
Friday, September 8, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0060]

National Wildlife Services Advisory Committee; Meeting

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: We are giving notice that the National Wildlife Services Advisory Committee will be holding a public meeting.

DATES: The public meeting will be held on October 4 and 5, 2023 from 8 a.m. to 5 p.m. (Eastern Daylight Time) each day.

Public and Written Comments: Due to time constraints, the public will not be allowed to participate in the discussions during the meeting: Written public comments will be accepted before and after the meeting but must be received no later than 11:59 p.m. (EST) on October 13, 2023.

ADDRESSES: The meeting will be held at the Jamie L. Whitten Building. 1400 Independence Avenue SW, Washington, DC 20250, in the Williamsburg Conference Room (104–A).

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Joyce, Designated Federal Officer, Wildlife Services, APHIS, 4700 River Road, Unit 87, Riverdale, MD 20737; (301) 851–3999; *carrie.e.joyce@usda.gov.*

SUPPLEMENTARY INFORMATION: The National Wildlife Services Advisory Committee (the Committee) advises the Secretary of Agriculture concerning policies, program issues, and research needed to conduct the Wildlife Services (WS) program. The Committee also serves as a public forum enabling those affected by the WS program to have a voice in the program's policies.

The meeting will focus on operational and research activities conducted by the WS program. The committee will discuss pertinent WS operational, research, and program activities, to increase program effectiveness and ensure that WS remains an active participant in the protection of agriculture, property, natural resources, and human health and safety.

The meeting will be open to the public. Attendees should arrive between 8 and 8:30 a.m. Photo identification is required to gain access to the Whitten Building.

Public and Written Comments:

Due to time constraints, the public will not be allowed to participate in the discussions during the meeting: Written public comments will be accepted before and after the meeting but must be received no later than 11:59 p.m. (EST) on October 13, 2023. Written statements may be filed with the Committee before or after the meeting by sending them to the person listed under **FOR FURTHER INFORMATION CONTACT**. Written statements may also be filed at the meeting. Please refer to Docket No. APHIS–2023–0060 when submitting your statements.

Reasonable Accommodations:

If needed, please request reasonable accommodations no later than September 15, 2023, by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. Requests made after that date may be considered, but it may not be possible to fulfill them.

This notice of meeting is given pursuant to section 10 of the Federal Advisory Committee Act (5 U.S.C. 10).

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women and person with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: August 31, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–19370 Filed 9–7–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Request for a Renewal of an Information Collection; Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Programs

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to request feedback from the general public on the ''Generic Clearance for the Collection of Qualitative Feedback on Agency Programs''. This collection was developed as part of a Federal Government-wide effort to streamline the process for seeking feedback from the public on service delivery. This notice announces our intent to submit this collection to OMB for approval and solicits comments on specific aspects for the proposed information collection.

DATES: Comments on this notice must be received by November 7, 2023 to be assured of consideration.

ADDRESSES:

• *Email: omb officer@nass.usda.gov.* Include the docket number above in the subject line of the message.

• *Efax:* (855) 838–6382.

• *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

• *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Kevin L. Barnes, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–2707. Copies of this information collection and related instructions can be obtained without charge from Richard Hopper, NASS—OMB Clearance Officer, at (202) 720–2206 or at *omb officer@nass.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Programs.

OMB Control Number: 0535–0261.

Type of Request: Intent to seek approval to renew an information collection for a period of three years.

Abstract: The proposed information collection activities provides a means to obtain qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving the quality and timeliness of survey data and its analysis. The qualitative feedback will provide useful insights on perceptions and opinions, but are not rigorous statistical surveys that yield quantitative results that can be generalized to the study population. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with data collection efforts, and focus attention on areas where communication, training or changes in operations might improve NASS surveys and publications. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders.

The information collections will target areas such as: timeliness, usefulness of summarized information, perceptions of products or services, accuracy of information, efficiency and ease of reporting data, and the ease and understandability of data collection instruments. Responses will be assessed to plan and inform efforts to improve or maintain the quality of data collected and reported to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

• The collections are voluntary;

• The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, 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 NASS surveys or data, or may reasonably be expected to have experience with the surveys or data in the near future;

• Information gathered will be used only internally for improving data collection efforts, products and services, and the summarization and publication of data, and is not intended for release outside of the agency;

• Information gathered will not be used for the purpose of substantially informing influential policy decisions; and

• Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the study population.

This generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, 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.

Respondents: Farmers, ranchers, agri-businesses and data users.

Estimated Number of Respondents: 120,000.

Below we provide projected average estimates for the next three years:

Average Number of Responses per Respondent: 1.

Total Responses: 120,000 (30,000 completed responses and 90,000 refusals).

Frequency of Responses: Once per request.

Average Minutes per Response: 5 to 20 minutes, depending on the survey.

Total Estimated Burden Hours: 8,375.

Comments: Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, July 28, 2023.

Kevin L. Barnes,

Associate Administrator.

[FR Doc. 2023–19382 Filed 9–7–23; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request Revision and Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Fruits, Nuts, and Specialty Crops Surveys. Revisions to burden are needed due to (1) funding status changes for surveys conducted under cooperative agreements under full cost recovery and (2) changes in the size of the target population, sample design,

and minor changes in questionnaire design.

DATES: Comments on this notice must be received by November 7, 2023 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0039, by any of the following methods:

- *Email: omboffi cer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *E-fax:* (855) 838–6382.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: Richard Hopper, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW, Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Kevin L. Barnes, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–2707. Copies of this information collection and related instructions can be obtained without charge from Richard Hopper, NASS—OMB Clearance Officer, at (202)720–2206 or at *omboffi cer@nass.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Fruits, Nuts, and Specialty Crops Surveys.

OMB Control Number: 0535–0039.

Expiration Date of Approval: April 30, 2026.

Type of Request: To revise and extend a currently approved information collection for a period of three years.

Abstract: The primary objective of the National Agricultural Statistics Service (NASS) is to collect, prepare and issue State and national estimates of crop and livestock production, prices, and disposition; as well as economic statistics, environmental statistics related to agriculture and also to conduct the Census of Agriculture.

The Fruits, Nuts, and Specialty Crops survey program collects information on acreage, yield, production, price, and value of citrus and non-citrus fruits and nuts and other specialty crops in States with significant commercial production. The program provides data needed by the U.S. Department of Agriculture and other government agencies to administer programs and to set trade quotas and tariffs. Producers, processors, other industry representatives, State Departments of Agriculture, and universities also use forecasts and estimates provided by these surveys. All questionnaires included in this information collection will be voluntary.

The following survey is no longer funded by a cooperative agreement and constitute the majority of changes from the current approval: (1) Dried Plum (Prune) Forecast Survey previously funded by the California Department of Food and Agriculture.

Authority: These data will be collected under authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985 as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–113) and Office of Management and Budget regulations at 5 CFR part 1320.

All NASS employees and NASS contractors must also fully comply with all provisions of the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2018, Title III of Public Law 115–435, codified in 44 U.S.C. Ch. 35. CIPSEA supports NASS's pledge of confidentiality to all respondents and facilitates the agency's efforts to reduce burden by supporting statistical activities of collaborative agencies through designation of NASS agents, subject to the limitations and penalties described in CIPSEA.

Estimate of Burden: Public reporting burden for this information collection is based on approximately 50 individual surveys with expected response times of 10—60 minutes. The frequency of data collection for the different surveys will include annual, seasonal, quarterly, monthly, and one weekly survey. Estimated number of responses per respondent is 1.2. Publicity materials and instruction sheets will account for approximately 5 minutes of additional burden per respondent. Respondents who refuse to complete a survey will be allotted 2 minutes of burden per attempt to collect the data. Respondents: Producers, processors, and handlers.

Estimated Number of Respondents: 59,000.

Estimated Total Annual Burden on Respondents: 30,000 hours.

Comments: Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, August 9, 2023.

Kevin L. Barnes,

Associate Administrator.

[FR Doc. 2023–19381 Filed 9–7–23; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Office of Partnerships and Public Engagement

Advisory Committee on Beginning Farmers and Ranchers; Solicitation of Membership Nominations

AGENCY: Office of Partnerships and Public Engagement, USDA.

ACTION: Notice.

SUMMARY: The United States Department of Agriculture's (USDA) Office of Partnerships and Public Engagement (OPPE) is seeking nominations for individuals to serve on the Advisory Committee on Beginning Farmers and Ranchers (''Advisory Committee'').

DATES: All nominations received by October 10, 2023 will be considered.

ADDRESSES: Nominations may be submitted electronically to the Advisory Committee's dedicated email inbox at *acbfr@usda.gov.* Nominations may also be sent via first-class mail to: Advisory Committee on Beginning Farmers and Ranchers, Office of Partnerships and Public Engagement, 1400 Independence Avenue SW, Mail Stop 0601, Room 524–A, Washington, DC 20250. All nominations received prior to the deadline under **DATES** (above) will be considered.

FOR FURTHER INFORMATION CONTACT: Ms. R. Jeanese Cabrera, Designated Federal Officer, Office of Partnerships and Public Engagement, 1400 Independence Avenue SW, Mail Stop 0601, Room 524–A, Washington, DC 20250; Phone: (202) 720–6350; Email: *acbfr@usda.gov.*

SUPPLEMENTARY INFORMATION: The full Advisory Committee shall consist of a minimum 14 members up to a maximum of 20 members. Each member shall be appointed to serve a 2-year term and may reapply to be considered up to

two additional 2-year terms. All members serve at the pleasure of the Secretary of Agriculture. The Advisory Committee will meet at least once annually to explore issues affecting beginning farmers and ranchers, USDA policies and programs, and related matters challenging new farmers and ranchers. Advisory Committee meetings may be held in hybrid style giving participants the choice to attend in person or virtually. During public meetings, the Advisory Committee shall explore and deliberate upon specific topics and frame up recommendations involving: (1) principles to leverage and maximize existing programs that assist beginning farmers and ranchers; (2) methods and strategies that amplify and improve State collaboration and participation in USDA programs; (3) opportunity creation strategies and pilot programs (*e.g.,* farm apprenticeships, farm incubators); and (4) ideas that provide relief from labor and taxation burdens.

Member Nominations. Any interested person may nominate individuals for membership. Interested candidates may also nominate themselves. Individuals who wish to be considered for membership on the Advisory Committee must submit a nomination package that includes (1) the background disclosure form (Form AD–755) [*https://www.usda.gov/sites/default/files/documents/ad-755.pdf*]; (2) a brief cover letter with a summary of nominee's qualifications to serve on the Advisory Committee; and (3) a resume providing the nominee's background, experience, and educational qualifications (5 pages or less). Nominees may also provide samples of published writings related to matters affecting new farmers and ranchers and letters of endorsement—both of which are optional. Nomination for membership is open to the public, including minorities, women, and persons with disabilities from within the United States and its territories (Puerto Rico and the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianna Islands). Final selection of Advisory Committee members is made by the Secretary.

The Advisory Committee was originally authorized pursuant to Section 5(b) of the Agricultural Credit Improvement Act of 1992, 7 U.S.C. 1929, as amended; and reauthorized under the Food, Conservation, and Energy Act of 2008; and is established and managed in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 10.

The Advisory Committee is statutory, and its members may be designated as Representatives, Special Government Employees (SGEs), or Regular Government Employees (RGEs). Pursuant to the Advisory Committee's statutory composition, members should represent (1) new farmers and ranchers; (2) State beginning farming programs; (3) commercial lenders; (4) private nonprofit organizations with active beginning farmer or rancher programs; (5) educational institutions with demonstrated experience in training beginning farmers and ranchers; and (6) other organizations or persons who provide lending or technical assistance for farmers and ranchers. RGEs shall include employees from the Farm Service Agency and the National Institute of Food and Agriculture. SGEs shall be appointed for their personal knowledge, academic scholarship, background, and expertise in specific areas of focus as required during their terms.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include, to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Dated: September 1, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–19423 Filed 9–7–23; 8:45 am]

BILLING CODE 3412–88–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–010]

Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that the sole mandatory respondent under review sold subject merchandise at less than normal value during the period of review (POR), February 1, 2021, through January 31, 2022. Additionally, Commerce determines that Hubei Trina Solar Energy Co., Ltd. (THB) and Trina Solar (Hefei) Science and Technology Co., Ltd. (THFT) did not ship subject merchandise during the POR.

DATES: Applicable September 8, 2023.

FOR FURTHER INFORMATION CONTACT: Krisha Hill, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4037.

SUPPLEMENTARY INFORMATION:

Background

On March 9, 2023, Commerce published the *Preliminary Results* of this review in the **Federal Register** and invited interested parties to comment on those results.[1] For details regarding the events that occurred subsequent to publication of the *Preliminary Results, see* the Issues and Decision Memorandum.[2] Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [3]

The products covered by the *Order* are certain crystalline silicon photovoltaic products (solar products) from the People's Republic of China (China). Merchandise covered by the *Order* is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 8501710000, 8501721000, 8501722000, 8501723000, 8501729000, 8501801000, 8501802000, 8501803000, 8501809000, 8507208031, 8507208041, 8507208061, 8507208091, 8541420010, and 8541430010. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of the *Order* is dispositive.

[1] *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Administrative Review, and Preliminary Determination of No Shipments; 2021–2022,* 88 FR 14602 (March 9, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2021–2022 Antidumping Duty Administrative Review of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China,'' (Issues and Decision Memorandum), dated concurrently with, and hereby adopted by, this notice.

[3] *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 8592 (February 18, 2015) (*Order*). For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

Analysis of Comments Received

We addressed all the issues raised in the case and rebuttal briefs in the Issues and Decision Memorandum. A list of the issues that parties raised, and to which we responded in the Issues and Decision Memorandum, is provided in an appendix to this notice. 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.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding the *Preliminary Results,* we corrected a conversion error pertaining the truck freight surrogate value applied to solar cells [4] and valued labor using data from the Republic of Turkey, rather than Malaysia.[5]

Final Determination of No Shipments

In the *Preliminary Results,* Commerce determined that THB and THFT did not sell or export subject merchandise to, nor was their subject merchandise entered into, the United States during the POR.[6] Interested parties did not comment on Commerce's ''no shipments'' determination. Because we have no basis to reconsider this determination, Commerce has continued to determine that THB and THFT did not sell or export subject merchandise to, nor was their subject merchandise entered into, the United States during the POR.

Separate Rates

In the *Preliminary Results,* Commerce determined that Trina,[7] the sole mandatory respondent under review, demonstrated its eligibility for a separate rate. Interested parties did not comment on Commerce's separate rate determination. Because we have no basis to reconsider this determination, Commerce has continued to determine that Trina is eligible for a separate rate.

Final Results of Review

We are assigning the following weighted-average dumping margin to the firms listed below for the period February 1, 2021, through January 31, 2022:

Exporter	Weighted-average dumping margin (percent)
Trina Solar (Changzhou) Science & Technology Co., Ltd./Trina Solar Co., Ltd./Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd. (a.k.a. Yancheng Trina Solar Guoneng Science & Technology Co., Ltd.)/Trina Solar Yiwu Technology Co., Ltd./Trina Solar (Su Qian) Technology Co., Ltd./Trina Solar (Yancheng Dafeng) Co., Ltd./Changzhou Trina Hezhong Photoelectric Co., Ltd. (a.k.a. Changzhou Trina Hezhong PV Co., Ltd.)/Changzhou Trina Solar Yabang Energy Co., Ltd./Turpan Trina Solar Energy Co., Ltd	10.50

Disclosure

Commerce intends to disclose to parties to the proceeding the calculations performed for these final results of review within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise covered by the final results of this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication date of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Commerce will calculate importer-specific assessment rates for antidumping duties, in accordance with 19 CFR 351.212(b)(1). Trina reported reliable entered values. Thus, Commerce intends to calculate importer-specific *ad valorem* assessment rates by aggregating the amount of dumping calculated for all U.S. sales to the importer and dividing this amount by the total entered value of the merchandise sold to the importer.[8] Where an importer-specific *ad valorem* assessment rate is not zero or *de minimis,* Commerce will instruct CBP to collect the appropriate duties at the time of liquidation. However, where an importer specific *ad valorem* assessment rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.

For entries that were not reported in the U.S. sales database submitted by Trina, but that were entered under its case number (*i.e.,* at Trina's cash deposit rate), Commerce will instruct CBP to liquidate such entries at the China-wide entity rate (*i.e.,* 152.84 percent).[9]

Additionally, for the companies that Commerce determined did not ship subject merchandise during the POR, any suspended entries under the

[4] *See* Issues and Decision Memorandum at Comment 1.

[5] *Id.* at Comment 5.

[6] *See Preliminary Results* PDM at 5.

[7] Trina refers to the single entity comprising the following companies: Trina Solar (Changzhou) Science & Technology Co., Ltd., Trina Solar Co., Ltd., Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd. (a.k.a. Yancheng Trina Solar Guoneng Science & Technology Co., Ltd.), Trina Solar Yiwu Technology Co., Ltd., Trina Solar (Su Qian) Technology Co., Ltd., Trina Solar (Yancheng Dafeng) Co., Ltd., Changzhou Trina Hezhong Photoelectric Co., Ltd. (a.k.a. Changzhou Trina Hezhong PV Co., Ltd.), Changzhou Trina Solar Yabang Energy Co., Ltd., and Turpan Trina Solar Energy Co., Ltd. Commerce determined that these companies are affiliated within the meaning of 771(33)(F) of the Act, and should be treated as a single entity, in accordance with 19 CFR 351.401(f). *See Preliminary Results* PDM at 5–6; *see also* Memorandum, ''Antidumping Duty Administrative Review of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Affiliation and Collapsing Memorandum,'' dated February 28, 2023. Commerce received no comments regarding the determination of affiliation among these companies. Accordingly, Commerce continues to find these companies are affiliated and continues to treat them as a single entity.

[8] *See* 19 CFR 351.212(b)(1).

[9] *See Order,* 80 FR at 8595; *see also* instructions issued to CBP following publication of the *Order,* Message Number 5061301 (listing the China-wide entity's cash deposit rate as 152.84 percent), dated 03/02/2015, publicly available at *https://aceservices.cbp.dhs.gov/adcvdweb/#.*

company's case number will be liquidated at the China-wide entity rate.

Cash Deposit Requirements

The following cash deposit requirements will be in effect for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on, or after, the date of publication of this notice in the **Federal Register**, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Trina will be equal to the weighted-average dumping margin that is listed for Trina in the table above; (2) for a previously investigated or reviewed exporter of subject merchandise that is not listed in the table above that has a separate rate, the cash deposit rate will continue to be the exporter's existing cash deposit rate; (3) for all China exporters of subject merchandise that do not have a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin assigned to the China-wide entity, which is 152.84 percent; and (4) for a non-China exporter of subject merchandise that does not have a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin applicable to the China exporter(s) that supplied that non-China exporter.

These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties and/or antidumping duties increased by the amount of the countervailing duties.

Administrative Protective Order (APO)

This notice also serves as a reminder to parties subject to APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing these final results of administrative review and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213(h)(2) and 351.221(b)(5).

Dated: September 1, 2023.

Lisa W. Wang,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2023–19424 Filed 9–7–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Renewable Energy and Energy Efficiency Advisory Committee

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Renewable Energy and Energy Efficiency Advisory Committee (REEEAC or the Committee) will hold an in-person meeting, accessible to the public in-person and online, on Thursday, September 21, 2023 at the U.S. Department of Commerce in Washington, DC Registration instructions for the public to attend either in-person or online are provided below. The meeting has a limited number of spaces for members of the public to attend in-person. Requests to attend in-person will be considered on a first-come first-served basis.

DATES: Thursday September 21, 2023, from approximately 10:00 a.m. to 3:30 p.m. Eastern Daylight Time (EDT). Members of the public wishing to participate must register in advance with Cora Dickson at the contact information below by 5:00 p.m. EDT on Monday, September 18, 2023, including any requests to make comments during the meeting or for accommodations or auxiliary aids.

ADDRESSES: To register, please contact Cora Dickson, Designated Federal Officer (DFO), Office of Energy and Environmental Industries (OEEI), Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482–6083; email: *Cora.Dickson@trade.gov.* In their registration, members of the public wishing to attend in-person must request in-person attendance by the firm deadline above.

FOR FURTHER INFORMATION CONTACT: Cora Dickson, DFO, Office of Energy and Environmental Industries (OEEI), Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482–6083; email: *Cora.Dickson@trade.gov.* Registered participants joining virtually will be emailed the login information for the meeting, which will be accessible as a livestream via WebEx Webinar. Registered participants joining in-person will be emailed instructions on accessing the designated meeting space.

SUPPLEMENTARY INFORMATION:

Background: The Secretary of Commerce established the REEEAC pursuant to discretionary authority and in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. App.), on July 14, 2010. The REEEAC was re-chartered most recently on May 27, 2022. The REEEAC provides the Secretary of Commerce with advice from the private sector on the development and administration of programs and policies to expand the export competitiveness of U.S. renewable energy and energy efficiency products and services. More information about the REEEAC, including the list of appointed members for this charter, is published online at *http://trade.gov/reeeac.*

On September 21, 2023, the REEEAC will hold the fourth meeting of its current charter term. The Committee will deliberate on approval of several recommendations. The REEEAC will also be briefed on the Department of Energy's programs designed to enhance the competitiveness of the U.S. renewable energy and energy efficiency industries, and will be provided an overview of the National Export Strategy's chapter on climate and clean tech. The An agenda will be made available by September 18, 2023 upon request to Cora Dickson.

The meeting will be open to the public and will be accessible to people with disabilities. All guests are required to register in advance by the deadline identified under the DATE caption. Requests for auxiliary aids must be submitted by the registration deadline. Last minute requests will be accepted but may not be possible to fill.

A limited amount of time before the close of the meeting will be available for oral comments from members of the public attending the meeting. Members of the public attending virtually who wish to speak during the public comment period must give the DFO advance notice in order to facilitate their access. To accommodate as many speakers as possible, the time for public comments will be limited to two to five minutes per person (depending on number of public participants). Individuals wishing to reserve speaking time during the meeting must contact Cora Dickson using the contact information above and submit a brief statement of the general nature of the comments, as well as the name and address of the proposed participant, by 5:00 p.m. EDT on Monday, September 18, 2023. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the International Trade Administration may conduct a lottery to determine the speakers. Speakers are requested to submit a copy of their oral comments by email to Cora Dickson for distribution to the participants in advance of the meeting.

Any member of the public may submit written comments concerning the REEEAC's affairs at any time before or after the meeting. Comments may be submitted via email to the Renewable Energy and Energy Efficiency Advisory Committee, c/o: Cora Dickson, Designated Federal Officer, Office of Energy and Environmental Industries, U.S. Department of Commerce; *Cora.Dickson@trade.gov.* To be considered during the meeting, public comments must be transmitted to the REEEAC prior to the meeting. As such, written comments must be received no later than 5:00 p.m. EDT on Monday, September 18, 2023. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of REEEAC meeting minutes will be available within 30 days following the meeting.

Man K. Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2023–19379 Filed 9–7–23; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–469–817]

Ripe Olives From Spain: Preliminary Results of Antidumping Duty Administrative Review, and Partial Rescission of Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that producers/exporters subject to this administrative review made sales of subject merchandise at less than normal value during the period of review (POR), August 1, 2021, through July 31, 2022. In addition, we are rescinding the administrative review with respect to one company. We invite interested parties to comment on these preliminary results.

DATES: Applicable September 8, 2023.

FOR FURTHER INFORMATION CONTACT: Dusten Hom or Mary Kolberg, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5075 or (202) 482–1785, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2018, Commerce published in the **Federal Register** the antidumping duty order on ripe olives (olives) from Spain.[1] On August 2, 2022, we published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order.*[2] On October 11, 2022, based on timely requests for an administrative review, Commerce initiated the administrative review of seven companies.[3] On November 10, 2022, Commerce selected Agro Sevilla Aceitunas, S. Coop. And. (Agro Sevilla) and Angel Camacho Alimentacion, S.L. (Camacho) as the mandatory respondents in this administrative review.[4]

On April 11, 2023, Commerce extended the time limit for issuing the preliminary results of this review by 120 days, to no later than August 31, 2023.[5] For a complete description of the events between the initiation of this review and these preliminary results, *see* the Preliminary Decision Memorandum.[6]

A list of the topics discussed in the Preliminary Decision Memorandum is attached as the appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum is available at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The products covered by this *Order* are olives from Spain. For a full description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act). Export price and constructed export price are calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum.

Partial Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party that requested a review withdraws its request within 90 days of the date of publication of the notice of initiation. The request for an administrative review of Plasoliva, S.L (Plasoliva) was withdrawn within 90 days of the date of publication of the *Initiation Notice.*[7] No other party requested an administrative review of Plasoliva. As a result, Commerce is rescinding this review with respect to

[1] *See Ripe Olives from Spain: Antidumping Duty Order,* 83 FR 37465 (August 1, 2018); *see also Ripe Olives from Spain: Notice of Correction to Antidumping Duty Order,* 83 FR 39691 (August 10, 2018).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 87 FR 47187 (August 2, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022) (*Initiation Notice*).

[4] *See* Memorandum, ''Respondent Selection,'' dated November 10, 2022.

[5] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated April 11, 2023.

[6] *See* Memorandum, ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Ripe Olives from Spain; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *See* Plasoliva's Letter, ''Withdrawal Request for Administrative Review,'' dated January 9, 2023.

this company, in accordance with 19 CFR 351.213(d)(1).

Rate for Non-Selected Companies

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available.'' In this review, we preliminarily calculated dumping margins for the two mandatory respondents, Agro Sevilla and Camacho, of 2.42 and 2.35 percent, respectively, and have assigned to the non-selected companies a rate of 2.39 percent, which is the weighted average dumping margins of Agro Sevilla and Camacho weighted by their publicly ranged U.S. sales values.[8]

Preliminary Results of Review

We preliminarily determine that the following estimated weighted-average dumping margins exist for the period August 1, 2021, through July 31, 2022:

Producer/exporter	Weighted-average dumping margin (percent)
Agro Sevilla Aceitunas, S. Coop. And	2.42
Angel Camacho Alimentacion, S.L	2.35
Aceitunas Guadalquivir, S.L.U	2.39
Aceitunera del Norte de Cáceres, S.Coop.Ltda. de 2 Grado	2.39
Alimentary Group DCOOP, S.Coop.And	2.39
Internacional Olivarera, S.A	2.39

Disclosure

We intend to disclose the calculations performed in connection with these preliminary results to interested parties within five days after public announcement of the preliminary results.[9]

Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to the Assistant Secretary for Enforcement and Compliance no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[10] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[11] Case and rebuttal briefs should be filed using ACCESS and must be served on interested parties.[12] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Assessment Rates

Upon completion of the final results, Commerce shall determine, and the U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[14] If a respondent's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we intend to calculate an importer-specific assessment rate based on the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[15] If the respondent's weighted-average dumping margin or an importer-specific assessment rate is zero or *de minimis* in the final results of this review, we intend to instruct CBP not to assess duties on any of its entries in accordance with the *Final Modification for Reviews*.[16] The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this

[8] With two respondents under examination, Commerce normally calculates (A) a weighted-average of the dumping margins calculated for the examined respondents; (B) a simple average of the dumping margins calculated for the examined respondents; and (C) a weighted-average of the dumping margins calculated for the examined respondent using each company's publicly-ranged U.S. sales quantities for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts thereof from France, Germany, Italy, Japan, and the United Kingdom*'' *Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010).

[9] *See* 19 CFR 351.224(b).

[10] *See* 19 CFR 351.309(d).

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] *See* 19 CFR 351.303.

[13] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[14] *See* 19 CFR 351.212(b)(1).

[15] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

[16] *See Final Modification for Reviews,* 77 FR at 8103; *see also* 19 CFR 351.106(c)(2).

review and for future deposits of estimated duties, where applicable.[17]

For entries of subject merchandise during the POR produced by either of the individually examined respondents for which they did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate these entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[18]

For the companies identified above that were not selected for individual examination, we will instruct CBP to liquidate entries at the rates established after the completion of the final results of review.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective upon publication in the **Federal Register** of the notice of final results of this review for all shipments of olives from Spain entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) the cash deposit rate for companies subject to this review will be equal to the weighted-average dumping margins established in the final results of the review; (2) for merchandise exported by companies not covered in this review but covered in a prior segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation but the producer is, then the cash deposit rate will be the rate established in the completed segment for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 19.98 percent,[19] the all-others rate established in the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Final Results of Review

Unless extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, no later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of countervailing duties.

Notification to Interested Parties

These preliminary results and notice are issued and published in accordance with sections 751(a)(1) and 777(i) of the Act, 19 CFR 351.213(d)(4), 19 CFR 351.213(h) and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2023–19384 Filed 9–7–23; 8:45 am]

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[17] *See* section 751(a)(2)(C) of the Act.

[18] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[19] *See Ripe Olives from Spain: Antidumping Duty Order,* 83 FR 37465 (August 1, 2018) (*Order)* at 37466.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–859, A–533–915, A–508–814, A–201–858, A–580–916, A–791–828]

Brass Rod From Brazil, India, Israel, Mexico, the Republic of Korea, and South Africa: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable September 8, 2023.

FOR FURTHER INFORMATION CONTACT: Claudia Cott (Brazil), Christopher Williams (India), Andrew Hart (Israel), Frank Schmitt (Mexico), Drew Jackson (the Republic of Korea (Korea)), Dmitry Vladimirov (South Africa), AD/CVD Operations, Offices I, II, IV, VI, and IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4270, (202) 482–5166, (202) 482–1058, (202) 482–4880, (202) 482–4406, (202) 482–0665), respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 17, 2023, the U.S. Department of Commerce (Commerce) initiated less-than-fair-value (LTFV) investigations of imports of brass rod from Brazil, India, Israel, Mexico, Korea, and South Africa.[1] Currently, the preliminary determinations are due no later than October 4, 2023.

Postponement of Preliminary Determinations

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1)(A)(b)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) the petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR

[1] *See Brass Rod from Brazil, India, Israel, Mexico, the Republic of Korea, and South Africa: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 33579 (May 24, 2023) (*Initiation Notice*).

351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On August 23, 2023, the petitioners [2] submitted a timely request that Commerce postpone the preliminary determinations in these LTFV investigations to 190 days after the date of initiation of the investigations.[3] The petitioners stated that they request postponement due to the size and complexity of the investigations, the extensions of time already granted by Commerce to respondents, and the amount of time that will be needed for Commerce to conduct complete and thorough analyses in these investigations, including the issuance and review of additional supplemental questionnaires.[4]

For the reasons stated above and because there are no compelling reasons to deny the request for postponement, Commerce, in accordance with section 733(c)(1)(A) of the Act, is postponing the deadline for the preliminary determinations by 50 days (*i.e.,* 190 days after the date on which these investigations were initiated). As a result, Commerce will issue its preliminary determinations no later than November 24, 2023.[5] In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: September 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–19388 Filed 9–7–23; 8:45 am]

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[2] The petitioners are the American Brass Rod Fair Trade Coalition and its constituent members, Mueller Brass Co. and Wieland Chase LLC, U.S.

[3] *See* Petitioners' Letter, ''Request to Extend Antidumping Preliminary Determinations,'' dated August 23, 2023.

[4] *Id.*

[5] Because the extended deadline for these preliminary determinations falls on a Federal holiday (*i.e.,* November 23, 2023), the deadline becomes the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

DEPARTMENT OF COMMERCE

International Trade Administration

United States-Mexico-Canada Agreement (USMCA), Article 10.12: Binational Panel Review: Notice of Request for Panel Review

AGENCY: United States Section, USMCA Secretariat, International Trade Administration, Department of Commerce.

ACTION: Notice of USMCA request for panel review.

SUMMARY: A Request for Panel Review was filed in the matter of Certain Softwood Lumber from Canada: Final Results of a Final Rescission, in Part, of the Countervailing Duty Administrative Review; 2021 with the U.S. Section of the USMCA Secretariat on August 31, 2023, pursuant to USMCA Article 10.12. The final results of the administrative review were published in the **Federal Register** on August 1, 2023. The USMCA Secretariat has assigned case number USA–CDA–2023–10.12–01 to this request.

FOR FURTHER INFORMATION CONTACT: Vidya Desai, United States Secretary, USMCA Secretariat, Room 2061, 1401 Constitution Avenue NW, Washington, DC 20230, 202–482–5438.

SUPPLEMENTARY INFORMATION: Article 10.12 of chapter 10 of USMCA provides a dispute settlement mechanism involving trade remedy determinations issued by the Government of the United States, the Government of Canada, and the Government of Mexico. Following a Request for Panel Review, a Binational Panel is composed to review the trade remedy determination being challenged and issue a binding Panel Decision. There are established USMCA *Rules of Procedure for Article 10.12 (Binational Panel Reviews),* which were adopted by the three governments for panels requested pursuant to article 10.12(2) of USMCA which requires Requests for Panel Review to be published in accordance with Rule 40. For the complete Rules, please see *https://can-mex-usa-sec.org/secretariat/agreement-accord-acuerdo/usmca-aceum-tmec/rules-regles-reglas/article-article-articulo_10_12.aspx?lang=eng.*

The Rules provide that:

(a) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 44 no later than 30 days after the filing of the first Request for Panel Review (the deadline for filing a Complaint is October 2, 2023);

(b) A Party, an investigating authority or other interested person who does not file a Complaint but who intends to participate in the panel review shall file a Notice of Appearance in accordance with Rule 45 no later than 45 days after the filing of the first Request for Panel Review (the deadline for filing a Notice of Appearance is October 16, 2023);

(c) The panel review will be limited to the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and to the procedural and substantive defenses raised in the panel review.

Dated: September 5, 2023.

Vidya Desai,

U.S. Secretary, USMCA Secretariat.

[FR Doc. 2023–19439 Filed 9–7–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–155]

Certain Pea Protein From the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable September 8, 2023.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson and Laura Griffith, 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) 482–4793 and (202) 482–6430, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2023, the U.S. Department of Commerce (Commerce) initiated a countervailing duty (CVD) investigation of imports of certain pea protein from the People's Republic of China.[1] Currently, the preliminary determination is due no later than October 5, 2023.

Postponement of Preliminary Determination

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires

[1] *See Certain Pea Protein from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 88 FR 52116 (August 7, 2023) (*Initiation Notice*).

Commerce to issue the preliminary determination in a CVD investigation within 65 days after the date on which Commerce initiated the investigation. However, section 703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation if: (A) the petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On August 29, 2023, the petitioner [2] submitted a timely request that Commerce postpone the preliminary determination in this investigation.[3] The petitioner stated that a postponement of the preliminary determination is necessary because the mandatory respondents have not yet submitted initial questionnaire responses and additional time will be needed to review those responses and issue supplemental questionnaires should there be deficiencies.[4]

In accordance with 19 CFR 351.205(e), the petitioner has stated the reasons for requesting a postponement of the preliminary determination, and Commerce finds no compelling reason to deny the request. Therefore, in accordance with section 703(c)(1)(A) of the Act, Commerce is postponing the deadline for the preliminary determination to no later than 130 days after the date on which this investigation was initiated, *i.e.,* December 11, 2023.[5] Pursuant to section 705(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determination of this investigation will continue to be 75 days after the date of the preliminary determination.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: September 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–19386 Filed 9–7–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–836]

Light-Walled Rectangular Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that Maquilacero S.A. de C.V. (Maquilacero) and Tecnicas de Fluidos S.A. de C.V. (TEFLU), (collectively, Maquilacero/TEFLU) and Regiomontana de Perfiles y Tubos S. de R.L. de C.V. (Regiopytsa) sold light-walled rectangular pipe and tube (LWRPT) from Mexico at less than normal value during the period of review (POR), August 1, 2021, through July 31, 2022. We invite interested parties to comment on these preliminary results.

DATES: Applicable September 8, 2023.

FOR FURTHER INFORMATION CONTACT: Charles Doss or John Conniff, 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) 482–4474 and (202) 482–1009, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 5, 2008, Commerce published in the **Federal Register** the antidumping duty order on LWRPT from Mexico.[1] On August 2, 2022, Commerce published in the **Federal Register** a notice of opportunity to request administrative reviews of the *Order*.[2] On October 11, 2022, based on timely requests for review, in accordance with section 751(a)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review of the *Order* covering 20 companies.[3] On January 3, 2023, we selected Maquilacero/TEFLU and Regiopytsa for individual examination as the mandatory respondents in this administrative review.[4] Pursuant to section 751(a)(3)(A) of the Act, Commerce extended the deadline for the preliminary results until August 31, 2023.[5]

For a complete description of the events that followed the initiation of the review, *see* the Preliminary Decision Memorandum.[6] A list of topics included in the Preliminary Decision Memorandum is included in the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The merchandise subject to the *Order* is certain light-walled rectangular pipe and tube from Mexico. The LWRPT subject to the *Order* is currently classified under the Harmonized Tariff

[2] The petitioner is PURIS Proteins, LLC.

[3] *See* Petitioner's Letter, ''Request for Extension of Preliminary Determination Deadline,'' dated August 29, 2023.

[4] *Id.*

[5] Postponing the preliminary determination to 130 days after initiation would place the deadline on Saturday, December 9, 2023. Commerce's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

[1] *See Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China and Republic of Korea: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value,* 73 FR 45403 (August 5, 2008) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 47187 (August 2, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022) (*Initiation Notice*). We note that Commerce has previously determined that Regiomontana de Perfiles y Tubos S. de R.L. de C.V. is the successor-in-interest to Regiomontana de Perfiles y Tubos S.A. de C.V. and that Maquilacero and TEFLU comprise a single entity. *See, e.g., Light-Walled Rectangular Pipe and Tube from Mexico: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2018–2019,* 85 FR 83886 (December 23, 2020), and accompanying Preliminary Decision Memorandum at 6, unchanged in *Light Walled Rectangular Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review: 2018–2019,* 86 FR 33646 (June 25, 2021).

[4] *See* Memorandum, ''Respondent Selection,'' dated January 3, 2023.

[5] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated April 3, 2023.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results: Light-Walled Rectangular Pipe and Tube from Mexico; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Schedule of the United States (HTSUS) subheadings 7306.61.5000 and 7306.61.7060. While HTSUS subheadings are provided for convenience and Customs purposes; the written description of the scope of the *Order* is dispositive.

For a complete description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. Export price was calculated in accordance with section 772 of the Act. Normal value was calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Rate for Non-Examined Companies

For the rate for companies not selected for individual examination in an administrative review, generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a less-than-fair-value (LTFV) investigation. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' In this administrative review, we calculated weighted-average dumping margins for Maquilacero/TEFLU and Regiopytsa that are not zero, *de minimis,* or based entirely on total facts available. For the respondents that were not selected for individual examination in this administrative review, we have assigned to them the simple average of the weighted-average dumping margins calculated for Maquilacero/TELFLU and Regiopytsa, consistent with the guidance in section 735(c)(5)(B) of the Act.[7]

Preliminary Results of Review

We preliminarily determine the following estimated weighted-average dumping margins exist for the period August 1, 2021, through July 31, 2022:

Exporter or producer	Weighted-average dumping margin (percent)
Maquilacero S.A. de C.V./Tecnicas de Fluidos S.A. de C.V	5.08
Regiomontana de Perfiles y Tubos S. de R.L. de C.V	1.29
Aceros Cuatro Caminos S.A. de C.V	3.19
Arco Metal S.A. de C.V	3.19
Fabricaciones y Servicios de Mexico	3.19
Galvak, S.A. de C.V	3.19
Grupo Estructuras y Perfiles	3.19
Industrias Monterrey S.A. de C.V	3.19
Internacional de Aceros, S.A. de C.V	3.19
Nacional de Acero S.A. de C.V	3.19
PEASA-Productos Especializados de Acero	3.19
Perfiles LM, S.A. de C.V	3.19
Productos Laminados de Monterrey S.A. de C.V	3.19
Talleres Acero Rey S.A. de C.V	3.19
Ternium Mexico S.A. de C.V	3.19
Tuberias Aspe S.A de C.V	3.19
Tuberia Laguna, S.A. de C.V	3.19
Tuberias y Derivados S.A. de C.V	3.19

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to interested parties within five days after the date of publication of this notice in accordance with 19 CFR 351.224(b).

Interested parties will be notified of the timeline for the submission of such case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[8] Parties who submit case or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[9] Executive summaries should be limited to five pages total, including footnotes.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via Commerce's electronic records system, ACCESS, within 30 days of the date of publication of this notice in the **Federal Register**.[10] Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

All submissions to Commerce should be filed using ACCESS.[11] An electronically filed document must be received successfully in its entirety by ACCESS by 5 p.m. Eastern Time on the date that the document is due. Note that Commerce had modified certain of its requirements for serving documents

[7] *See* Preliminary Decision Memorandum at ''Companies Not Selected For Individual Examination;'' *see also* Memorandum, ''Calculation of Non-Selected Rate in Preliminary Results,'' dated concurrently with this notice; *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010).

[8] *See* 19 CFR 351.309(d)(1).

[9] *See* 19 CFR 351.309(c)(2) and (d)(2).

[10] *See* 19 CFR 351.310(c).

[11] *See* 19 CFR 351.303.

containing business proprietary information, until further notice.[12]

Final Results of Review

Unless extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of all issues raised in the case and rebuttal briefs, within 120 days of publication of these preliminary results in the **Federal Register**.[13]

Verification

On January 19, 2023, Nucor Tubular Products Inc., a domestic interested party, requested that Commerce conduct verification of the information submitted in the Maquilacero/TEFLU's responses.[14] Accordingly, as provided in section 782(i)(3) of the Act, Commerce intends to verify Maquilacero/TEFLU's information that will be relied upon in determining the final results of review.

Assessment Rates

Upon issuance of the final results of this administrative review, pursuant to section 751(a)(2)(A) of the Act, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise.

For individually examined respondents whose weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.50 percent), we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). If the respondent has not reported entered values, we will calculate a per-unit assessment rate for each importer by dividing the total amount of dumping calculated for the examined sales made to that importer by the total quantity associated with those sales. To determine whether an importer-specific, per-unit assessment rate is *de minimis,* in accordance with 19 CFR 351.106(c)(2), we also will calculate an importer-specific *ad valorem* ratio based on estimated entered values. Where either a respondent's weighted average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,* we intend to instruct CBP to liquidate appropriate entries without regard to antidumping duties.[15]

For entries of subject merchandise during the POR produced by each individually examined respondent for which the producer did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate such entries at the all-others rate (3.76 percent) if there is no rate for the intermediate company(ies) involved in the transaction.[16]

For those companies which were not individually examined, we will instruct CBP to assess antidumping duties at an *ad valorem* rate equal to the weighted-average dumping margin determined for the non-examined companies in the final results of this review.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review where applicable. Commerce intends to issue assessment instructions to CBP no earlier than 41 days after the date of publication of the final results of this review in the **Federal Register**, in accordance with 19 CFR 356.8(a).

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for each specific company listed above will be equal to the weighted-average dumping margin established in the final results of this administrative review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rates will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the producer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be the all-others rate of 3.76 percent.[17]

These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act, 19 CFR 351.213(h)(2), and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2023–19385 Filed 9–7–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–810]

Stainless Steel Bar from India: Final Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that producers/exporters of stainless steel bar (SS Bar) did not make sales at prices

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID 19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[13] *See* section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

[14] *See* Petitioner's Letter, ''Request for Verification,'' dated January 19, 2023.

[15] *See* 19 CFR 351.106(c)(2); *see also Antidumping Proceeding: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101, 8103 (February 14, 2012).

[16] *See Order,* 73 FR at 45405; *see also Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[17] *See Order,* 73 FR at 45405.

below normal value during the period of review (POR), February 1, 2021, through January 31, 2022.

DATES: Applicable September 8, 2023.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone: (202) 482–1785.

SUPPLEMENTARY INFORMATION:

Background

On March 7, 2023, Commerce published in the **Federal Register** the *Preliminary Results* of the 2021–2022 administrative review of the antidumping duty order on SS Bar from India.[1] We invited interested parties to comment on the *Preliminary Results.* For a complete description of the events that occurred since the *Preliminary Results,* see the Issues and Decision Memorandum.[2] Commerce conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [3]

The products covered by the *Order* are SS Bar. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.[4]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in this review are listed in Appendix I to this notice and addressed in the Issues and Decision Memorandum. 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 at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our analysis of the comments received, we removed certain price deductions made after the time of sale when calculating net normal value for Laxcon Steels Limited, and its affiliates, Ocean Steels Private Limited, Metlax International Private Limited, Parvati Private Limited, and Mega Steels Private Limited (collectively, Laxcon).[5]

Final Results of Review

We determine that the following weighted-average dumping margins exists for the period February 1, 2021, through January 31, 2022:

Producer/exporter	Weighted-average dumping margin (percent)
Laxcon Steels Limited, and its affiliates, Ocean Steels Private Limited, Metlax International Private Limited, Parvati Private Limited, and Mega Steels Private Limited [6]	0.00
Bhansali Bright Bars Pvt. Ltd [7]	0.00
Bhansali Inc	0.00
Venus Wire Industries Pvt. Ltd., and its affiliates, Precision Metals, Hindustan Inox Ltd., and Sieves Manufacturers (India) Pvt. Ltd [8]	0.00

Disclosure

We intend to disclose the calculations performed for these final results of review to the parties within five days after public announcement, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For any individually examined respondents whose weighted-average dumping margin is above *de minimis,* we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales to that importer, and we will instruct CBP to assess antidumping duties on all appropriate entries covered by this. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review in the **Federal Register**, as provided for by section 751(a)(2) of the Act: (1) the cash deposit rate for companies subject to this review will be the rates established in these final results of the review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, then the cash deposit rate will be the rate established for the most recent period for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 12.45 percent,[9] the all-others rate established in the investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties

[1] *See Stainless Steel Bar from India: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 14118 (March 7, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Stainless Steel Bar from India; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Antidumping Duty Orders: Stainless Steel Bar from Brazil, India and Japan,* 60 FR 9661 (February 21, 1995) (*Orders*).

[4] *See* Issues and Decision Memorandum.

[5] *Id.* at Comment 8.

[6] Collectively, these companies are known as Laxcon.

[7] *See Preliminary Results* at 14119 for discussion on the rate for companies not individually examined. In accordance with section 735(c)(5)(B) of the Act, we are assigning the zero percent rate calculated for the mandatory respondent, Laxcon.

[8] Collectively, these companies are known as Venus Group.

[9] *See Order* at 66921.

has occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2023–19390 Filed 9–7–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–817, C–533–818, A–560–805, C–560–806, A–580–836, C–580–837]

Certain Cut-To-Length Carbon-Quality Steel Plate From India, Indonesia, and the Republic of Korea: Continuation of Antidumping and Countervailing Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order and countervailing duty (CVD) orders on certain cut-to-length carbon-quality steel plate (CTL plate) from India, Indonesia, and the Republic of Korea (Korea) would likely lead to the continuation or recurrence of dumping and countervailable subsidies, and material injury to an industry in the United States, Commerce is publishing a notice of continuation of these AD and CVD orders.

DATES: Applicable August 28, 2023.

FOR FURTHER INFORMATION CONTACT: Nathan Araya (AD) or Katherine Sliney (CVD), AD/CVD Operations, Offices II and III respectively, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3401 or (202) 482–2437, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 10, 2000, Commerce published in the **Federal Register** the AD and CVD orders on certain CTL plate from India, Indonesia, and Korea.[1] On February 1, 2023, the ITC instituted,[2] and Commerce initiated,[3] the fourth sunset reviews of the *Orders,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). As a result of its reviews, Commerce determined that revocation of the *Orders* would likely lead to the continuation or recurrence of dumping or countervailable subsidies, and therefore, notified the ITC of the magnitude of the margins of dumping and countervailable subsidies likely to prevail should the *Orders* be revoked.[4]

On August 28, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

Scope of the Orders

The products covered by the *Orders* are certain hot-rolled carbon-quality steel: (1) universal mill plates (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a nominal or actual thickness of not less than 4 mm, which are cut-to-length (not in coils) and without patterns in relief), of iron or non-alloy-quality steel; and (2) flat-rolled products, hot-rolled, of a nominal or actual thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are cut-to-length (not in coils).

Steel products to be included in the scope of the *Orders* are of rectangular, square, circular or other shape and of rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process (*i.e.,* products which

[1] *See Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products from France, India, Indonesia, Italy, Japan, and the Republic of Korea,* 65 FR 6585 (February 10, 2000); and *Notice of Amended Final Determinations: Certain Cut-to-Length Carbon-Quality Steel Plate from India and the Republic of Korea; and Notice of Countervailing Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate from France, India, Indonesia, Italy, and the Republic of Korea,* 65 FR 6587 (February 10, 2000) (collectively, *Orders*).

[2] *See Cut-to-Length Carbon-Quality Steel Plate (CTL Plate) from India, Indonesia, and South Korea; Institution of Five-Year Reviews,* 88 FR 6781 (February 1, 2023).

[3] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 6700 (February 1, 2023).

[4] *See Certain Cut-to-Length Carbon-Quality Steel Plate from India, Indonesia, and the Republic of Korea: Final Results of the Expedited Fourth Sunset Reviews of the Antidumping Duty Orders,* 88 FR 36530 (June 5, 2023); *see also Certain Cut-to-Length Carbon-Quality Steel Plate from India, Indonesia, and the Republic of Korea: Final Results of Expedited Fourth Sunset Reviews of Countervailing Duty Orders,* 88 FR 37856 (June 9, 2023).

[5] *See Cut-to-Length Carbon-Quality Steel Plate from India, Indonesia, and South Korea Determinations,* 88 FR 58619 (August 28, 2023) (*CTL Plate from India, Indonesia, and South Korea*); *See also Cut-to-Length Carbon-Quality Steel Plate from India, Indonesia, and South Korea Determinations,* Inv. Nos. 701–TA–388, 389, and 391 and 731–TA–817, 818, and 821, 88 FR 58619 USITC Pub. 5455 (August 2023) (Fourth Sunset Review) (*ITC Sunset Review Determination*).

have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Steel products that meet the noted physical characteristics that are painted, varnished or coated with plastic or other non-metallic substances are included within this scope. Also, specifically included in the scope of the *Orders* is high strength, low alloy (HSLA) steels. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum.

Steel products to be included in this scope, regardless of Harmonized Tariff Schedule of the United States (HTSUS) definitions, are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is two percent or less, by weight; and (3) none of the elements listed below is equal to or exceeds the quantity, by weight, respectively indicated: 1.80 percent of manganese, or 1.50 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.41 percent of titanium, or 0.15 percent of vanadium, or 0.15 percent zirconium. All products that meet the written physical description, and in which the chemistry quantities do not equal or exceed any one of the levels listed above, are within the scope of these *Orders* unless otherwise specifically excluded. The following products are specifically excluded from the *Orders:* (1) products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances; (2) SAE grades (formerly AISI grades) of series 2300 and above; (3) products made to ASTM A710 and A736 or their proprietary equivalents; (4) abrasion-resistant steels (*i.e.,* USS AR 400, USS AR 500); (5) products made to ASTM A202, A225, A514 grade S, A517 grade S, or their proprietary equivalents; (6) ball bearing steels; (7) tool steels; and (8) silicon manganese steel or silicon electric steel.

The merchandise subject to the *Orders* is currently classifiable in the HTSUS under subheadings: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7225.40.3050, 7225.40.7000, 7225.50.6000, 7225.99.0090, 7226.91.5000, 7226.91.7000, 7226.91.8000, 7226.99.0000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise covered by the *Orders* is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Orders.* U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* will be August 28, 2023.[6] Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year reviews of the *Orders* not later than 30 days prior to fifth anniversary of the date of the last determination by the Commission.

Administrative Protective Order (APO)

This notice also serves as a final reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

These five-year (sunset) reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i) of the Act, and 19 CFR 351.218(f)(4).

Dated: September 1, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–19387 Filed 9–7–23; 8:45 am]

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[6] *See ITC Sunset Review Determination.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–133]

Certain Metal Lockers and Parts Thereof From the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that certain exporters made sales of certain metal lockers and parts thereof (metal lockers) from the People's Republic of China (China) during the period of review (POR), February 11, 2021, through July 31, 2022. Additionally, Commerce is rescinding this review with respect to Hangzhou Zhuoxu Trading Co. Ltd. (Hangzhou Zhuoxu). Interested parties are invited to comment on these preliminary results.

DATES: Applicable September 8, 2023.

FOR FURTHER INFORMATION CONTACT: Deborah Cohen 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) 482–4521 or (202) 482–1678, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 20, 2021, Commerce published in the **Federal Register** the antidumping duty order on metal lockers from China.[1] On August 2, 2022, Commerce published in the **Federal Register** a notice of opportunity to request administrative reviews of the *Order*.[2] On October 11, 2022, in accordance with 19 CFR 351.221(c)(1)(i), Commerce published a notice of initiation for this administrative review in response to requests to review by interested parties.[3] On March 28, 2023, we extended the deadline for these preliminary results, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended

[1] *See Certain Metal Lockers and Parts Thereof From the People's Republic of China: Antidumping and Countervailing Duty Orders,* 86 FR 46826 (August 20, 2021) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 47187 (August 2, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022). (*Initiation Notice*).

(the Act), and 19 CFR 351.213(h)(2), until August 31, 2023.

For a complete description of the events that followed the initiation of this administrative review, *see* the Preliminary Decision Memorandum.[4] A list of topics included in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be found at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The products covered by the *Order* are metal lockers from China. For a complete description of the *Order, see* the Preliminary Decision Memorandum.

Partial Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), based on the timely withdrawal of the sole request for review, we are rescinding this administrative review with respect to the following company named in the *Initiation Notice:* Hangzhou Zhuoxu.[5]

Separate Rates

Commerce preliminarily determines that three non-individually examined companies are eligible for separate rates in this administrative review.[6] The Act and Commerce's regulations do not address the establishment of a separate rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for separate-rate respondents which Commerce did not examine individually in an administrative review. Section 735(c)(5)(A) of the Act states that the all-others rate should be calculated by averaging the weighted-average dumping margins calculated for individually-examined respondents, excluding dumping margins that are zero, *de minimis,* or based entirely on facts available. For the preliminary results of this review, Commerce determined the estimated dumping margins for ZXM/XMT and Hangzhou Evernew to be 76.95 percent and 288.06 percent, respectively. As explained in the Preliminary Decision Memorandum, we are preliminarily assigning a rate of 94.13 percent to the three non-examined respondents: Kunshan Dongchu Precision Machinery Co., Ltd., Tianjin Jia Mei Metal Furniture Ltd, and Zhejiang Focus-On Import & Export Co., Ltd., which qualify for a separate rate in this review, consistent with Commerce's practice and section 735(c)(5)(A) of the Act.

The China-Wide Entity

Under Commerce's policy regarding the conditional review of the China-wide entity,[7] the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of the China-wide entity in this review, the entity is not under review, and the entity's rate (*i.e.,* 322.25 percent) is not subject to change.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act and constructed export prices in accordance with section 772(b) of the Act. Because China is a non-market economy, within the meaning of section 771(18) of the Act, Commerce has calculated normal value (NV) in accordance with section 773(c) of the Act. For a full description of the methodology underlying Commerce's preliminary results, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

We preliminarily determine that the following estimated weighted-average dumping margins exist for the period February 11, 2021, through July 31, 2022:

Exporter	Weighted-average dumping margin (percent)
Zhejiang Xingyi Metal Products Co., Ltd and Xingyi Metal-working Technology (Zhejiang) Co., Ltd	76.95
Hangzhou Evernew Machinery & Equipment Company Limited/ Zhejiang Yinghong Metalworks Co., Ltd[8]	239.33
Kunshan Dongchu Precision Machinery Co., Ltd	96.31
Tianjin Jia Mei Metal Furniture Ltd	96.31
Zhejiang Focus-On Import & Export Co., Ltd	96.31

Disclosure and Public Comment

We intend to disclose to interested parties the calculations performed for these preliminary results in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review.[9] Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[10] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this review are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Executive summaries should be limited to five pages total, including footnotes. Case and rebuttal briefs should be filed using ACCESS.[11] Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information, until further notice.[12]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a

[4] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Certain Metal Lockers and Parts Thereof from the People's Republic of China, 2021–2022,'' dated concurrently with this notice (Preliminary Decision Memorandum).

[5] *See* Hangzhou Zhuoxu's Letter, ''Withdrawal of Administrative Review Request,'' dated November 1, 2022.

[6] *See* Preliminary Decision Memorandum at the ''Separate Rate Determination'' section for more details.

[7] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[8] We preliminarily find that Hangzhou Evernew and its producer, Zhejiang Yinghong Metalworks Co., Ltd., are affiliated, pursuant to section 771(33)(F) of the Act and 19 CFR 351.102(b)(3) and should be treated as a single entity pursuant to 19 CFR 351.401(f)(1) for the purposes of these preliminary results. *See* Preliminary Decision Memorandum at Section V. ''Single Entity Analysis'' for further discussion of the preliminary collapsing determination.

[9] *See* 19 CFR 351.309(c).

[10] *See* 19 CFR 351.309(d); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006, 17007 (March 26, 2020) (''To provide adequate time for release of case briefs via ACCESS, E&C intends to schedule the due date for all rebuttal briefs to be 7 days after case briefs are filed (while these modifications remain in effect.'').

[11] *See, generally,* 19 CFR 351.303.

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically via Commerce's electric records system, ACCESS. An electronically-filed request must be received successfully in its entirety by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.[13] Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined.[14] Parties should confirm by telephone the date and time of the hearing two days before the scheduled date.

Unless otherwise extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case and rebuttal briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

Assessment Rates

Upon issuance of the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review, in accordance with 19 CFR 351.212(b)(1). Commerce intends to issue assessment instructions to CBP 35 days after the publication of the final results of this review. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

We will calculate importer/customer-specific assessment rates equal to the ratio of the total amount of dumping calculated for examined sales to a particular importer/customer to the total entered value of those sales, in accordance with 19 CFR 351.212(b)(1).[15] Where the respondents reported reliable entered values, Commerce intends to calculate importer/customer-specific *ad valorem* assessment rates by dividing the total amount of dumping calculated for all reviewed U.S. sales to the importer/customer by the total entered value of the merchandise sold to the importer/customer.[16] Where the respondents did not report entered values, Commerce will calculate importer/customer-specific assessment rates by dividing the total amount of dumping calculated for all reviewed U.S. sales to the importer/customer by the total quantity of those sales. Commerce will calculate an estimated *ad valorem* importer/customer-specific assessment rate to determine whether the per-unit assessment rate is *de minimis;* however, Commerce will use the per-unit assessment rate where entered values were not reported.[17] Where an importer/customer-specific *ad valorem* assessment rate is not zero or *de minimis,* Commerce will instruct CBP to collect the appropriate duties at the time of liquidation. Where either the respondents' *ad valorem* weighted-average dumping margin is zero or *de minimis,* or an importer/customer-specific *ad valorem* assessment rate is zero or de minimis,[18] Commerce will instruct CBP to liquidate the appropriate entries without regard to ADs.

Pursuant to Commerce's refinement to its practice, for sales that were not reported in the U.S. sales database submitted by a respondent individually examined during this review, Commerce will instruct CBP to liquidate the entry of such merchandise at the dumping margin assigned to the China-wide entity.[19] For respondents not individually examined in this administrative review that qualified for a separate rate, the assessment rate will be equal to the weighted-average dumping margin assigned to the respondent in the final results of this review.[20]

In accordance with section 751(a)(2)(C) of the Act, the final results of this review shall be the basis for the assessment of ADs on entries of merchandise covered by the final results of this review and for future deposits of estimated ADs, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for all shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of the final results of administrative review in the **Federal Register**, as provided for by section 751(a)(2)(C) of the Act: (1) for the companies that have a separate rate, the cash deposit rate will be that rate established in the final results of this review (except, if the rate is *de minimis,* then a cash deposit rate of zero will be required); (2) for previously investigated or reviewed Chinese and non-Chinese exporters for which a review was not requested and that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity (*i.e.,* 322.25 percent); and (4) for all non-Chinese exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

In the underlying investigation, we determined that ZXM and its affiliate, XMT, comprised a single entity pursuant to 19 CFR 351.401(f). Commerce's practice is to presume that companies continue to comprise a single entity when that finding has been made in a prior segment of the proceeding.[21] Accordingly, we initiated upon and examined the collapsed ZXM/XMT respondent throughout the preliminary stage of this proceeding. However, as discussed in the Preliminary Decision Memorandum, we preliminarily determine that the record no longer supports a finding that ZXM should be collapsed with XMT subsequent to January 13, 2022, as ZXM

[13] *See* 19 CFR 351.310(c).

[14] *See* 19 CFR 351.310(d).

[15] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[16] *See* 19 CFR 351.212(b)(1).

[17] *Id.*

[18] *See* 19 CFR 351.106(c)(2).

[19] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

[20] *See, e.g., Drawn Stainless Steel Sinks from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments: 2014–2015,* 81 FR 29528 (May 12, 2016), and accompanying PDM at 10–11, unchanged in *Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2014–2015,* 81 FR 54042 (August 15, 2016).

[21] *See Initiation Notice. See also, e.g., China First Pencil Co., Ltd.* v. *United States,* 427 F.Supp.2d. 1236, 1239–41 (CIT 2006) (sustaining Commerce's decision to continue collapsing companies which were found to be collapsed in a previous review, where plaintiff ''failed to meet its burden of establishing that the facts and circumstances had changed sufficiently to warrant a re-examination of Commerce's decision.'').

ceased involvement with the production and/or exportation of subject merchandise prior to the POR, was acquired by an unrelated third-party ownership a month prior, and all indicia of affiliation and/or control between the two companies ceased as of that date. Accordingly, we continue to review the single entity for the February 11, 2021, through January 13, 2022, segment of this review and for the purposes of subsequent assessment. Therefore, should Commerce continue to determine the companies are not a single entity and XMT remains the only component of the former ZXM/XMT entity involved in the exportation of subject merchandise in the final results, we intend to assign the prospective cash deposit rate only to XMT as the exporter, and to instruct CBP to discontinue the ZXM/XMT combination rate.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing the preliminary results of this review in accordance with sections 751(a)(l) and 777(i)(l) of the Act, 19 CFR 351.213(d)(4), and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2023–19389 Filed 9–7–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–813]

Polyethylene Retail Carrier Bags From Malaysia: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily finds that Euro SME Sdn Bhd (Euro SME) made sales of polyethylene retail carrier bags (PRCBs) from Malaysia at less than normal value (NV) during the period of review (POR), August 1, 2021, through July 31, 2022. We invite interested parties to comment on these preliminary results.

DATES: Applicable September 8, 2023.

FOR FURTHER INFORMATION CONTACT: Katherine Sliney, 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) 482–2437.

SUPPLEMENTARY INFORMATION:

Background

On August 9, 2004, Commerce published in the **Federal Register** the antidumping duty (AD) order on polyethylene retail carrier bags from Malaysia.[1] On August 2, 2022, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order*.[2] On October 11, 2022, based on timely requests for review and in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review of the *Order*.[3] Pursuant to section 751(a)(3)(A) of the Act, Commerce extended the deadline for the preliminary results until August 31, 2021.[4]

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[5] A list of topics included in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The merchandise covered by this *Order* is polyethylene retail carrier bags from Malaysia, which also may be referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags. For a full description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. Export price and constructed export price were calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum.

Preliminary Results of the Review

We preliminarily determine that the following estimated weighted-average dumping margin exists for the period August 1, 2021, through July 31, 2022:

[1] *See Antidumping Duty Order: Polyethylene Retail Carrier Bags from Malaysia,* 69 FR 48203 (August 9, 2004) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 47187 (August 2, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 61278 (October 11, 2022).

[4] *See* Memorandum, ''Polyethylene Retail Carrier Bags from Malaysia: Extension of Deadline for the Preliminary Results of Antidumping Duty Administrative Review; 2019–2020,'' dated March 31, 2021.

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2021–2022 Antidumping Duty Administrative Review: Polyethylene Retail Carrier Bags from Malaysia,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Exporter/producer	Weighted-average dumping margin (percent)
Euro SME Sdn. Bhd.; and Euro Nature Green Sdn. Bhd.[6]	2.12

Disclosure and Public Comment

We intend to disclose the calculations used for these preliminary results to interested parties within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b). Commerce will announce the briefing schedule to interested parties at a later date. Interested parties may submit case briefs on the deadline that Commerce will announce. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the date for filing case briefs.[7] Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[8] Executive summaries should be limited to five pages total, including footnotes. Case and rebuttal briefs should be filed using ACCESS[9] and must be served on interested parties.[10]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, within 30 days after the date of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national; and (4) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce will announce the date and time of the hearing. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[11] An electronically filed document must be received successfully in its entirety in ACCESS by 5 p.m. Eastern Time on the due date.

We intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case and rebuttal briefs, within 120 days of publication of this notice, unless extended, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results of this review, Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. If the weighted-average dumping margin for Euro SME (*i.e.,* the sole individually-examined respondent in this review) is not zero or *de minimis* (*i.e.,* greater than or equal to 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* antidumping duty assessment rates on the basis of the ratio of the total amount of dumping calculated for the examined sales made during the POR to each importer and the total entered value of those same sales, in accordance with 19 CFR 351.212(b)(1). If Euro SME has not reported entered values, we will calculate a per-unit assessment rate for each importer by dividing the total amount of dumping calculated for the examined sales made to that importer by the total quantity associated with those sales. To determine whether an importer-specific, per-unit assessment rate is *de minimis,* in accordance with 19 CFR 351.106(c)(2), we also will calculate an importer-specific *ad valorem* ratio based on estimated entered values. Where either Euro SME's weighted average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,* we intend to instruct CBP to liquidate appropriate entries without regard to antidumping duties.[12]

For entries of subject merchandise during the POR produced by Euro SME for which the producer did not know its merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate (*i.e.,* 84.94 percent)[13] if there is no rate for the intermediate company (or companies) involved in the transaction.

We intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for Euro SME will be equal to the weighted-average dumping margin established in the final results of this administrative review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers and/or exporters will continue to be 84.94 percent, the all-others rate established in the LTFV investigation of this proceeding.[14] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of

[6] In the 2018–2019 review, Commerce treated Euro SME and Euro Nature Green Sdn. Bhd. (Nature Green) as a single entity. *See Polyethylene Retail Carrier Bags from Malaysia: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019,* 85 FR 83515 (December 22, 2020), and accompanying Preliminary Decision Memorandum at 3–5, unchanged in *Polyethylene Retail Carrier Bags from Malaysia: Final Results of Antidumping Administrative Review; 2018–19,* 86 FR 22019 (April 26, 2021). Our treatment of Euro SME and Nature Green remains unchanged in this review.

[7] *See* 19 CFR 351.309(d); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

[8] *See* 19 CFR 351.309(c)(2) and (d)(2).

[9] *See, generally,* 19 CFR 351.303.

[10] *See* 19 CFR 351.303(f).

[11] *See Temporary Rule.*

[12] *See* 19 CFR 351.106(c)(2); *see also Antidumping Proceeding: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101, 8103 (February 14, 2012).

[13] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[14] *See Order,* 69 FR at 48204.

antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing the preliminary results of this review in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h) and 19 CFR 351.221(b)(4).

Dated: August 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Discussion of the Methodology
V. Currency Conversion
VI. Recommendation

[FR Doc. 2023–19428 Filed 9–7–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Interagency Marine Debris Coordinating Committee Meeting

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

ACTION: Notice of open meeting.

SUMMARY: Notice is hereby given of a virtual public meeting of the Interagency Marine Debris Coordinating Committee (IMDCC). IMDCC members will discuss Federal marine debris activities, with a particular emphasis on the topics identified in the section on *Matters to Be Considered.*

DATES: The virtual public meeting will be held on September 26, 2023, from 2 to 3 p.m. Eastern Time (ET).

ADDRESSES: The meeting will be held virtually using Google Meet. You can connect to the meeting using the website or phone number provided:

Meeting link: https://meet.google.com/paw-wtws-fip.

Phone: +1 470–285–4443; PIN: 752 261 320#.

Attendance will be limited to the first 500 individuals to join the virtual meeting room. Refer to the IMDCC website at *https://marinedebris.noaa.gov/our-work/IMDCC* for the most up-to-date information on the agenda and how to participate.

FOR FURTHER INFORMATION CONTACT: Ya'el Seid-Green, Executive Secretariat, IMDCC, Marine Debris Program; Phone 240–622–5910; Email *yael.seid-green@noaa.gov* or visit the IMDCC website at *https://marinedebris.noaa.gov/our-work/IMDCC.*

SUPPLEMENTARY INFORMATION:

The IMDCC is a multi-agency body responsible for coordinating a comprehensive program of marine debris research and activities among Federal agencies, in cooperation and coordination with non-governmental organizations, industry, academia, States, Tribes, and other nations, as appropriate. Representatives meet to share information, assess and promote best management practices, and coordinate the Federal Government's efforts to address marine debris.

The Marine Debris Act establishes the IMDCC (33 U.S.C. 1954). The IMDCC submits biennial progress reports to Congress with updates on activities, achievements, strategies, and recommendations. NOAA serves as the Chairperson of the IMDCC.

The meeting will be open to public attendance on September 26, 2023, from 2 to 3 p.m. ET. There will not be a public comment period. The meeting will not be recorded.

Matters To Be Considered

The open meeting will include a presentation from the National Oceanic and Atmospheric Administration's Marine Debris Program and the Environmental Protection Agency's Trash Free Waters Program on the Report on Microfiber Pollution required by section 132 of the Save Our Seas 2.0 Act (Pub. L. 116–224). On behalf of the IMDCC, Meridian Institute will provide information on the process to create new IMDCC recommendations on addressing marine debris. The agenda topics described are subject to change. The latest version of the agenda will be posted at *https://marinedebris.noaa.gov/our-work/IMDCC.*

Special Accommodations

The meeting is accessible to people with disabilities. Closed captioning will be available. Requests for other auxiliary aids should be directed to Ya'el Seid-Green, Executive Secretariat at *yael.seid-green@noaa.gov* or 240–622–5910 by September 15, 2023.

Scott Lundgren,

Director, Office of Response and Restoration, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2023–19373 Filed 9–7–23; 8:45 am]

BILLING CODE 3510–NK–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds product(s) and service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities and deletes product(s) from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* October 8, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 785–6404, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 7/7/2023 and 7/21/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the product(s) and service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the product(s) and service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will

furnish the product(s) and service(s) to the Government.

2. The action will result in authorizing small entities to furnish the product(s) and service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) and service(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following product(s) and service(s) are added to the Procurement List:

Product(s)

NSN(s)—Product Name(s):
6140–01–624–2917—Battery, Storage, 12V, Lead Acid, 15 Amp Hours
6140–01–619–9474—Battery, Storage, 12V, Lead Acid, 8.5 Amp Hours
6140–01–237–8005—Battery, Storage, 12V, Lead Acid, 1.2 Amp Hours
6135–01–370–2599—Battery, Nonchargeable, 3.6V, Lithium
Designated Source of Supply: Eastern Carolina Vocational Center, Inc., Greenville, NC
Contracting Activity: DEFENSE LOGISTICS AGENCY, DLA LAND AND MARITIME
List Designation: C-List
Mandatory for: 100% of the requirement of the Department of Defense

Service(s)

Service Type: Custodial Service
Mandatory for: US Navy, Naval Surface Warfare Center Dahlgren Division, Dahlgren, VA and Pumpkin Neck Annex Explosive Location, King George, VA
Designated Source of Supply: ServiceSource, Inc., Oakton, VA
Contracting Activity: DEPT OF THE NAVY, NSWC DAHLGREN

The Committee finds good cause to dispense with the 30-day delay in the effective date normally required by the Administrative Procedure Act. See 5 U.S.C. 553(d). This addition to the Committee's Procurement List is effectuated because of the expiration of the Department of the Navy, NSWC Dahlgren's, Custodial Service, NSWCDD, Dahlgren, VA and Pumpkin Neck Annex, King George, VA contract. The Federal customer contacted and has worked diligently with the AbilityOne Program to fulfill this service need under the AbilityOne Program. To avoid performance disruption, and the possibility that the NSWC Dahlgren will refer its business elsewhere, this addition must be effective on September 27, 2023, ensuring timely execution for an October 1, 2023 start date while still allowing 19 days for comment. The Committee also published a notice of proposed Procurement List addition in the **Federal Register** on July 11, 2023 and did not receive any comments from any interested persons. This addition will not create a public hardship and has limited effect on the public at large, but, rather, will create new jobs for other affected parties—people with significant disabilities in the AbilityOne program who otherwise face challenges locating employment. Moreover, this addition will enable Federal customer operations to continue without interruption.

Deletions

On 8/4/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the product(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) deleted from the Procurement List.

End of Certification

Accordingly, the following product(s) are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):
8415–01–518–4561—Pants, Physical Training Uniform, USAF, Blue, X-Small/Short
8415–01–518–4562—Pants, Physical Training Uniform, USAF, Blue, X-Small/Regular
8415–01–518–4563—Pants, Physical Training Uniform, USAF, Blue, X-Small/Long
8415–01–518–4564—Pants, Physical Training Uniform, USAF, Blue, Small/Short
8415–01–518–4565—Pants, Physical Training Uniform, USAF, Blue, Small/Regular
8415–01–518–4566—Pants, Physical Training Uniform, USAF, Blue, Small/Long
8415–01–518–4567—Pants, Physical Training Uniform, USAF, Blue, Medium/Short
8415–01–518–4568—Pants, Physical Training Uniform, USAF, Blue, Medium/Regular
8415–01–518–4570—Pants, Physical Training Uniform, USAF, Blue, Medium/Long
8415–01–518–4571—Pants, Physical Training Uniform, USAF, Blue, Large/Short
8415–01–518–4572—Pants, Physical Training Uniform, USAF, Blue, Large/Regular
8415–01–518–4573—Pants, Physical Training Uniform, USAF, Blue, Large/Long
8415–01–518–4574—Pants, Physical Training Uniform, USAF, Blue, X-Large/Short
8415–01–518–4575—Pants, Physical Training Uniform, USAF, Blue, X-Large/Regular
8415–01–518–4576—Pants, Physical Training Uniform, USAF, Blue, X-Large/Long
8415–01–518–4577—Pants, Physical Training Uniform, USAF, Blue, XX-Large/Short
8415–01–518–4578—Pants, Physical Training Uniform, USAF, Blue, XX-Large/Regular
8415–01–518–4579—Pants, Physical Training Uniform, USAF, Blue, XX-Large/Long
8415–01–518–4580—Pants, Physical Training Uniform, USAF, Blue, XXX-Large/Short
8415–01–518–4581—Pants, Physical Training Uniform, USAF, Blue, XXX-Large/Regular
8415–01–518–4582—Pants, Physical Training Uniform, USAF, Blue, XXX-Large/Long
8415–01–518–4583—Pants, Physical Training Uniform, USAF, Blue, XXXX-Large/Short
8415–01–518–4584—Pants, Physical Training Uniform, USAF, Blue, XXXX-Large/Regular
8415–01–518–4585—Pants, Physical Training Uniform, USAF, Blue, XXXX-Large/Long
8415–01–521–0426—Pants, Physical Training Uniform, USAF, Blue, Small/X-Short
8415–01–521–0452—Pants, Physical Training Uniform, USAF, Blue, Medium/X-Short
8415–01–521–0453—Pants, Physical Training Uniform, USAF, Blue, Large/X-Short
8415–01–521–0454—Pants, Physical Training Uniform, USAF, Blue, X Large/X-Short
8415–01–521–0455—Pants, Physical Training Uniform, USAF, Blue, XXX Large/X-Short
8415–01–521–0456—Pants, Physical Training Uniform, USAF, Blue, XX Large/X-Short
8415–01–521–0458—Pants, Physical Training Uniform, USAF, Blue, XXXX Large/X-Short
8415–01–528–8025—Pants, Physical Training Uniform, USAF, X Small/X-Short
Designated Source of Supply: Alphapointe, Kansas City, MO
Designated Source of Supply: Lions Services, Inc., Charlotte, NC
Designated Source of Supply: LC Industries, Inc., Durham, NC
Designated Source of Supply: Goodwill Vision Enterprises, Rochester, NY
Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

NSN(s)—Product Name(s):
MR 1114—Mat, Sink, Small
Designated Source of Supply: CINCINNATI ASSOCIATION FOR THE BLIND AND VISUALLY IMPAIRED, Cincinnati, OH
Contracting Activity: Military Resale-Defense

Commissary Agency

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–19408 Filed 9–7–23; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 9:00 a.m. EDT, Friday, September 15, 2023.

PLACE: Virtual meeting.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.cftc.gov/.*

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

(Authority: 5 U.S.C. 552b.)

Dated: September 6, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–19495 Filed 9–6–23; 11:15 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Global Markets Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of meeting.

SUMMARY: The Commodity Futures Trading Commission (CFTC) announces that on October 5, 2023, 2023, from 1:00 p.m. to 5:00 p.m. (Eastern Daylight Time), the Global Markets Advisory Committee (GMAC or Committee) will hold an in-person meeting for GMAC members at the CFTC's Washington, DC headquarters, with options for the public to attend in-person and virtually. At this meeting, the GMAC will hear a presentation from the GMAC's Global Market Structure Subcommittee on the Subcommittee's workstreams involving U.S. Treasury market reforms, global standards and best practices for market volatility controls and circuit breakers, improving liquidity across asset classes, and international alignment of trading and clearing obligations to address market fragmentation, and consider recommendations from the Subcommittee on such workstreams. At this meeting, the GMAC will also hear a presentation from the GMAC's Technical Issues Subcommittee on the Subcommittee's workstreams involving international standardization and amalgamation of trade reporting for swaps market oversight, global coordination of market events, and improving efficiencies in post-trade processes, and consider recommendations from the Subcommittee on such workstreams. Additionally, the GMAC will hear a presentation from the GMAC's Digital Asset Markets Subcommittee on the Subcommittee's workstreams involving industry standards and best practices for tokenized asset markets, the regulation of non-fungible tokens (NFTs) and utility tokens, and identification of other issues to address in digital finance and tokenization of assets, non-financial activities and Web3, and blockchain technology and consider recommendations from the Subcommittee on such workstreams. Finally, the GMAC will also address procedural matters, including topics of discussion on a forward-looking basis.

DATES: The meeting will be held on October 5, 2023, from 1:00 p.m. to 5:00 p.m. (Eastern Daylight Time). Members of the public who wish to submit written statements in connection with the meeting should submit them by October 12, 2023.

ADDRESSES: The meeting will take place in the Conference Center at the CFTC's headquarters, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581 for GMAC members and the public. Members of the public may also attend the meeting virtually via teleconference or live webcast. You may submit public comments, identified by Global Markets Advisory Committee, through the CFTC website at *https://comments.cftc.gov.* Follow the instructions for submitting comments through the Comments Online process on the website. If you are unable to submit comments online, contact Brigitte Weyls, Designated Federal Officer, via the contact information listed below to discuss alternate means of submitting your comments. Any statements submitted in connection with the committee meeting will be made available to the public, including publication on the CFTC website, *https://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: Brigitte Weyls, GMAC Designated Federal Officer, Commodity Futures Trading Commission, 77 West Jackson Blvd., Suite 800, Chicago, IL 60604, (312) 596–0700; or Philip Raimondi, GMAC Alternate Designated Federal Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC, (202) 418–5000.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public with seating on a first-come, first-served basis. Members of the public may also listen to the meeting by telephone by calling a domestic or international toll or toll-free number to connect to a live, listen-only audio feed. Call-in participants should be prepared to provide their first name, last name, and affiliation. The meeting will also be open to the public via teleconference.

Domestic Toll and Toll Free Numbers:

833 435 1820 U.S. Toll Free

833 568 8864 U.S. Toll Free

+1 669 254 5252 U.S. (San Jose)

+1 646 828 7666 U.S. (New York)

+1 646 964 1167 U.S. (U.S. Spanish Line)

+1 415 449 4000 U.S. (U.S. Spanish Line)

+1 551 285 1373 U.S.

+1 669 216 1590 US (San Jose)

International Numbers are available here: https://cftc-gov.zoomgov.com/u/acVfb58GDz and will also be posted on the CFTC's website, *https://www.cftc.gov,* on the page for the meeting, under Related Links.

Call-In/Webinar ID: 161 832 1892.

Passcode/Pin Code: 566144.

Members of the public may also view a live webcast of the meeting via the *https://www.cftc.gov* website. The meeting agenda may change to accommodate other Committee priorities. For agenda updates, please visit *https://www.cftc.gov/About/AdvisoryCommittees/GMAC.*

After the meeting, a transcript of the meeting will be published through a link on the CFTC's website, *https://www.cftc.gov.* Persons requiring special accommodations to attend the meeting because of a disability should notify the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Authority: 5 U.S.C. 1001 *et seq.*

Dated: September 5, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–19409 Filed 9–7–23; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0060]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; School Pulse Panel 2023–24 Second Quarter Revision

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 10, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, (202) 245–6347.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: School Pulse Panel 2023–24 Second Quarter Revision.

OMB Control Number: 1850–0975.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 53,955.

Total Estimated Number of Annual Burden Hours: 10,175.

Abstract: The School Pulse Panel (SPP) is a data collection originally designed to collect voluntary responses from a nationally representative sample The School Pulse Panel is conducted by the National Center for Education Statistics (NCES), part of the Institute of Education Sciences (IES), within the United States Department of Education. Initially, the purpose of the study was to collect extensive real-time data on issues brought to light by the COVID–19 pandemic on students and staff, as well as other important education-related issues that could inform data-driven policy decisions, in U.S. public primary, middle, high, and combined-grade schools and districts. Specifically, this was accomplished by collecting data on, among other things, the percentage of the student body starting the school year behind grade level, the types of learning recovery strategies being implemented and the perceived effectiveness of those strategies, classroom behavioral concerns, mental health services provided, and staffing issues. NCES was able to capture each of these pieces in an expedited fashion and report out findings in a matter of weeks, providing rich information to help tell the full story of what students, staff, and administrators were battling on a daily basis. The success of the quick-turnaround nature of the SPP was a clear indication of the immense value of having a real-time data collection vehicle readily available to capture content on prominent events occurring in the school environment. Therefore, stakeholders and ED leadership have asked NCES to continue this type of data collection methodology for the 2023–24 school year and beyond with content extending beyond COVID–19 pandemic impacts on the education environment.

The package containing the details of the SPP 2023–24 Data Collection (OMB #1850–0975 v.2) went through 60-day and 30-day public comment periods beginning in March 2023, and that primary request was approved in July 2023. Following that approval, items in the September and October questionnaires were modified via a change request (v.3) based on the results of cognitive testing; minor changes to the communications materials were also modified via this same change request. The current package (v.4) contains the November 2023–January 2024 questionnaires and the full year of communication materials. The November 2023 questionnaire has been finalized but the items in the December 2023 and January 2024 questionnaires were still undergoing cognitive testing at the time of the publication of this 30-day package. A change request (OMB #1850–0803 v.5) will be submitted at the conclusion of the 30-day public comment period for this package to make updates to these instruments, as informed by cognitive testing.

Dated: September 1, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–19364 Filed 9–7–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2023–FSA–0088]

Privacy Act of 1974; Matching Program

AGENCY: Federal Student Aid, U.S. Department of Education.

ACTION: Notice of a new matching program.

SUMMARY: Pursuant to the Privacy Act of 1974, as amended by the Computer Matching and Privacy Protection Act of 1988 and the Computer Matching and Privacy Protection Amendments of 1990 (Privacy Act) and Office of Management and Budget (OMB) guidance on the conduct of matching programs, notice is hereby given of the re-establishment of the matching program between the U.S. Department of Education (ED or Department), as the recipient agency, and the Social Security Administration (SSA), as the source agency, to assist the Department in meeting its obligations under title IV of the Higher Education Act of 1965, as amended (HEA), including to ensure that applicants for title IV, HEA program assistance satisfy eligibility requirements.

DATES: The period of this matching program is estimated to cover the 12-month period from October 11, 2023, through October 10, 2024. However, the computer matching agreement (CMA) will become applicable at the later of the following two dates: October 11, 2023, or 30 days after the publication of this notice, on September 8, 2023, unless comments have been received

from interested members of the public requiring revision to and republication of the notice. The matching program will continue for 12 months after the applicable date and may be extended for up to an additional 12 months, if the respective agency Data Integrity Boards (DIBs) determine that the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at regulations.gov. However, if you require an accommodation or cannot otherwise submit your comments via regulations.gov, please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments submitted by fax or by email, or comments submitted after the comment period. To ensure that the Department does not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov,* including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the ''FAQ'' tab.

Privacy Note: The Department's policy is generally to make comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Gerard Duffey, Management and Program Analyst, U.S. Department of Education, Federal Student Aid, Philadelphia, PA 19107. Telephone: (215) 656–3249.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act; OMB ''Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988,'' published in the **Federal Register** on June 19, 1989 (54 FR 25818); and OMB Circular No. A–108, notice is hereby provided of the re-establishment of the matching program between SSA and ED to assist ED in the verification of Social Security numbers (SSNs), confirmation of citizenship status as recorded in SSA records, and death indicators (when applicable) of individuals who initiate the steps associated with accessing programs authorized by title IV of the Higher Education Act, or participating in the application process for such assistance, to assist ED in meeting its obligations under title IV of the HEA, including to ensure that applicants for Title IV, HEA program assistance satisfy eligibility requirements.

Participating Agencies

ED and SSA.

Authority for Conducting the Matching Program

ED's legal authority to enter into the CMA includes:

- Section 484(p) of the HEA (20 U.S.C. 1091(p)) (which will be section 484(o) of the HEA (20 U.S.C. 1091(o)) following implementation of the FAFSA Simplification Act on July 1, 2024);
- Section 484(g) of the HEA (20 U.S.C. 1091(g));
- Section 483(a)(12) of the HEA (20 U.S.C. 1090(a)(12)) (which will be section 483(a)(2)(B) (20 U.S.C. 1090(a)(2)(B)) following implementation of the FAFSA Simplification Act);
- Section 428B(f) of the HEA (20 U.S.C. 1078–2(f));
- Sections 427, 432, 451, 483, and 484 of the HEA (20 U.S.C. 1077, 1082, 1087a, 1090, and 1091); and
- Subsection (b)(3) of the Privacy Act (5 U.S.C. 552a(b)(3)).

SSA is authorized to participate in the matching program under section 1106 of the Social Security Act (42 U.S.C. 1306) and the regulations promulgated pursuant to that section (20 CFR part 401), and subsection (b)(3) the Privacy Act (5 U.S.C. 552a(b)(3)). Section 7213 of the Intelligence Reform and Terrorism Prevention Act of 2004 provides SSA authority to add a death indicator to verification routines that SSA determines to be appropriate.

Purpose(s)

The CMA establishes the terms, safeguards, and procedures under which the SSA will provide to ED SSN verification, citizenship status as recorded in SSA records, and death indicators (when applicable) of individuals who initiate the steps associated with accessing programs authorized by title IV of the HEA, or participating in the application process for such assistance, to assist ED in meeting its obligations under title IV of the HEA, including to ensure that applicants for title IV, HEA program assistance satisfy eligibility requirements.

Categories of Individuals

Under the CMA, ED will send to SSA records on individuals who apply for Federal student financial assistance through the Free Application for Federal Student Aid (FAFSA®) and on individuals who initiate the steps associated with accessing programs administered under the authority of title IV of the HEA. These individuals also include the parents of dependent students and applicants for Federal PLUS loans.

Under the CMA, SSA will match ED's records to its files on each individual who has applied for, and obtained, an SSN.

Categories of Records

The specific data elements that ED will transmit to SSA are: SSN, first name, last name, and date of birth (DOB).

SSA's system of records involved in the matching program maintains information required to apply for, and obtain, an SSN. The specific data elements that SSA will send back to ED include: SSN, first name, last name, DOB, and an SSA verification code on each record to indicate the match results. The verification codes are: 1 = No match on SSN, 3 = SSN match, name match, no match on DOB, 5 = SSN match, no match on name, DOB not checked, 6 = SSN not verified, Blank = SSN match, name match, DOB match. SSA will also send a death indicator if one is present on SSA's database for the record. Records returned from SSA also will include a citizenship status code as follows: A = U.S. citizen, B = legal alien, eligible to work, C = legal alien, not eligible to work, D = other, E = alien, student restricted, F = conditionally legalized alien, * = foreign born, Blank = domestic born (U.S. citizen), N = unable to verify citizenship due to no match on name, DOB, or SSN.

System(s) of Records

There are two ED systems of records notices that cover information disclosed by ED to SSA in this matching program. The first is entitled, ''Aid Awareness and Application Processing'' (AAAP)(18–11–21), and was last fully published in the **Federal Register** on June 15, 2023 (88 FR 39233–39248) (available at: *https://www.federalregister.gov/documents/2023/06/15/2023-12831/privacy-act-of-1974-system-of-records*). *Note:* The Central Processing System (CPS) and FAFSA Processing System (FPS) are the ED information systems that process FAFSA data. CPS will process this data through September 30, 2024, for Award

Year (AY) 2023–2024. FPS will become operational on or after December 1, 2023, and begin processing FAFSA data for AY 2024–25. After September 30, 2024, CPS will be decommissioned and be fully replaced by FPS. FPS will process data for all AYs thereafter. The second system of records notice is entitled, ''Person Authentication Service (PAS)'' (18–11–12) and was last fully published in the **Federal Register** on July 28, 2023 (88 FR 48817–48824) (available at: *https://www.federalregister.gov/documents/2023/07/28/2023-16001/privacy-act-of-1974-system-of-records*). This is the system of records that covers the records of applicants for FSA IDs. In addition, ED will maintain the information that it receives back from SSA in the ''Common Origination and Disbursement (COD) System'' (18–11–02), for which ED last fully published a system of records notice in the **Federal Register** on June 28, 2023 (88 FR 41942–41951) (available at: *https://www.federalregister.gov/documents/2023/06/28/2023-13698/privacy-act-of-1974-system-of-records*).

SSA's system of records involved in this matching program is entitled, ''Master Files of Social Security Number (SSN) Holders and SSN Applications'' (Enumeration System) 60–0058, last fully published in the **Federal Register** on January 4, 2022 (87 FR 263–267).

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, or audiotape) by contacting the contact person listed in the preceding paragraph.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Richard Cordray,

Chief Operating Officer Federal Student Aid.

[FR Doc. 2023–19446 Filed 9–7–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2751–000]

White Rock Wind East, 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 White Rock Wind East, 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 21, 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: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19411 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2752–000]

White Rock Wind West, 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 White Rock Wind West, 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 21, 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.

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Dated: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19410 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD23–10–000]

Capacity Accreditation; Notice of Request for Technical Conference

Take notice that on August 22, 2023, the American Clean Power Association, pursuant to Rule 207 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207 (2022), filed a petition requesting that the Commission hold a technical conference to explore ways to improve the accreditation of resources' capacity value in Independent System Operator/Regional Transmission Organization (ISO/RTO) regions with and without capacity markets, as well as in non-ISO/RTO regions.

Any person that wishes to comment in this proceeding must file comments in accordance with Rule 211 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 (2022). Comments will be considered by the Commission in determining the appropriate action to be taken. Comments must be filed on or before the comment date.

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 (*https://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.

This filing is accessible on-line at *https://www.ferc.gov,* using the ''eLibrary'' link. There is an ''eSubscription'' link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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Comment Date: 5 p.m. Eastern Time on October 2, 2023.

Dated: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19418 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2749–000]

AEUG Union 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 AEUG Union 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 21, 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.

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Dated: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19413 Filed 9–7–23; 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: PR23–68–000.
Applicants: National Fuel Gas Distribution Corporation.
Description: § 284.123 Rate Filing: Amendment of Rates Under an Order No. 63 Blanket Certificate to be effective 8/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5173.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: RP23–1010–000.
Applicants: MarkWest Pioneer, L.L.C.
Description: § 4(d) Rate Filing: Quarterly Fuel Adjustment Filing to be effective 10/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5150.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1011–000.
Applicants: Ruby Pipeline, L.L.C.
Description: § 4(d) Rate Filing: RP 2023–08–31 Negotiated Rate Agreements to be effective 10/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5169.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1012–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Agreements—9/1/2023 to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5179.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1013–000.
Applicants: Southern Star Central Gas Pipeline, Inc.
Description: § 4(d) Rate Filing: Removal of SFT Rate Schedule to be effective 10/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5189.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1014–000.
Applicants: Rockies Express Pipeline LLC.
Description: § 4(d) Rate Filing: REX 2023–08–31 Negotiated Rate Agreement to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5192.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1015–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 9–1–2023 to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5197.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1016–000.
Applicants: LA Storage, LLC.
Description: § 4(d) Rate Filing: Filing of Negotiated Rate, Conforming IW Agreement 8.31.2023 to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5215.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1017–000.
Applicants: Maritimes & Northeast Pipeline, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rates—Northern to NRG Business 2956 eff 9–1–2023 to be effective 9/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5245.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1018–000.
Applicants: Tres Palacios Gas Storage LLC.
Description: § 4(d) Rate Filing: Tres Palacios Tariff Modifications to be effective 10/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5252.
Comment Date: 5 p.m. ET 9/12/23.

Docket Numbers: RP23–1019–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Payment Method Update to be effective 10/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5006.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1020–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Amendment to Neg Rate Agmt (Chevron 41610) eff 9–1–2023 to be effective 9/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5015.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1021–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Osaka 46429 to Texla 56463) to be effective 9/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5016.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1022–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Capacity Release Agreements—9/1/2023 to be effective 9/1/2023.

Filed Date: 9/1/23.
Accession Number: 20230901–5030.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1023–000.
Applicants: MoGas Pipeline LLC.
Description: § 4(d) Rate Filing: MoGas Negotiated Rate Agreement Filing to be effective 11/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5045.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1024–000.
Applicants: Transwestern Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Non-Conforming Agreements—Related to 2023 Settlement to be effective 9/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5052.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1025–000.
Applicants: Transwestern Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Update Non-Conforming Agreements List on 09–01–23 to be effective 9/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5053.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1026–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Osaka 46429 to ConocoPhillips 56465) to be effective 9/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5062.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1027–000.
Applicants: Rover Pipeline LLC.
Description: § 4(d) Rate Filing: Summary of Negotiated Rate Capacity Release Agreements 9–1–23 to be effective 9/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5065.
Comment Date: 5 p.m. ET 9/13/23.

Docket Numbers: RP23–1028–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (Hartree Sep 5 2023) to be effective 9/5/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5068.
Comment Date: 5 p.m. ET 9/13/23.

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: RP11–2473–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Refund Report: Gulf South Pipeline Company, LLC submits tariff filing per 154.501: 2023 CICO Filing to be effective N/A.

Filed Date: 9/1/23.

Accession Number: 20230901–5012.

Comment Date: 5 p.m. ET 9/13/23.

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.

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Dated: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19416 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2746–000]

El Sol Storage 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 El Sol Storage 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 21, 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.

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Dated: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19415 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–507–000]

Equitrans, L.P.; Notice of Schedule for the Preparation of An Environmental Assessment for the Swarts And Hunters Cave Well Replacement Project

On June 30, 2023, Equitrans, L.P. (Equitrans) filed an application in Docket No. CP23–507–000 requesting a Certificate of Public Convenience and Necessity pursuant to section 7(c) and Authorization pursuant to section 7(b) of the Natural Gas Act to construct, operate, and abandon certain natural gas pipeline facilities in Greene County, Pennsylvania. The proposed project is known as the Swarts and Hunters Cave Well Replacement Project (Project) and would: abandon a series of wells by sale, abandon well lines in place and any associated appurtenant facilities; construct and operate two horizontal storage wells; acquire pipelines and related equipment to serve as well lines and auxiliary facilities for the Swarts Horizontal Storage Well; and sell base gas from the Swarts Complex.

On July 18, 2023, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's environmental document for the Project.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the Project and the planned schedule for the completion of the environmental review.[1]

Schedule for Environmental Review

Issuance of EA	December 8, 2023
90-day Federal Authorization Decision Deadline[2]	March 7, 2024

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

Equitrans proposes to abandon, construct, and operate certain facilities within the Swarts Complex and Hunters Cave Storage Fields in Greene County, Pennsylvania. According to Equitrans, the Swarts and Hunters Cave Well Replacement Project is necessary because of planned mining activity from CONSOL Pennsylvania Coal Company LLC (CONSOL). According to Pennsylvania state law, any active storage well within 2,000 feet of mining activities would need to be plugged or upgraded to current mining standards. The Swarts and Hunters Cave Well Replacement Project would consist of the following:

- abandonment by-sale of a series of 19 injection/withdrawal wells at Equitrans' Hunters Cave Storage Field, abandonment in-place of the associated well pipelines and any associated facilities;
- construction and operation of a new horizontal well, associated pipelines, and ancillary facilities at the Hunters Cave Storage Field;
- construction and operation of a new horizontal well, associated pipelines, and ancillary facilities at the Swarts Complex;
- expansions of the existing Morris Interconnect and Pierce Gates Valve Yards at the Hunters Cave Storage Field;
- acquisition of non-jurisdictional gathering assets from EQM Gathering Opco, LLC (pipelines and related equipment) for operation of the new Swarts Horizontal Storage Well; and
- the sale of 580 million cubic feet of base gas from the Swarts Complex.

Background

On August 2, 2023, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Swarts and Hunters Cave Well Replacement Project* (Notice of Scoping). The Notice of Scoping was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the Notice of Scoping, the Commission received one comment from the U.S. Environmental Protection Agency, Region III. The U.S. Environmental Protection Agency, Region III provided general guidance and recommendations for consideration in the development of the NEPA document. The Commission also received a comment from the Delaware Nation requesting further information on project specifics, cultural resources, and the Section 106 process. All substantive comments received will be addressed in the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This service provides automatic notification of filings made to subscribed dockets, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

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[1] 40 CFR 1501.10 (2020).

[2] The Commission's deadline applies to the decisions of other federal agencies, and state agencies acting under federally delegated authority, that are responsible for federal authorizations, permits, and other approvals necessary for proposed projects under the Natural Gas Act. Per 18 CFR 157.22(a), the Commission's deadline for other agency's decisions applies unless a schedule is otherwise established by federal law.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (*i.e.,* CP23–507), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: September 1, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19403 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2747–000]

SCEF1 Fuel Cell, 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 SCEF1 Fuel Cell, 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 21, 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.

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Dated: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19414 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2750–000]

Horizon Hill Wind, 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 Horizon Hill Wind, 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 21, 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.

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field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

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Dated: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19412 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–273–000.
Applicants: Five Wells Solar Center LLC.
Description: Five Wells Solar Center LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 9/1/23.
Accession Number: 20230901–5029.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: EG23–274–000.
Applicants: Hopkins Energy LLC.
Description: Hopkins Energy LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 9/1/23.
Accession Number: 20230901–5038.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: EG23–275–000.
Applicants: Myrtle Storage, LLC.
Description: Myrtle Storage, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 9/1/23.
Accession Number: 20230901–5086.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: EG23–276–000.
Applicants: Mammoth North LLC.
Description: Mammoth North LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 9/1/23.
Accession Number: 20230901–5134.
Comment Date: 5 p.m. ET 9/22/23.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL23–96–000.
Applicants: New York Power Authority.
Description: Petition for Declaratory Order New York Power Authority Propel NY Energy Alternate Solution 5 Project.
Filed Date: 8/28/23.
Accession Number: 20230828–5437.
Comment Date: 5 p.m. ET 9/27/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER18–2358–008.
Applicants: GridLiance High Plains LLC, Southwest Power Pool, Inc.
Description: Compliance filing: Southwest Power Pool, Inc. submits tariff filing per 35: GridLiance—Amended Compliance Filing in Response to Order issued in ER18–2358 to be effective 2/1/2019.
Filed Date: 9/1/23.
Accession Number: 20230901–5078.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: ER22–962–005.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Order No. 2222 Compliance Filing to be effective 2/2/2026.
Filed Date: 9/1/23.
Accession Number: 20230901–5130.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: ER23–1783–001.
Applicants: New York Independent System Operator, Inc.
Description: Compliance filing: NYISO Compliance Filing Errata re: Order 676–J NAESB/WEQ Standards to be effective 12/31/9998.
Filed Date: 9/1/23.
Accession Number: 20230901–5075.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: ER23–2212–001.
Applicants: New York Independent System Operator, Inc., Consolidated Edison Company of New York, Inc.
Description: Tariff Amendment: Consolidated Edison Company of New York, Inc. submits tariff filing per 35.17(b): Con Edison Deficiency Response re: FR Template and Protocols in RS 10 and 19 to be effective 8/22/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5079.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: ER23–2330–001.
Applicants: Upper Missouri G. & T. Electric Cooperative, Inc.
Description: Tariff Amendment: Amend Administrative Filing Correct Tariff Records ER23–2330 to be effective 7/1/2022.
Filed Date: 9/1/23.
Accession Number: 20230901–5001.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: ER23–2753–000.
Applicants: Arizona Public Service Company.
Description: § 205(d) Rate Filing: Service Agreement Nos. 218 and 335 to be effective 10/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5232.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2754–000.
Applicants: West Penn Power Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: West Penn Power Company submits tariff filing per 35.13(a)(2)(iii: WPP submits Amended Operating and Interconnection Agreement, SA No. 4976 to be effective 10/30/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5237.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2755–000.
Applicants: Jersey Central Power & Light Company, Mid-Atlantic Interstate Transmission, LLC, Metropolitan Edison Company, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Jersey Central Power & Light Company submits tariff filing per 35.13(a)(2)(iii: FE submits Amended OIAs, Service Agreement Nos. 6409, 6410, 6411 to be effective 10/31/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5247.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2756–000.
Applicants: New England Power Pool Participants Committee.
Description: § 205(d) Rate Filing: Sep 2023 Membership Filing to be effective 8/1/2023.
Filed Date: 8/31/23.
Accession Number: 20230831–5255.
Comment Date: 5 p.m. ET 9/21/23.

Docket Numbers: ER23–2757–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA/CSA, SA Nos. 4904/4952; Queue No. AA2–119/AC1–055/AD2–192 to be effective 11/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5010.
Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: ER23–2758–000.
Applicants: Pacific Gas and Electric Company.
Description: § 205(d) Rate Filing: Revisions to TO20 Formula Rate Model References to be effective 11/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5063.
Comment Date: 5 p.m. ET 9/22/23.
Docket Numbers: ER23–2759–000.
Applicants: Mammoth North LLC.
Description: Baseline eTariff Filing: Baseline new to be effective 10/31/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5092.
Comment Date: 5 p.m. ET 9/22/23.
Docket Numbers: ER23–2760–000.
Applicants: Omnis Pleasants, LLC.
Description: Compliance filing: Notice of Succession and Request for Waiver to be effective 8/14/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5095.
Comment Date: 5 p.m. ET 9/22/23.
Docket Numbers: ER23–2761–000.
Applicants: Public Service Company of Colorado.
Description: Tariff Amendment: 2023–09–01 TSGT—Rifle SS LGIA—504—NOC to be effective 9/2/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5100.
Comment Date: 5 p.m. ET 9/22/23.
Docket Numbers: ER23–2762–000.
Applicants: Icon Energy LLC.
Description: Tariff Amendment: Notice of Cancellation to be effective 9/2/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5121.
Comment Date: 5 p.m. ET 9/22/23.
Docket Numbers: ER23–2763–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Designated Entity Agreement, SA No. 7060 between PJM and PSE&G to be effective 8/4/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5124.
Comment Date: 5 p.m. ET 9/22/23.
Docket Numbers: ER23–2764–000.
Applicants: Northeastern Power & Gas, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization, Request for Related Waivers to be effective 9/25/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5149.
Comment Date: 5 p.m. ET 9/22/23.
Docket Numbers: ER23–2765–000.
Applicants: SunZia Transmission, LLC.
Description: § 205(d) Rate Filing: Amended & Restated Transmission Service Agreement w/SunZia Wind PowerCo LLC to be effective 11/1/2023.
Filed Date: 9/1/23.
Accession Number: 20230901–5171.
Comment Date: 5 p.m. ET 9/22/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES23–67–000.
Applicants: Basin Electric Power Cooperative.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Basin Electric Power Cooperative.
Filed Date: 8/31/23.
Accession Number: 20230831–5278.
Comment Date: 5 p.m. ET 9/21/23.

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: September 1, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–19417 Filed 9–7–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–085]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*
Weekly receipt of Environmental Impact Statements (EIS)
Filed August 28, 2023 10 a.m. EST Through September 1, 2023 10 a.m. EST
Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.*

EIS No. 20230111, Final, DOE, LA, ADOPTION—CP2 LNG and CP Express Project, *Contact:* Brian Lavoie 202–586–2459. The Department of Energy (DOE) has adopted the Federal Energy Regulatory Commission's Final EIS No. 20230092 filed 07/28/2023 with the Environmental Protection Agency. The DOE was a cooperating agency on this project. Therefore, republication of the document is not necessary under Section 1506.3(b)(2) of the CEQ regulations.

EIS No. 20230112, Draft Supplement, NRC, FL, Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, NUREG–1437, Supplement 5a, Second Renewal, *Comment Period Ends:* 10/23/2023, *Contact:* Lance J Rakovan 301–415–2589.

EIS No. 20230113, Draft, USACE, ND, Dakota Access Pipeline Lake Oahe Crossing Project, *Comment Period Ends:* 11/13/2023, *Contact:* Brent Cossette 402–995–2716.

EIS No. 20230114, Revised Draft, GSA, AZ, Expansion and Modernization of the Raul Hector Castro Land Port of Entry in Douglas, Arizona, *Comment Period Ends:* 10/23/2023, *Contact:* Osmahn Kadri 415–522–3617.

EIS No. 20230115, Final Supplement, USFS, ID, Hungry Ridge Restoration Project, *Review Period Ends:* 10/10/2023, *Contact:* Jennie Fischer 208–983–4048.

EIS No. 20230116, Draft Supplement, BLM, USFWS, AK, Coastal Plain Oil and Gas Leasing Program, *Comment Period Ends:* 10/23/2023, *Contact:* Serena Sweet 907–271–4543.

Dated: September 5, 2023.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2023–19397 Filed 9–7–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2023–0452; FRL–11385–01–OGC]

Proposed Interim Consent Decree and Proposed Interim Settlement Agreement, Clean Water Act and Administrative Procedure Act Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed interim consent decree and proposed interim settlement agreement; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's March 18, 2022, memorandum regarding ''Consent Decrees and Settlement Agreements to resolve Environmental Claims Against the Agency,'' notice is hereby given of a proposed interim consent decree and proposed interim settlement agreement in *Northwest Environmental Advocates* v. *EPA,* No. 19–01537 (W.D. Wash.). On September 26, 2019, Plaintiff Northwest Environmental Advocates filed a complaint alleging that EPA failed to perform duties mandated by the Clean Water Act (CWA) regarding Washington's obligation to develop Total Maximum Daily Loads (TMDLs) to address waters identified on the state's impaired waters list and that EPA's inaction was arbitrary and capricious under the Administrative Procedure Act (APA), among other claims. EPA seeks public input on a proposed interim consent decree and proposed interim settlement agreement prior to its final decision-making regarding entering into the proposed documents.

DATES: Written comments on the proposed interim consent decree and proposed interim settlement agreement must be received by October 10, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2023–0452 online at *www.regulations.gov* (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action. Comments received may be posted without change to *www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments, see the ''Additional Information About Commenting on the Proposed Interim Consent Decree and Proposed Interim Settlement Agreement'' heading under the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Elise O'Dea, Water Law Office, Office of General Counsel, U.S. Environmental Protection Agency; telephone: (202) 564–4201; email address: *odea.elise@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Interim Consent Decree and Proposed Interim Settlement Agreement

On September 26, 2019, Plaintiff filed a complaint [1] in the federal district court for the Western District of Washington alleging that EPA actions and inactions concerning the state of Washington's water quality assessment and listing program and TMDL program violated the APA and section 303(d) of the CWA. Among other claims, Plaintiff asserted that EPA violated the CWA by failing to disapprove Washington's alleged constructive submission of no TMDLs for waters on the state's 1996 list of impaired waters needing TMDLs and to establish TMDLs for such waters. In August 2020, the district court granted Washington's motion to intervene as a defendant in the litigation. The parties initiated settlement negotiations shortly thereafter, which led to the development of the proposed interim consent decree and proposed interim settlement agreement that are the subject of this notice.

The proposed interim consent decree and proposed interim settlement agreement would constitute the first part of a potential two-phase settlement framework and thus completion of the commitments set forth in each document would not result in dismissal of the litigation. Specifically, the proposed interim consent decree would require Washington to submit three TMDLs to EPA by December 2025 (Soos Creek fine sediment, Drayton Harbor bacteria, and Whatcom Creek bacteria) and would prohibit the Plaintiff from filing any new TMDL constructive submission lawsuits in Washington for a period of 34 months. Under the proposed interim settlement agreement, while the litigation was held in abeyance, an EPA-funded contractor would review and evaluate Washington's TMDL program to inform an EPA report providing recommendations for improving the program, particularly with respect to the timely development of TMDLs. Upon completion and consideration of the report, the parties would reengage in settlement discussions in an effort to reach a final agreement that would resolve the litigation.

For a period of thirty (30) days following the date of publication of this notice, EPA will accept written comments relating to the proposed interim consent decree and proposed interim settlement agreement from persons who are not parties to the litigation. EPA also may hold a public hearing on whether to enter into the proposed interim consent decree and proposed interim settlement agreement. EPA or the Department of Justice may withdraw or withhold consent to the proposed interim consent decree and proposed interim settlement agreement if the comments received disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the CWA or APA.

II. Additional Information About Commenting on the Proposed Interim Consent Decree and Proposed Interim Settlement Agreement

A. How can I get a copy of the proposed interim consent decree and proposed interim settlement agreement?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2023–0452) contains a copy of the proposed interim consent decree and proposed interim settlement agreement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

The electronic version of the public docket for this action contains a copy of the proposed interim consent decree and proposed interim settlement agreement and is available through *https://www.regulations.gov.* You may use *https://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the

[1] Plaintiff filed an amended complaint on January 24, 2020.

system, key in the appropriate docket identification number then select ''search.''

B. How and to whom do I submit comments?

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2023–0452 via *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *https://www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA does not plan to consider these late comments.

Steven Neugeboren,

Associate General Counsel.

[FR Doc. 2023–19431 Filed 9–7–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2023–0453; FRL–11386–01–OGC]

Proposed Consent Decree, Clean Water Act Claim

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's March 18, 2022, memorandum regarding ''Consent Decrees and Settlement Agreements to resolve Environmental Claims Against the Agency,'' notice is hereby given of a proposed consent decree in *Center for Biological Diversity, et al.,* v. *Regan, et al.,* No. 3:23–cv–535 (N.D. Cal. 2023). On February 6, 2023, the Center for Biological Diversity, the Friends of the Earth, and Marcelin Keever (collectively, ''Plaintiffs'') filed a complaint in the United States District Court for the Northern District of California against the EPA alleging that the Agency had failed to perform its non-discretionary duty to promulgate national standards of performance for discharges incidental to the normal operation of large commercial vessels (and ballast water from certain other types of vessels) pursuant to the Clean Water Act (CWA) as amended by the Vessel Incidental Discharge Act of 2018 (VIDA). EPA seeks public input on a proposed consent decree setting a date for final action on the national standards of performance prior to its final decision-making regarding potential settlement of the litigation.

DATES: Written comments on the proposed consent decree must be received by October 10, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2023–0453 online at *https://www.regulations.gov* (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments, see the ''Additional Information About Commenting on the Proposed Consent Decree'' heading under the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Thomas Glazer, Water Law Office, Office of General Counsel, U.S. Environmental Protection Agency; telephone: (202) 564–0908; email address: *glazer.thomas@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The president signed VIDA into law on December 4, 2018. Among other things, VIDA directed EPA to ''promulgate Federal standards of performance for marine pollution control devices for each type of discharge incidental to the normal operation of a vessel'' by December 4, 2020. 33 U.S.C. 1322(p)(4)(A)(i). EPA published a proposed rulemaking on October 26, 2020, 85 FR. 67818, but did not take final action in time to meet the statutory deadline.

On September 13, 2022, Plaintiffs sent EPA a notice of intent (NOI) to sue alleging that EPA had failed to satisfy its mandatory duty under VIDA to promulgate Federal standards of performance. The Plaintiffs filed a complaint on February 6, 2023, seeking a declaratory judgment that EPA violated the statutory deadline and ordering the Agency to promulgate expeditiously.

The parties initiated settlement discussions, which produced the proposed consent decree. Under the consent decree, EPA would be obligated to sign a decision taking final action by September 23, 2024. The consent decree's schedule is based on EPA's projected timeline for completing the rulemaking. This deadline may be extended by written agreement of the parties or by the court pursuant to Federal Rule 60(b).

For a period of thirty (30) days following the date of publication of this notice, EPA will accept written comments relating to the proposed consent decree from persons who are not parties to the litigation. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments received disclose facts or considerations that

indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the CWA.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the proposed consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2023–0453) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

The electronic version of the public docket for this action contains a copy of the proposed consent decree and is available through *https://www.regulations.gov.* You may use *https://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

B. How and to whom do I submit comments?

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2023–0453 via *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *https://www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA does not plan to consider these late comments.

Steven M. Neugeboren,

Associate General Counsel.

[FR Doc. 2023–19433 Filed 9–7–23; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Renewal Without Change of Existing Collection; Comment Request

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final notice of information collection under review; ADEA waivers.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Equal Employment Opportunity Commission (EEOC or Commission) announces that it has submitted to the Office of Management and Budget (OMB) a request for a three-year extension without change of the existing collection requirements under the Waivers of rights and claims under the Age Discrimination in Employment Act (ADEA). No public comments were received in response to the EEOC's June 12, 2023 60-Day Notice soliciting comments on the proposed extension of this collection.

DATES: Written comments on this notice must be submitted on or before October 10, 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: Kathleen Oram, Assistant Legal Counsel, (202) 921–2665 and *kathleen.oram@eeoc.gov,* or Ashley T. Adams, General Attorney, (202) 921–2697 and *ashley.adams@eeoc.gov,* Office of Legal Counsel, 131 M Street NE, Washington, DC 20507. Requests for this notice in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663–4191 (voice) or (202) 663–4494 (TTY).

SUPPLEMENTARY INFORMATION: The Age Discrimination in Employment Act (ADEA) allows for individuals to waive rights and claims protected under the Act, provided certain circumstances are met; particularly that the waiver is knowing and voluntary. In order for an individual's waiver in connection with a program to be considered knowing and voluntary, the employer must inform the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The EEOC's regulations clarify that the relevant section of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such

individuals. The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow an employee to make an informed choice whether or not to sign a waiver agreement. The employer does not provide this information to the EEOC; the ADEA and the EEOC's regulation solely require that the employer provide this information to any employee it would apply to, and not to the Federal government.

The EEOC, in accordance with the PRA and OMB regulation 5 CFR 1320.8(d)(1), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the EEOC to assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public to understand the EEOC's information collection requirements and provide the requested data in the desired format. The EEOC is soliciting comments on the information collection that is described below. The EEOC is especially interested in public comment that will assist in the following: (1) Evaluating whether the collection of information is necessary for the proper performance of the Commission's functions, including whether the collection has practical utility; (2) Evaluating the accuracy of the Commission's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) Enhancing the quality, utility, and clarity of the information to be collected; and (4) Minimizing the burden of the collection of information on those who are to respond, including 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. Please note that written comments received in response to this notice will be considered public records.

Overview of This Information Collection

Collection title: Waivers of Rights and Claims Under the ADEA; Informational Requirements.

OMB number: 3046–0042.

Type of Respondent: Business, state or local governments, not for profit institutions.

Description of affected public: Any employer with 20 or more employees that seeks waiver agreements in connection with exit incentive or other employment termination program.

Number of respondents: 1,489.

Burden Hours per Respondent: 16.19.

Total Annual Burden Hours: 24,107.

Number of forms: 0.

Abstract: The EEOC enforces the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against employees and applicants for employment who are age 40 or older. The OWBPA, enacted in 1990, amended the ADEA to require employers to disclose certain information to employees (but not to EEOC) in writing when they ask employees to waive their rights under the ADEA in connection with an exit incentive program or other employment termination program. The regulation at 29 CFR 1625.22 reiterates those disclosure requirements. The EEOC seeks an extension without change for the third-party disclosure requirements contained in this regulation. On June 12, 2023, the Commission published a 60-Day Notice informing the public of its intent to request an extension of the information collection requirements from the Office of Management and Budget. 88 FR 38047–49 (June 12, 2023). No comments were received.

For the Commission.

Dated: September 1, 2023.

Charlotte A. Burrows,

Chair, U.S. Equal Employment Opportunity Commission.

[FR Doc. 2023–19399 Filed 9–7–23; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1058; FR ID 170003]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before November 7, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

OMB Control Number: 3060–1058.

Title: FCC Application or Notification for Spectrum Leasing Arrangement or Private Commons Arrangement; Wireless Telecommunications Bureau; Public Safety and Homeland Security Bureau.

Form Number: FCC Form 608.

Type of Review: Revision of a currently approved collection.

Respondents: Individual and households, Business or other for-profit entities, state, local, or tribal government, and not for profit institutions.

Number of Respondents and Responses: 1,116 respondents and 1,116 responses.

Estimated Time per Response: 0.05 to 1 hour.

Frequency of Response: Recordkeeping requirement; third party disclosure requirement, on occasion reporting requirement and periodic reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C.

154, 155, 158, 161, 301, 303(r), 308, 309, 310 and 332.

Total Annual Burden: 1,135.

Total Annual Cost: $1,443,825.

Needs and Uses: FCC Form 608 is a multi-purpose form. It is used to provide notification or request approval for any spectrum leasing arrangement (''Lease'') entered into between an existing licensee in certain Wireless and/or Public Safety Radio Services and a spectrum lessee. This form also is required to notify or request approval for any spectrum subleasing arrangement (''Sublease''). The data collected on the form is used by the FCC to determine whether the public interest would be served by the Lease or Sublease. The form is also used to provide notification for any Private Commons Arrangement entered into between a licensee, lessee, or sublessee and a class of third-party users (as defined in Section 1.9080 of the Commission's Rules).

On July 18, 2022, the Commission released a Report and Order and Second Further Notice of Proposed Rulemaking, Partitioning, Disaggregation, and Leasing of Spectrum, WT Docket No. 19–38, FCC 22–53, in which the Commission established the Enhanced Competition Incentive Program (ECIP) to establish incentives for wireless radio service licensees to make underutilized spectrum available to small carriers, Tribal Nations, and entities serving rural areas (ECIP Report and Order in WT Docket No. 19–38, FCC 22–53). In the Report and Order, the Commission adopted a program under which any covered geographic area licensee may offer spectrum to an unaffiliated eligible entity through a partition and/or disaggregation, and any covered geographic area licensee eligible to lease in an included service may offer spectrum to an unaffiliated eligible entity through a long-term leasing arrangement. If the FCC finds that approval of an ECIP eligible assignment or lease is in the public interest, the agency will consent to the transaction and confer benefits, including five-year license term extensions, one year construction extensions, and substituted alternative construction requirements for rural-focused transactions. The Commission also established rules to permit reaggregation of geographic licenses.

In establishing the ECIP, the Commission requires applicants seeking to participate in the program to submit certain information that shows the transaction qualifies for ECIP inclusion. The Commission found that the ECIP builds on Congressional goals in the MOBILE NOW Act to incentivize beneficial transactions in the public interest that will promote greater competition in the provision of wireless services, facilitate increased availability of advanced wireless services in rural areas, facilitate new opportunities for small carriers and Tribal Nations to increase access to spectrum, and bring more advanced wireless service including 5G to underserved communities. Specifically, in the ECIP Report and Order, the Commission revised its rules to allow any covered geographic licenses in included services to be leased to eligible entities through a long-term leasing arrangement.

Specifically, in the ECIP Report and Order, the Commission revised its rules to allow any covered geographic licenses in included services to be leased to eligible entities through a long-term leasing arrangement, to designate a Qualifying Transaction identified in the application as seeking consideration under the ECIP. Two new questions are being added to the FCC Form 608 as a result. Respondents are required to indicate by yes or no answer whether the application is seeking consideration under ECIP. Respondents are also required to select the applicable ECIP prong to its Qualifying Transaction, pursuant to either § 1.60003 or § 1.60004.

Finally, a new Schedule J is being added to FCC Form 608 and will be used by Spectrum Manager Lessors (*i.e.,* the Licensee) to file either the Initial Operation Requirement Notifications (IORN) or the Final Operation Requirement Notifications (FORN), as required by 47 CFR 1.60004, 1.60006, on behalf of the Lessee.

The Commission now seeks approval for revisions to its currently approved collection of information under OMB Control Number 3060–1058 to permit the collection of the changes requested herein. We anticipate that these revisions will have minimal impact on the hourly burden to complete FCC Form 608. The Commission therefore seeks approval for a revision to its currently approved information collection on FCC Form 608 to revise FCC Form 608 accordingly.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–19436 Filed 9–7–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0182; FR ID 169930]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before November 7, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

OMB Control Number: 3060–0182.

Title: Section 73.1620, Program Tests.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit, Not-for-profit institutions.

Number of Respondents and Responses: 1,470 respondents; 1,470 responses.

Estimated Time per Response: 1–5 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Section 154(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 1,521 hours.

Total Annual Cost: None.

Needs and Uses: The information collection requirements for this collection are as follows:

47 CFR 73.1620(a)(1) require permittees of a nondirectional AM or FM station, or a nondirectional or directional TV station to notify the FCC upon beginning of program tests. An application for license must be filed within 10 days of this notification.

47 CFR 73.1620(a)(2) require a permittee of an AM or FM station with a directional antenna to file a request for program test authority 10 days prior to date on which it desires to begin program tests. This is filed in conjunction with an application for license.

47 CFR 73.1620(a)(3) require a licensee of an FM station replacing a directional antenna without changes to file a modification of the license application within 10 days after commencing operations with the replacement antenna.

47 CFR 73.1620(a)(4) requires a permittee of an AM station with a directional antenna to file a request for program test authority 10 days prior to the date on which it desires to begin program test.

47 CFR 73.1620(a)(5) requires that, except for permits subject to successive license terms, a permittee of an LPFM station may begin program tests upon notification to the FCC in Washington, DC provided that within 10 days thereafter an application for license is filed. Program tests may be conducted by a licensee subject to mandatory license terms only during the term specified on such license authorization.

47 CFR 73.1620(b) allows the FCC to right to revoke, suspend, or modify program tests by any station without right of hearing for failure to comply adequately with all terms of the construction permit or the provision of 47 CFR 73.1690(c) for a modification of license application, or in order to resolve instances of interference. The FCC may also require the filing of a construction permit application to bring the station into compliance with the Commission's rules and policies.

47 CFR 73.1620(f) requires licensees of UHF TV stations, assigned to the same allocated channel which a 1,000 watt UHF translator station is authorized to use, to notify the licensee of the translator station at least 10 days prior to commencing or resuming operation and certify to the FCC that such advance notice has been given.

47 CFR 73.1620(g) requires permittees to report any deviations from their promises, if any, in their application for license to cover their construction permit (FCC Form 302) and on the first anniversary of their commencement of program tests.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–19435 Filed 9–7–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS23–12]

Appraisal Subcommittee; Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting.

In accordance with section 1104(b) of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in open session for its regular meeting:

Location: This will be a virtual meeting via Webex. Please visit the agency's homepage (*www.asc.gov*) and access the provided registration link in the News and Events section. You MUST register in advance to attend this Meeting.

Date: September 13, 2023.

Time: 10:00 a.m. ET.

Status: Open.

Reports

Chair
Executive Director
Delegated State Compliance Reviews
Grants Director
Financial Manager

Action and Discussion Items

Approval of Minutes
June 14, 2023 Quarterly Meeting Minutes
FY24 ASC Budget Proposal
Proposed Enforcement Rule

How to Attend and Observe an ASC Meeting: The meeting will be open to the public via live webcast only. Visit the agency's homepage (*www.asc.gov*) and access the provided registration link in the News and Events section. The meeting space is intended to accommodate public attendees. However, if the space will not accommodate all requests, the ASC may refuse attendance on that reasonable basis. The use of any video or audio tape recording device, photographing device, or any other electronic or mechanical device designed for similar purposes is prohibited at ASC Meetings.

James R. Park,

Executive Director.

[FR Doc. 2023–19466 Filed 9–7–23; 8:45 am]

BILLING CODE 6700–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to implement the Whistleblower Intake Guide (FR 30; OMB No. 7100–NEW).

DATES: Comments must be submitted on or before November 7, 2023.

ADDRESSES: You may submit comments, identified by FR 30, by any of the following methods:

- *Agency Website: https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number or FR number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Federal Reserve Board of Governors, Attn: Ann E. Misback, Secretary of the Board, Mailstop M–4775, 2001 C St NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable

information at the commenter's request. Accordingly, comments will not be edited to remove any confidential business information, identifying information, or contact information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. on weekdays, except for Federal holidays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

During the comment period for this proposal, a copy of the proposed PRA OMB submission, including the draft reporting form and instructions, supporting statement (which contains more detail about the information collection and burden estimates than this notice), and other documentation, will be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportingforms/home/review* or may be requested from the agency clearance officer, whose name appears above. Final versions of these documents will be made available at *https://www.reginfo.gov/public/do/PRAMain,* if approved.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Implement, the Following Information Collection

Collection title: Whistleblower Intake Guide.

Collection identifier: FR 30.

OMB control number: 7100–NEW.

General description of collection: The Whistleblower Intake Guide collects information regarding alleged misconduct or retaliation by a Board-supervised institution or an affiliated party of such institution. The information collected through the FR 30 assists in the Board's supervision of financial institutions.

Frequency: Event-generated.

Respondents: Employees of Board-supervised entities and members of the public.

Total estimated number of respondents: 5.

Estimated average hours per response: 0.5.

Total estimated annual burden hours: 3.[1]

[1] More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at *https://www.federalreserve.gov/apps/reportingforms/home/review.* On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR 30.

Board of Governors of the Federal Reserve System, September 5, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–19447 Filed 9–7–23; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0153; Docket No. 2023–0053; Sequence No. 8]

Information Collection; Federal Acquisition Regulation Part 11 Requirements

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, and the Office of Management and Budget (OMB) regulations, DoD, GSA, and NASA invite the public to comment on a revision concerning certain Federal Acquisition Regulation (FAR) part 11 requirements.

DoD, GSA, and NASA invite comments on: whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility; the accuracy of the estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. OMB has approved this information collection for use through March 31, 2024. DoD, GSA, and NASA propose that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD, GSA, and NASA will consider all comments received by November 7, 2023.

ADDRESSES: DoD, GSA, and NASA invite interested persons to submit comments on this collection through *https://www.regulations.gov* and follow

the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

Instructions: All items submitted must cite OMB Control No. 9000–0153, Federal Acquisition Regulation Part 11 Requirements. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

OMB Control No. 9000–0153, Federal Acquisition Regulation Part 11 Requirements.

B. Need and Uses

DoD, GSA, and NASA are combining OMB Control Nos. by FAR part. This consolidation is expected to improve industry's ability to easily and efficiently identify burdens associated with a given FAR part. The review of the information collections by FAR part allows improved oversight to ensure there is no redundant or unaccounted for burden placed on industry. Lastly, combining information collections in a given FAR part is also expected to reduce the administrative burden associated with processing multiple information collections.

This justification supports the extension of OMB Control No. 9000–0153 and combines it with the previously approved information collections under OMB Control No. 9000–0043, with the new title ''Federal Acquisition Regulation Part 11 Requirements''. Upon approval of this consolidated information collection, OMB Control No. 9000–0043 will be discontinued. The burden requirements previously approved under the discontinued number will be covered under OMB Control No. 9000–0153.

This clearance covers the information that offerors or contractors must submit to comply with the following FAR requirements:

• FAR 52.211–7, Alternatives to Government-Unique Standards. This solicitation provision permits offerors to propose alternatives to Government-unique standards in response to Government solicitations. When an offeror proposes a voluntary consensus standard as an alternative to a Government-unique standard included in a solicitation, the offeror must furnish data and/or information regarding the alternative in sufficient detail for the Government to determine if it meets the Government's requirements. This provision is prescribed in FAR 11.107 for use when a solicitation uses Government-unique standards and the agency uses the transaction-based reporting method to report its use of voluntary consensus standards to the National Institutes of Standards and Technology (NIST). This provision is optional for use if an agency uses the categorical method to report to NIST. In accordance with OMB Circular A–119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, and section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113, 15 U.S.C. 272 note), agencies must use voluntary consensus standards, when they exist, in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical. The information collected from offerors will be used by Federal agencies to determine if voluntary consensus standards will satisfy the Government's needs for a particular solicitation.

• FAR 52.211–8, Time of Delivery; and 52.211–9, Desired and Required Time of Delivery. These time of delivery clauses may be used by contracting officers to set forth a required delivery schedule and to allow offerors to propose an alternative delivery schedule. Contracting officers use the collected information to ensure supplies or services are obtained in a timely manner.

C. Annual Burden

Respondents: 1,377.

Total Annual Responses: 1,377.

Total Burden Hours: 738.5.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0153, Federal Acquisition Regulation Part 11 Requirements.

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2023–19395 Filed 9–7–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–855S]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by October 10, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of the currently approved collection; *Title of Information Collection:* Medicare Enrollment Application—Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Suppliers; *Use:* The primary function of the Form CMS–855S Medicare enrollment application for suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) is to gather information from the supplier that tells us who the supplier is, whether the supplier meets certain qualifications to be a Medicare DMEPOS supplier, where the supplier practices or renders services, and other information necessary to establish correct claims payments. *Form Number:* CMS–855S (OMB control number: 0938–1056); *Frequency:* Yearly; *Affected Public:* Private Sector, Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 32,790; *Total Annual Responses:* 32,790; *Total Annual Hours:* 67,886. (For policy questions regarding this collection contact Frank Whelan at 410–786–1302.)

Dated: September 5, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–19429 Filed 9–7–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10137]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by October 10, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Solicitation for Applications for Medicare prescription Drug Plan 2025 Contracts; *Use:* Coverage for the prescription drug benefit is provided through contracted prescription drug plans (PDPs) or through Medicare Advantage (MA) plans that offer integrated prescription drug and health care coverage (MA–PD plans). Cost Plans that are regulated under Section 1876 of the Social Security Act, and Employer Group Waiver Plans (EGWP) may also provide a Part D benefit. Organizations wishing to provide services under the Prescription Drug Benefit Program must complete an application, negotiate rates, and receive final approval from CMS. Existing Part D Sponsors may also expand their contracted service area by completing the Service Area Expansion (SAE) application.

Collection of this information is mandated in Part D of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) in Subpart 3. The application requirements are codified in Subpart K of 42 CFR 423

entitled ''Application Procedures and Contracts with PDP Sponsors.''

The information will be collected under the solicitation of proposals from PDP, MA–PD, Cost Plan, Program of All-Inclusive Care for the Elderly (PACE), and EGWP applicants. The collected information will be used by CMS to: (1) ensure that applicants meet CMS requirements for offering Part D plans (including network adequacy, contracting requirements, and compliance program requirements, as described in the application), (2) support the determination of contract awards. *Form Number:* CMS–10137 (OMB Control Number: 0938–0936); *Frequency:* Yearly; *Affected Public:* Private Sector, Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 795; *Number of Responses:* 433; *Total Annual Hours:* 1,839. (For policy questions regarding this collection contact April Forsythe at 410–786–8493.)

Dated: September 1, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–19362 Filed 9–7–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10525 and CMS–10866]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by November 7, 2023.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *https://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10525 Programs of All-Inclusive Care for the Elderly (PACE) PACE Quality Data Monitoring and Reporting

CMS–10866 CMS Health Equity Award—Call for Nominations

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Programs of All-Inclusive Care for the Elderly (PACE) PACE Quality Data Monitoring and Reporting; *Use:* The Programs of All-Inclusive Care for the Elderly (PACE) program is a unique model of managed care service delivery for the frail elderly, most of whom are dually-eligible for Medicare and Medicaid benefits. To be eligible to enroll in PACE, an individual must: be 55 or older, live in the service area of a PACE organization (PO), need a nursing home-level of care (as certified by the state in which he or she lives), and be able to live safely in the community with assistance from PACE.

PACE organizations are responsible for providing all required Medicare and Medicaid covered services, and any other service that the interdisciplinary team (IDT) determines necessary to improve and maintain a participant's overall health condition (42 CFR 460.92). POs must also comply with the quality monitoring and reporting requirements outlined in §§ 460.140, 460.200(b)(1), 460.200(c) and 460.202. POs are also required to report certain unusual incidents to other Federal and State agencies consistent with applicable statutory or regulatory requirements (see 42 CFR 460.136(a)(5)). *Form Number:* CMS–10525 (OMB control number: 0938–1264); *Frequency:* Occasion; *Affected Public:* Business or other for-profits, Not-for-profits institutions; *Number of Respondents:* 152; *Total Annual Responses:* 1,279; *Total Annual Hours:* 1471. (For policy questions regarding this collection contact Donna Williamson at 410 786 4647.)

2. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Monoclonal Antibodies Directed Against Amyloid

for the Treatment of Alzheimer's Disease; *Use:* CMS Office of Minority Health (OMH) is going to announce a call for nominations for the 2024 CMS Health Equity Award. This award will recognize organizations who demonstrate they have advanced health equity by designing, implementing, and operationalizing policies and programs that support health for all the people served by our programs, reducing avoidable differences in health outcomes experienced by people who are underserved, and provided the care and support that CMS enrollees need to thrive.

The goals of the award are to encourage organizations to identify and address their health disparities, to disseminate best practices, and to show that progress is possible by having a results-oriented focus. By identifying organizations who are successfully closing gaps and reducing disparities, CMS can show our stakeholders how health equity work can be initiated, targeted, measured, and successfully reduce disparities among communities nationwide.

CMS Representatives collect Company Name, Point of Contact Information (email, phone# & name) along with information from the organizations regarding their programs to improve the health quality, outcomes, and access to care for the communities that they serve. The CMS selection committee uses a scoring rubric to score the applicants on demonstrated measurable results in reducing a disparity in one or more of the CMS priority populations. *Form Number:* CMS–10866 (OMB control number: 0938–NEW); *Frequency:* Annually; *Affected Public:* Federal Government, Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 50; *Number of Responses:* 50; *Total Annual Hours:* 100. (For policy questions regarding this collection, contact Ashley Peddicord-Austin at 410–786–0757.)

Dated: September 1, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–19359 Filed 9–7–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Announcing the Intent To Award a Single-Source Supplement for the Alternatives to Guardianship Youth Resource Center Cooperative Agreement

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) announces the intent to award a single-source supplement to the current cooperative agreement held by the University of Massachusetts for the Alternatives to Guardianship Youth Resource Center cooperative agreement. The purpose of this project is to divert high school students with intellectual and developmental disabilities (I/DD) away from guardianship to less restrictive decisional supports. The target audience for this information includes youth with I/DD, families, and caregivers of high school students with I/DD, teachers, education administrators, advocates, vocational rehabilitation counselors, guidance counselors, and school district officials. The administrative supplement for FY 2023 will amount to $200,000, bringing the total award for FY 2023 to $500,000.

FOR FURTHER INFORMATION CONTACT: For further information or comments regarding this program supplement, contact Dana Fink, U.S. Department of Health and Human Services, Administration for Community Living, Administration on Disabilities, (202) 795–7604 or via email *dana.fink@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: This supplementary funding will expand the Alternatives to Guardianship Youth Resource Center's engagement and education efforts around diverting high school students with I/DD away from guardianship to less restrictive decisional supports. As a result of funding this Center, ACL expects that:

- More students with I/DD will have more decisional options, such as Powers of Attorney, supported-decision-making, joint bank accounts, bill paying services, and medical or educational release forms, on completion of high school;
- Fewer young adults with I/DD will be subject to guardianship;
- The public will become more knowledgeable of alternatives to guardianship; and
- Youth will become more independent by gaining job experience and personal responsibilities.

This supplement will fund:

- Support to enhance the engagement of youth advisory board members, including (1) a dedicated staff member for facilitation and administrative coordination and support and; (2) paid opportunities for youth advisory board members to be more deeply engaged in project activities.
- Continued support for two additional staff members from grant partner Self-Advocates Becoming Empowered who have joined the youth ambassador training team.
- Additional training for project staff and partners on allyship and augmentative and alternative communication (AAC) to support a state team of AAC users.
- Support for travel for youth ambassadors and youth advisors to participate in conference presentations.
- Supervisory support for the new youth trainer position that will begin August 2023. This youth trainer will join the Youth Ambassador workgroup and be part of the training team that facilitates the third cohort of youth ambassadors from Texas, California, and New York.
- Continued enhancement to the project website, which includes a dedicated page for each of the 40+ youth ambassadors, youth-friendly products and videos, and plain language documents.

The administrative supplement for FY 2023 will amount to $200,000, bringing the total award for FY 2023 to $500,000.

Program Name: Center for Youth Voice Youth Choice (CYVYC) Alternatives to Guardianship Youth Resource Center.

Recipient: University of Massachusetts, Boston.

Period of Performance: The supplement award will be issued for the fourth year of the five-year project period of September 1, 2023, through August 31, 2024.

Total Supplement Award Amount: $200,000.

Award Type: Cooperative Agreement.

Statutory Authority: This program is authorized under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 Pub. L. 106–402, Section 161(2) (B), (C) and (D).

Basis for Award:

The University of Massachusetts is currently funded to carry out the CYVYC Project for the period of September 1, 2020 through August 31, 2025. Much work has already been completed and further tasks are currently being accomplished. It would be unnecessarily time consuming and disruptive to the CYVYC project and the beneficiaries being served for ACL to establish a new grantee at this time

when critical services are presently being provided in an efficient manner.

Dated: September 4, 2023.

Alison Barkoff,

Senior official performing the duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2023–19391 Filed 9–7–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–3518]

Endogenous Cushing's Syndrome: Developing Drugs for Treatment; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Endogenous Cushing's Syndrome: Developing Drugs for Treatment.'' The purpose of this guidance is to provide recommendations to sponsors regarding clinical trial designs for drugs intended for the treatment of adults with endogenous Cushing's syndrome for whom surgery is not an option or has not been curative. This draft guidance is intended to focus continued discussions among FDA's Division of General Endocrinology, pharmaceutical sponsors, the academic community, and the public.

DATES: Submit either electronic or written comments on the draft guidance by November 7, 2023 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2023–D–3518 for ''Endogenous Cushing's Syndrome: Developing Drugs for Treatment.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Naomi Lowy, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–0692.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Endogenous Cushing's Syndrome: Developing Drugs for Treatment.'' The purpose of this guidance is to provide recommendations to sponsors regarding clinical trial designs for drugs intended for the treatment of adults with endogenous Cushing's syndrome for whom surgery is not an option or has not been curative. This draft guidance is intended to focus continued discussions among FDA's Division of General Endocrinology, pharmaceutical sponsors, the academic community, and the public. This is the first guidance drafted by FDA on this topic.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Endogenous Cushing's Syndrome:

Developing Drugs for Treatment.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information in 21 CFR part 312 relating to the submissions of investigational new drug applications have been approved under OMB control number 0910–0014. The collections of information in 21 CFR part 314 relating to the submissions of new drug applications and abbreviated new drug applications have been approved under OMB control number 0910–0001.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: September 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19419 Filed 9–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–0350]

Use of International Standard ISO 10993–1, ''Biological Evaluation of Medical Devices—Part 1: Evaluation and Testing Within a Risk Management Process''; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Use of International Standard ISO 10993–1, 'Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process'.'' This guidance was revised to incorporate updates to FDA's current thinking regarding the type of biocompatibility information that should be provided in a premarket submission for certain devices made from common polymers and fabrics that are in contact with intact skin. The purpose of this guidance is to provide further clarification and updated information on the use of International Standard ISO 10993–1, ''Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process'' to support premarket approval applications (PMAs), humanitarian device exemptions (HDEs), investigational device exemption (IDE) applications, premarket notifications (510(k)s), and De Novo requests.

DATES: The announcement of the guidance is published in the **Federal Register** on September 8, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2013–D–0350 for ''Use of International Standard ISO 10993–1, 'Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process'.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management

Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Use of International Standard ISO 10993–1, 'Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process' '' to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002; or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Jennifer Goode, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1656, Silver Spring, MD 20993–0002, 301–796–5701; or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

On September 4, 2020, FDA issued a guidance entitled ''Use of International Standard ISO 10993–1, 'Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process' '' (''2020 Biocompatibility Guidance''). The 2020 Biocompatibility Guidance was developed to assist industry with PMAs, HDEs, IDEs, 510(k)s, and De Novo requests for medical devices that come into direct contact or indirect contact with the human body to determine the potential for an unacceptable adverse biological response resulting from contact of the component materials of the device with the body.

On October 15, 2020, FDA issued a draft guidance entitled ''Select Updates for Biocompatibility of Certain Devices in Contact with Intact Skin'' (the Select Updates Guidance) which proposed updates to the 2020 Biocompatibility Guidance regarding the type of biocompatibility information that should be provided in a premarket submission for certain devices made from common synthetic polymers and natural fabrics that are in contact with intact skin. A notice of availability of the draft guidance appeared in the **Federal Register** of October 15, 2020 (85 FR 65410).

FDA is issuing this guidance to incorporate content from the Select Updates Guidance. FDA considered comments received to the Select Updates Guidance, and we revised the guidance as appropriate in response to the comments, including addition of materials to the list of those included in the policy and clarification of the following: applicability of the policy to device components, devices or components made from multiple materials, and materials including processing chemicals; situations where additional discussion on applicability of the policy is recommended; and clarification on characteristics of devices or materials to which this policy does not apply. In addition, FDA made minor updates to the guidance to align with the current recognized versions of consensus standards. This guidance supersedes the 2020 Biocompatibility Guidance.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on Use of International Standard ISO 10993–1, ''Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* This guidance document is also available at *https://www.regulations.gov*, *https://www.fda.gov/regulatory-information/search-fda-guidance-documents*, or *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics.* Persons unable to download an electronic copy of ''Use of International Standard ISO 10993–1, 'Biological evaluation of medical devices—Part 1: Evaluation and testing within a risk management process' '' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number GUI00001811 and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While this guidance contains no new collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in the following table have been approved by OMB:

21 CFR part or guidance	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
814, subparts A through E	Premarket approval	0910–0231
814, subpart H	Humanitarian Device Exemption	0910–0332
812	Investigational Device Exemption	0910–0078
860, subpart D	De Novo classification process	0910–0844
''Requests for Feedback on Medical Device Submissions: The Q-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-Submissions and Early Payor Feedback Request Programs for Medical Devices.	0910–0756
800, 801, 809, and 830	Medical Device Labeling Regulations; Unique Device Identification.	0910–0485

21 CFR part or guidance	Topic	OMB control No.
803	Medical Devices; Medical Device Reporting; Manufacturer reporting, importer reporting, user facility reporting, distributor reporting.	0910–0437
822	Postmarket Surveillance of Medical Devices	0910–0449
820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation.	0910–0073
58	Good Laboratory Practice (GLP) Regulations for Nonclinical Laboratory Studies.	0910–0119

Dated: September 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19402 Filed 9–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–4848]

Application of Human Factors Engineering Principles for Combination Products: Questions and Answers; Guidance for Industry and FDA Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry and FDA staff entitled ''Application of Human Factors Engineering Principles for Combination Products: Questions and Answers.'' This document provides questions and answers for industry and FDA staff on the application of human factors engineering (HFE) principles to the development of combination products as defined under the regulations. The guidance clarifies how the unique aspects of a combination product influence the considerations within the HFE process. This guidance is intended to facilitate the development of combination products. This guidance finalizes the draft guidance entitled ''Human Factors Studies and Related Clinical Study Considerations in Combination Product Design and Development'' issued on February 3, 2016.

DATES: The announcement of the guidance is published in the **Federal Register** on September 8, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2015–D–4848 for ''Application of Human Factors Engineering Principles for Combination Products: Questions and Answers.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this guidance to the Office of

Combination Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5129, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Patricia Love, Office of Combination Products, Food and Drug Administration, 10903 New Hampshire Avenue, Bldg. 32, Rm. 5129, Silver Spring, MD 20993, 301–796–8930, *Patricia.Love@fda.hhs.gov* or *combination@fda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry and FDA staff entitled ''Application of Human Factors Engineering Principles for Combination Products: Questions and Answers.'' This guidance provides questions and answers for industry and FDA staff on the application of HFE principles to the development of combination products as defined under 21 CFR part 3. This guidance should be used in conjunction with the guidance for industry and FDA staff ''Applying Human Factors and Usability Engineering to Medical Devices'' (available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/applying-human-factors-and-usability-engineering-medical-devices*) and with the guidance for industry ''Safety Considerations for Product Design to Minimize Medication Errors'' (available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/safety-considerations-product-design-minimize-medication-errors-guidance-industry*).

This guidance focuses on considerations for the application of HFE principles to combination products comprised of a medical device combined with a drug or a biological product submitted for review in the Center for Biologics Evaluation and Research, the Center for Devices and Radiological Health, or the Center for Drug Evaluation and Research. This guidance discusses, among other things, the definition of a combination product critical task, considerations for combination products due to the use of a drug or biological product constituent part together with a device constituent part, training as part of the user interface, and human factors (HF) validation data to support the combination product user interface that may be included in a premarket submission.

This guidance finalizes the draft guidance entitled ''Human Factors Studies and Related Clinical Study Considerations in Combination Product Design and Development'' issued on February 3, 2016 (81 FR 5764). FDA considered comments received on the draft guidance as the guidance was finalized. Changes from the draft to the final guidance include: change in format to a questions and answers format, deletion of HF information that is redundant with other FDA guidance documents and focusing the guidance on combination product specific issues, providing additional information in response to comments, clarification of the combination product critical task definition, further explanation of considerations to help identify combination product critical tasks, and replacement of an appendix of examples of user task failures with examples that provide a contextual discussion of combination product critical task considerations. In addition, editorial changes were made to improve clarity.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Application of Human Factors Engineering Principles for Combination Products: Questions and Answers.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information for 21 CFR part 312 for investigational new drug applications have been approved under OMB control number 0910–0014 and the collections of information for 21 CFR part 812 for investigational device exemptions have been approved under OMB control number 0910–0078. The collections of information in 21 CFR part 314 for new drug applications have been approved under OMB control number 0910–0001 and the collections of information in 21 CFR part 601 for biologics license applications have been approved under OMB control number 0910–0338. The collections of information in 21 CFR part 814, subparts A through E for premarket approval applications have been approved under OMB control number 0910–0231. The collections of information in 21 CFR part 807, subpart E for premarket notifications have been approved under OMB control number 0910–0120 and the collections of information in 21 CFR 860, subpart D for De Novo classifications have been approved under OMB control number 0910–0844.

III. Electronic Access

Persons with access to the internet may obtain the guidance at *https://www.fda.gov/combination-products/guidance-regulatory-information/combination-products-guidance-documents, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: September 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19404 Filed 9–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0984]

Pulmonary-Allergy Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Pulmonary-Allergy Drugs Advisory Committee (the Committee). The general function of the Committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on November 17, 2023, from 9 a.m. to 5 p.m. Eastern Time.

ADDRESSES: All meeting participants will be heard, viewed, captioned, and recorded for this advisory committee meeting via an online teleconferencing and/or video conferencing platform.

Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2023–N–0984. The docket will close on November 16, 2023. 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 November 16, 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.

Comments received on or before November 2, 2023, will be provided to the Committee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2023–N–0984 for ''Pulmonary-Allergy Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information 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 the 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: Takyiah Stevenson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 240–402–2507, email: *PADAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform. The Committee will discuss new drug application 215010, for gefapixant oral tablets, submitted by Merck Sharp & Dohme Corp., for the proposed indication of treatment of adults with refractory or unexplained chronic cough.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference and/or video conference meeting will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio and video components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views,

orally or in writing, on issues pending before the Committee. All electronic and written submissions to the Docket (see **ADDRESSES**) on or before November 2, 2023, will be provided to the Committee. Oral presentations from the public will be scheduled between approximately 1:30 p.m. and 2:30 p.m. Eastern Time. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before October 25, 2023. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by October 26, 2023.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Takyiah Stevenson (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). This meeting notice also serves as notice that, pursuant to 21 CFR 10.19, the requirements in 21 CFR 14.22(b), (f), and (g) relating to the location of advisory committee meetings are hereby waived to allow for this meeting to take place using an online meeting platform. This waiver is in the interest of allowing greater transparency and opportunities for public participation, in addition to convenience for advisory committee members, speakers, and guest speakers. No participant will be prejudiced by this waiver, and that the ends of justice will be served by allowing for this modification to FDA's advisory committee meeting procedures.

Dated: September 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19407 Filed 9–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–3137]

Endpoints and Trial Designs To Advance Drug Development in Kidney Transplantation; Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the following public meeting on ''Endpoints and Trial Designs To Advance Drug Development in Kidney Transplantation.''

DATES: The public meeting will be held on November 9, 2023, from 8 a.m. to 4:30 p.m. Eastern Time. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public meeting will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Entrance for the public meeting participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to *https://www.fda.gov/about-fda/visitor-information.*

FOR FURTHER INFORMATION CONTACT: Ozlem Belen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave, Bldg. 22, Rm. 6118, Silver Spring, MD 20993–0002, 301–796–0676.

SUPPLEMENTARY INFORMATION:

I. Background

The goal of this public meeting is to facilitate discussion among FDA, academicians, and industry representatives on endpoint and trial designs to promote drug development in kidney transplantation. The last drug FDA approved for use in prophylaxis of organ rejection in kidney transplant was belatacept in 2011. It is well established that kidney transplantation offers a clear survival and quality-of-life advantage to patients with end-stage kidney disease. The current treatment options have resulted in excellent short-term graft and patient survival but not without long-term side effects. FDA recognizes the importance of offering safe and effective drugs with a tolerable adverse effect profile to preserve kidney allografts for patients. This public meeting aims to discuss current and future potential endpoints and trial designs that can promote development in this area of unmet need.

II. Topics for Discussion at the Public Meeting

The topics of discussion include:

- Efficacy endpoints for prophylaxis of kidney transplant rejection trials: current state of primary endpoints and future potential endpoints.
- Biopsy proven acute rejection efficacy failure: long-term impact, impact of treatment, and grade of rejection.
- Noninferiority trials: identifying clinically important noninferiority margin, safety, and secondary efficacy endpoints.
- Enrichment as a tool in trial design: identifying target populations.

III. Attending the Public Meeting

Registration: If you wish to attend the public meeting (either in person or via Zoom), please register by October 26, 2023, at 4 p.m. Eastern Time. Visit the registration page here: *https://kidney-transplantation-workshop.eventbrite.com.*

Registration is free and based on space availability, with priority given to early registrants. Early registration is recommended because seating is limited; therefore, FDA may limit the number of participants from each organization. If time and space permit, onsite registration on the day of the public meeting will be provided beginning at 7:30 a.m. Eastern Time. We will let registrants know if registration closes before the day of the public meeting/public workshop.

If you need special accommodations due to a disability, please contact *ONDPublicMTGSupport@fda.hhs.gov* no later than October 18, 2023.

Streaming Webcast of the Public Meeting: This public meeting will also be virtual via Zoom. Zoom links will be sent using the email provided by persons who register. We will post a link to the archived recording on *http://wcms-internet.fda.gov/drugs/news-events-human-drugs/endpoints-and-trial-designs-advance-drug-development-kidney-transplantation-11092023?check_logged_in=1*

approximately 1 week after the public meeting.

FDA has verified the website addresses in this document, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

Transcripts: Please be advised that as soon as a transcript of the public meeting is available, it will be accessible at *https://www.regulations.gov*. A link to the transcript will also be available at *https://www.fda.gov/about-fda/office-immunology-and-inflammation-division-rheumatology-and-transplant-medicine-drtm.*

Dated: September 1, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–19405 Filed 9–7–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Council on Blood Stem Cell Transplantation

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the Secretary's Advisory Council on Blood Stem Cell Transplantation (ACBSCT or Advisory Council) has scheduled public meetings. Information about the Advisory Council and the agenda for these meetings can be found on the ACBSCT website at: *https://bloodstemcell.hrsa.gov/about/advisory-council.*

DATES: Thursday, September 28, 2023, 2:00 p.m.–6:00 p.m. Eastern Standard Time; and Thursday, October 26, 2023, 2:00 p.m.–6:00 p.m. Eastern Standard Time.

ADDRESSES: Both meetings will be held virtually by webinar. A link to register and join each meeting will be posted at least 10 days prior to the meeting date at: *https://bloodstemcell.hrsa.gov/about/advisory-council.*

FOR FURTHER INFORMATION CONTACT: Shelley Tims Grant, Designated Federal Official, at the HRSA Health Systems Bureau, Division of Transplantation, 5600 Fishers Lane, 8W–67, Rockville, MD 20857; 301–443–8036; or *ACBSCTHRSA@hrsa.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Council provides advice and recommendations to the Secretary of Health and Human Services on policy, program development, and other matters of significance concerning the activities under the authority of 42 U.S.C. 274k (section 379 of the Public Health Service Act), as amended, and Public Law 109–129, as amended. The Advisory Council may transmit its recommendations through the Administrator of HRSA on matters related to the activities of the C.W. Bill Young Cell Transplantation Program and National Cord Blood Inventory.

The agenda for the September 28, 2023, meeting is being finalized and may include the following topics: the Department of Health and Human Services' periodic review of the state of the science of using adult stem cells and birthing tissues to develop new types of therapies for patients, for the purpose of considering potential inclusion of such new therapies in the C.W. Bill Young Cell Transplantation Program; criteria for defining a high-quality cord blood unit for banking specifications; the unmet needs in blood stem cell transplantation and cellular therapy; strategies to improve rates of donation for adult blood stem cell donors; and other areas to increase blood stem cell donation and transplantation. The agenda for the October 26, 2023, meeting will be determined based on discussion, priorities, and/or action items from the September 28, 2023 meeting. All agenda items will be posted on the Advisory Council's website no later than 10 days prior to the respective meeting dates. Agenda items are subject to change as priorities dictate. Refer to the Advisory Council's website for any updated information concerning the meeting. Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meetings; oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to the Advisory Council should be sent to Shelley Tims Grant, using the contact information above at least 3 business days prior to the meeting. Individuals who plan to attend and need special assistance or other reasonable accommodations should notify the Advisory Council at the address and phone number listed above at least 10 business days prior to the meeting.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–19398 Filed 9–7–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Advisory Council on Drug Abuse, September 12, 2023, 10:30 a.m. to September 12, 2023, 05:00 p.m., National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 which was published in the **Federal Register** on August 21, 2023, FR Doc 2023–17889, 88 FR 56847.

This notice is being amended to change the open session start time from 12:45 p.m. to 1:00 p.m. The open session will now be held from 1:00 p.m. to 5:00 p.m. on September 12, 2023. The meeting is partially closed to the public.

Dated: September 1, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19406 Filed 9–7–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meeting for the Interdepartmental Serious Mental Illness Coordinating Committee (ISMICC)

AGENCY: Substance Abuse and Mental Health Services Administration, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Secretary of Health and Human Services announces a meeting of the Interdepartmental Serious Mental Illness Coordinating Committee (ISMICC).

The meeting will provide information on federal efforts related to serious mental illness (SMI) and serious emotional disturbance (SED).

DATES: October 18, 2023, 10:00 a.m. to 4:00 p.m. (EDT)/Open.

ADDRESSES: The meeting is open to the public and can be accessed virtually only by accessing: *https://www.zoomgov.com/j/1608742409?pwd=NjdoRlpGU2NoOHpaTzZVWXR3N0k4UT09*, or by dialing 646–828–7666, webinar ID: 160 874 2409, passcode: 446018. Agenda with call-in information will be posted on the

SAMHSA website prior to the meeting at *https://www.samhsa.gov/about-us/advisory-councils/meetings.*

FOR FURTHER INFORMATION CONTACT: Pamela Foote, ISMICC Designated Federal Officer, SAMHSA, 5600 Fishers Lane, Rockville, MD 20857; telephone: 240–276–1279; email: *pamela.foote@samhsa.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

The ISMICC was established on March 15, 2017, in accordance with section 6031 of the 21st Century Cures Act, and the Federal Advisory Committee Act, 5 U.S.C. app., as amended, to report to the Secretary, Congress, and any other relevant federal department or agency on advances in SMI and SED, research related to the prevention of, diagnosis of, intervention in, and treatment and recovery of SMIs, SEDs, and advances in access to services and supports for adults with SMI or children with SED. In addition, the ISMICC will evaluate the effect federal programs related to SMI and SED have on public health, including public health outcomes such as: (A) rates of suicide, suicide attempts, incidence and prevalence of SMIs, SEDs, and substance use disorders, overdose, overdose deaths, emergency hospitalizations, emergency room boarding, preventable emergency room visits, interaction with the criminal justice system, homelessness, and unemployment; (B) increased rates of employment and enrollment in educational and vocational programs; (C) quality of mental and substance use disorders treatment services; or (D) any other criteria determined by the Secretary. Finally, the ISMICC will make specific recommendations for actions that agencies can take to better coordinate the administration of mental health services for adults with SMI or children with SED. Not later than one (1) year after the date of enactment of the 21st Century Cures Act, and five (5) years after such date of enactment, the ISMICC shall submit a report to Congress and any other relevant federal department or agency.

II. Membership

This ISMICC consists of federal members listed below or their designees, and non-federal public members.

Federal Membership: Members include, The Secretary of Health and Human Services; The Assistant Secretary for Mental Health and Substance Use; The Attorney General; The Secretary of the Department of Veterans Affairs; The Secretary of the Department of Defense; The Secretary of the Department of Housing and Urban Development; The Secretary of the Department of Education; The Secretary of the Department of Labor; The Administrator of the Centers for Medicare and Medicaid Services; the Administrator of the Administration for Community Living, and The Commissioner of the Social Security Administration.

Non-Federal Membership: Members include, not less than 14 non-federal public members appointed by the Secretary, representing psychologists, psychiatrists, social workers, peer support specialists, and other providers, patients, family of patients, law enforcement, the judiciary, and leading research, advocacy, or service organizations.

The ISMICC is required to meet at least twice per year.

To attend virtually, submit written or brief oral comments, or request special accommodation for persons with disabilities, contact Pamela Foote. Individuals can also register at *https://snacregister.samhsa.gov/.*

The public comment section will be scheduled at the conclusion of the meeting. Individuals interested in submitting a comment, must notify Pamela Foote on or before 4:00 p.m., September 29, 2023, via email to: *Pamela.Foote@samhsa.hhs.gov.*

Up to three minutes will be allotted for each approved public comment as time permits. Written comments received in advance of the meeting will be considered for inclusion in the official record of the meeting.

Substantive meeting information and a roster of Committee members is available at the Committee's website: *https://www.samhsa.gov/about-us/advisory-councils/ismicc.*

Dated: September 5, 2023.

Carlos Castillo,

Committee Management Officer.

[FR Doc. 2023–19449 Filed 9–7–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0024]

Simplifying FEMA Preparedness Grants

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice and request for information.

SUMMARY: The Federal Emergency Management Agency (FEMA) aims to improve the management and administration of its preparedness grant programs to continue to assist the nation in building and sustaining capabilities to prevent, prepare for, protect against, and respond to terrorist attacks and other hazards. FEMA is issuing this Notice and Request for Information (RFI) to seek public input on simplifying and streamlining its preparedness grant process to improve the efficiency and accessibility of its suite of preparedness grant programs.

DATES: Comments must be received no later than November 7, 2023.

ADDRESSES: Interested persons may submit comments responsive to this RFI electronically through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions for submitting comments and use Docket ID: FEMA–2023–0024. Submitting this information makes it public; you may wish to read the Privacy and Security Notice on *https://www.regulations.gov.*

Commenters are encouraged to identify the specific question or questions by number to which they are responding. All submissions received must include the agency name and Docket ID, and will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov* and will include any personal information you provide. Comments submitted can be viewed by other commenters and interested members of the public. Responses should not include any personally identifiable information or confidential commercial information.

FOR FURTHER INFORMATION CONTACT: Pamela Williams, Assistant Administrator, Grant Programs Directorate, Resilience, Federal Emergency Management Agency, *Fema-Grants-Feedback@fema.dhs.gov* or 202–212–8007.

SUPPLEMENTARY INFORMATION:

I. Background

On Jan. 25, 2023, the U.S. Department of Homeland Security (DHS) released the Secretary's 2023 department-wide priorities. FEMA seeks this input as part of the DHS 2023 priority to improve management and administration of grant programs by simplifying application processes and improving customer service, while ensuring greater accessibility and equity for under resourced populations. For decades,

FEMA has provided federal assistance to aid states in building and sustaining capabilities to measurably improve the nation's readiness in preventing, preparing for, protecting against, and responding to terrorist attacks and other hazards. The federal grants process is a critical tool for providing funding to a wide range of recipients, including state, local, tribal Nations, and territorial governments, and nonprofits. However, the process is often seen as complex and burdensome, which can discourage some stakeholders from applying for grants and limit program effectiveness.

The 2022–2026 FEMA Strategic Plan [1] outlines the agency's approach to transform how the agency delivers support and enables partners to increase their capacity. FEMA must routinely evaluate its programs and policies for outcome disparities; in keeping with the 2022–2026 FEMA Strategic Plan.

II. Maximizing the Value of Public Feedback

The impacts of federal regulations and policies tend to be widely dispersed in society, making members of the public one of the best sources of useful information, data and perspectives on the benefits and burdens of FEMA's existing programs, regulations, information collections and policies. FEMA seeks public feedback relevant to its grant preparedness programs to facilitate FEMA's review and simplification of its preparedness grant processes.

The following is meant to assist members of the public in formulating comments. This notice contains a list of questions, the answers to which will assist FEMA in reviewing, modifying and simplifying our preparedness grant processes and improving engagement with stakeholders. FEMA encourages public comment and seeks additional data commenters believe relevant to agency efforts to improve service delivery. FEMA finds the most effective feedback on agency process identifies specific programmatic information and policies for improvement; identifies specific barriers to participation and/or accessibility; offers actionable data; and specifies viable alternatives to existing approaches that meet statutory obligations.

For example, commentary stating that a stakeholder feels strongly that FEMA should change the preparedness grant application process, without providing specific information on how the proposed change would impact the cost, time and efforts of recipients, is less helpful to FEMA than specific actionable feedback that provides details on how to address identified challenges. FEMA is looking for new and/or specific information, data and perspectives to support any proposed changes. Commenters should consider these principles as they answer and respond to the questions in this notice:

- Specifically identify any administrative burdens, program requirements, information collection burdens, waiting time, or unnecessary complexity in FEMA's grant processes.
- Identify meaningful and helpful engagements that have been, or should be provided to enhance the knowledge and accessibility of FEMA's preparedness grant programs.
- Provide specific data that document the costs, burdens and benefits of existing requirements to the extent they are available. Commenters might also address how FEMA can best obtain and consider accurate, objective information and data about the costs, burdens, and benefits of existing programs, and whether there are existing sources of data that FEMA can use to evaluate its programs on a revolving basis.
- Where comments relate to a program's costs or benefits, consider providing data or other information about the program to ascertain the program's actual impact.

FEMA will also conduct several listening sessions for public commentary during the open comment period. Information will be posted on *https://www.fema.gov/event/public-comment-period-simplifying-fema-preparedness-grants.*

III. FEMA's Preparedness Programs

In Fiscal Year 2023, preparedness grant programs will provide more than two billion dollars in funding to state, local, tribal Nations, and territorial governments, as well as transportation authorities, nonprofit organizations, and other eligible entities as outlined in the funding notice for each program. FEMA preparedness grant programs include:

1. Assistance to Firefighters Grants (AFG);
2. Emergency Management Performance Grant Program (EMPG);
3. Fire Prevention & Safety (FP&S);
4. Homeland Security Grant Program (HSGP);
   a. State Homeland Security Program (SHSP);
   b. Urban Area Security Initiative (UASI);
   c. Operation Stonegarden (OPSG);
5. Intercity Bus Security Grant Program (IBSGP);
6. Intercity Passenger Rail Grant Program (IPR);
7. Nonprofit Security Grant Program (NSGP);
8. Staffing for Adequate Fire and Emergency Response (SAFER);
9. Port Security Grant Program (PSGP);
10. Regional Catastrophic Preparedness Grants Program (RCPGP);
11. State and Local Cybersecurity Grant Program (SLCGP);
12. Tribal Cybersecurity Grant Program (TCGP);
13. Transit Security Grant Program (TSGP); and
14. Tribal Homeland Security Grant Program (THSGP).

FEMA seeks specific input from the public regarding the outlined preparedness grant programs, collection of information, and policies. In response, FEMA will work to simplify and streamline its grant processes to improve efficiencies and accessibility. For additional information on the programs above, please visit *https://www.fema.gov/grants/preparedness/about.*

IV. Specific Information Requested

FEMA has divided this request for information into three sections: (1) a series of general questions which may be answered as applicable to any of FEMA's preparedness grant programs, (2) specific questions that solicit more targeted feedback on individual preparedness grant programs, and (3) follow up questions from the Request for Information concerning equity and climate change that FEMA released in 2021.[2]

A. General Inquiry

1. How would you describe the cadence of FEMA preparedness grant programs communication to your stakeholder group?
   - How often is too often, and how infrequently is too infrequently?
   - Do you feel that all information required to apply for a grant is discussed?
   - Is there anything missing from FEMA's communication on grants that would be helpful to have?

2. What other methods and modes of engagement (*e.g.,* listening sessions, online surveys, written inputs) would you like to participate in? Does this include regional and/or national engagements hosted by FEMA? If so, which ones?

[1] *https://www.fema.gov/sites/default/files/documents/fema_2022-2026-strategic-plan.pdf* (Last accessed 6/2/2023).

[2] See Request for Information on FEMA Programs, Regulations, and Policies *https://www.federalregister.gov/documents/2021/04/22/2021-08444/request-for-information-on-fema-programs-regulations-and-policies* (Last accessed 6/7/2023).

3. If you are responsible for managing grant programs from across the federal government:

- Do you believe there are opportunities for FEMA to better complement and coordinate with other federal grant programs? If so, what would you recommend?
- Are there any specific compliance elements with FEMA grants that are more or less burdensome than other federal grants? If so, can you provide specific examples?

4. What are your biggest challenges during the application periods? Consider the following:

- Timeframe, including the length of the application period, how many applications are due at the same time, the time of the year the application period opens, etc.;
- Technology including the grant application systems (ND Grants, FEMA GO, and Grants Reporting Tool);
- Completing the Biannual Strategy Implementation Report (BSIR);
- Forms;
- Knowledge of the program requirements and priorities;
- Internal approvals; or
- Other (please describe).

5. *Compliance vs. Complexity:* For the following topics, although FEMA must ensure compliance with certain grant requirements, we would like to simplify how these requirements are met and seek your feedback on how FEMA can make these requirements easier, while still achieving compliance. Potential topics for feedback include:

- Reporting requirements, fraud awareness, and fraud prevention;
- Record keeping/questioned costs;
- Environmental and historic preservation;
- Other Grant Requirements (Civil Rights, Drug Free Workplace, etc.);
- Audits from the DHS Office of Inspector General (OIG) or the Government Accountability Office, (GAO) and FEMA monitoring
- Procurement rules (*e.g.,* the Build American Buy American Act (BABAA))

6. FEMA seeks your feedback on your experiences with monitoring of FEMA preparedness grant programs, including:

- If you have received monitoring from FEMA, from whom did you receive it (Region or Headquarters)? Was it financial or programmatic monitoring or both?
- How would you describe the response time of the feedback you received? What did you need to do to prepare for the visit?
- Was the feedback helpful? How was your experience trying to close any corrective actions?

7. Measuring for Results:

- How do you quantify goods and services purchased with grant funds?
- How do you collect information at the project level to determine its impact on your preparedness capabilities?
- How can FEMA assist in simplifying that process?

8. What else can FEMA do to help balance the needs of emergency management, with other state and urban area grant recipient stakeholders such as fire and emergency medical services, public health officials, and law enforcement?

9. Which FEMA preparedness tools or products inform your grant investments decisions?

10. Have you identified areas for improvement in the grant process for which FEMA technical assistance or joint technical assistance with other jurisdictions could be helpful? If so, what are they?

11. How can FEMA better consolidate grant training and technical assistance to support a unified presentation of all its offerings to recipients and sub-recipients?

12. Are there data reporting elements that your organization captures, that you believe would be valuable to share with FEMA and would help FEMA articulate how the nation is better prepared and more resilient? If so, what are they?

13. How does your organization capture data on underserved communities serviced with preparedness grant resources?

B. Programmatic Questions

(1) Competitive Grant Programs

1. Regarding FEMA's competitive preparedness grant programs (AFG, FP&S, SAFER, IBSGP, NSGP, OPSG, PSGP, RCPGP, TSGP, THSGP):

a. Are there measures that FEMA could take to increase the number of entities that are aware of and apply for our grant programs? What are the specific barriers to submitting grant applications?

2. State Administrative Agencies: For the Emergency Management Performance Grant and Homeland Security Grant Program, what measures are being taken at the state level to promote equitable sub-awarding of federal grant funds? How can FEMA support these measures to make them simpler and more effective?

3. Grant subapplicants and subrecipients: What are your biggest challenges during the application process, including FEMA specific guidance and timelines and the applicant (State) specific guidance and timelines?

(2) Homeland Security Grant Program (HSGP)

4. FEMA and DHS have committed to having this year's six National Priority Areas (NPAs) remain consistent next year. How has this impacted your planning process? As a reminder, the six NPAs are:

a. Enhancing the protection of soft targets and crowded places;

b. Enhancing information sharing and intelligence analysis;

c. Combating domestic violence extremism;

d. Enhancing cybersecurity;

e. Enhancing community preparedness and resilience; and

f. Enhancing election security.

5. In what ways do the six NPAs accurately or inadequately represent the landscape of priorities that are needed to further strengthen homeland security?

6. Five of six NPAs provide minimum spend percentages required for both the State and Urban Area portfolios. The minimum spend requirements equated to 15% of the total award funds, and FEMA further required that an additional 15% be spent across any of the six NPAs for both the State and Urban Area portfolios.

a. Do you believe this approach provides adequate resourcing and investments into these priority areas?

7. Do you have any further recommendations for setting NPAs?

8. How can FEMA help state, local, tribal, and territorial partners better understand or clarify the risk methodology that informs allocations for the Homeland Security Grant Program?

9. In what ways does the risk profile help you understand your jurisdiction's relative risk?

10. How might FEMA improve the risk profile?

11. What data elements should be the most and least influential in the Terrorism Risk Methodology?

12. Are there any national level datasets that FEMA has not included as part of the risk assessment analysis? If so, please identify the relevant datasets.

13. Is there a way for FEMA to provide the public with a better understanding of the HSGP's priorities in advance the Notice of Funding Opportunity (NOFO)?

14. What can FEMA and DHS do to strengthen its grant programs to better build or sustain state and local capabilities to prevent terrorist attacks?

15. What can FEMA and DHS do to ensure that the Homeland Security Grant Programs (HSGP, UASI, OSGP) adequately meet your needs?

16. The HSGP is a resource among a limited pool of funding for the development of new and sustained capabilities. Given the limited funding, how do you prioritize building new capabilities versus sustaining existing capabilities? A complete answer would provide examples.

17. The HSGP contains an element of the State Homeland Security Program (SHSP) that provides the legislative requirement to subaward at least 80% of state funds to local units of government. Do you believe this an adequate measure to help ensure that funds are properly invested for building capabilities? If not, why not?

18. What suggestions do you have for proper alignment and balancing of SHSP funds to build capabilities?

19. What can FEMA and DHS do to help ensure law enforcement needs are met while also balancing the needs of other state and urban area grant recipient stakeholders such as fire and emergency management?

20. The Law Enforcement Terrorism Prevention Activity (LETPA) program imposes a minimum spend requirement on law enforcement terrorism prevention. How can FEMA and DHS refine LETPA requirement to ensure state and local capabilities to prevent terrorist attacks are being supported?

21. What can FEMA and DHS do to ensure campus law enforcement agencies understand how to access the Homeland Security Grant Program funding, to include Urban Area Security Initiative funding?

22. What can FEMA and DHS do to simplify the grant requirements for applicants and recipients to enhance the Operation Stonegarden Grant Program?

(3) Urban Areas Security Initiative Program

The Urban Areas Security Initiative Program is subject to the evolving and expanding threat landscape. Threats faced by the nation have changed dramatically over the last twenty years, becoming more dispersed in nature and often carried out by a single individual or small groups using very simple tactics. As a result, risk is no longer concentrated in the largest urban areas; the risk to smaller urban areas has risen, as well.

23. The Urban Areas Security Initiative Program must address this new threat environment, both in terms of eligible urban areas and risk-based funding allocations. Please provide your input on how this can best be accomplished without undermining the progress made over the past 20 years in building capacity to prevent, protect, and respond to terrorist acts.

(4) Emergency Management Performance Grant (EMPG)

24. Do you find the current EMPG work plan template preferable to the previous narrative format?

25. How much does the 50% cost share/match, which requires that the federal share applied toward the EMPG Program be no more than 50% of the total budget, factor into the State Administrative Agency's ability and approach to pass through EMPG funding to subrecipients?

C. 2021 Request for Information Follow Up Questions

FEMA released an RFI in April 2021 to receive input from the public on specific FEMA programs, regulations, collections of information, and policies for the agency to consider modifying, streamlining, expanding or repealing in light of Executive Order 13985, ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government'', among executive actions. The questions in this Simplifying FEMA Preparedness Grants 2023 RFI expands on the 2021 RFI feedback, and explores opportunities to identify and redress potential inequities in how partners access, apply and receive preparedness grant funds.

The 2021 RFI identified areas for improving the NSGP Investment Justification (IJ) process. As another example, one commentator suggested that communities that meet the small, impoverished community definition could use simpler forms or receive direct assistance from FEMA staff or FEMA-hired contractors to prepare the grant application.

1. What steps can FEMA take to improve the application process for our preparedness suite of grant programs?

2. How can FEMA better engage with underserved communities about national preparedness initiatives and grant programs?

3. Are there entities that are excluded from preparedness grant programs that could meet the priorities of one or more programs and provide a benefit to their community? Please provide the name of the grant program(s), entity type and how they can support a priority of the program(s).

4. How does your organization capture data on underserved communities serviced with preparedness grant resources?

FEMA notes that this notice is issued solely for information and program-planning purposes. Responses to this notice do not bind FEMA to any further actions related to the response.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–19376 Filed 9–7–23; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0017]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application for Advance Permission to Enter as a Nonimmigrant

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until October 10, 2023.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2008–0009. All submissions received must include the OMB Control Number 1615–0017 in the body of the letter, the agency name and Docket ID USCIS–2008–0009.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the

USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on May 8, 2023, at 88 FR 29685, allowing for a 60-day public comment period. USCIS received one comment in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and enter USCIS–2008–0009 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Advance Permission to Enter as a Nonimmigrant.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–192; e-SAFE; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The data collected will be used by CBP and USCIS to determine whether the applicant is eligible to enter the United States temporarily under the provisions of section 212(d)(3), 212(d)(13), and 212(d)(14) of the INA. The respondents for this information collection are certain inadmissible nonimmigrant aliens who wish to apply for permission to enter the United States and applicants for T nonimmigrant status or petitioners for U nonimmigrant status. CBP has developed an electronic filing system, called Electronic Secured Adjudication Forms Environment (e-SAFE), through which Form I–192 can be submitted when filed with CBP.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–192 is 61,050 and the estimated hour burden per response is 1 hour and 11 minutes; the estimated total number of respondents for the information collection e-SAFE is 7,000 and the estimated hour burden per response is 56 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 78,549 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $17,522,875.

Dated: September 1, 2023.

Samantha L Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–19374 Filed 9–7–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0023]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application To Register Permanent Residence or Adjust Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until November 7, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0023 in the body of the letter, the agency name and Docket ID USCIS–2009–0020. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2009–0020.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2009–0020 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Register Permanent Residence or Adjust Status; Supplement A to Form I–485, Adjustment of Status Under Section 245(i); Supplement J, Confirmation of Bona Fide Offer or Request for Job Portability Under Section 204(j); National Interest Waiver.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–485, Supplement A, Supplement J, National Interest Waiver; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The Form I–485 is used to request and determine eligibility for adjustment of permanent residence status. The Form I–485 Supplement A is used to adjust status under section 245(i) of the Immigration and Nationality Act (Act). The Form I–485 Supplement J is used if you are an employment-based applicant for adjustment of status who is filing or has previously filed a Form I–485 as the principal beneficiary of a valid Form I–140 in an employment-based immigrant visa category that requires a job offer, and you now seek, in connection with your Form I–485, to (1) confirm that the job offered in your Form I–140 is a bona fide offer you intent to accept or (2) request job portability under INA section 204(j) to a new, full-time permanent job offer that you intent to accept, once your Form I–485 is approved. The Physicians National Interest Waiver will be used to notify foreign physician applicants of the medical service requirements for national interest waiver physicians applying for adjustment of status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–485 is 603,500 and the estimated hour burden per response is 7.04 hours; the estimated total number of respondents for the information collection Supplement A is 51,072 and the estimated hour burden per response is 1.06 hours; the estimated total number of respondents for the information collection Supplement J is 65,311 and the estimated hour burden per response is 0.68 hours; the estimated total number of respondents for the information collection Biometrics Processing is 603,500 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 5,053,283 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $207,000,500.

Dated: September 1, 2023.

Samantha L Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–19369 Filed 9–7–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0075]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: I–864, Affidavit of Support Under Section 213A of the INA; I–864A, Contract Between Sponsor and Household Member; I–864EZ, Affidavit of Support Under Section 213A of the INA; I–864W, Request for Exemption for Intending Immigrant's Affidavit of Support

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until October 10, 2023.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2007–0029. All submissions received must include the OMB Control Number 1615–0075 in the body of the letter, the agency name and Docket ID USCIS–2007–0029.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this

notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on June 29, 2023, at 88 FR 42094, allowing for a 60-day public comment period. USCIS did not receive any comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and enter USCIS–2007–0029 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* I–864, Affidavit of Support Under Section 213A of the INA; I–864A, Contract Between Sponsor and Household Member; I–864EZ, Affidavit of Support Under Section 213A of the INA; I–864W, Request for Exemption for Intending Immigrant's Affidavit of Support.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–864; I–864A; I–864EZ; I–864W; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the data collected on Form I–864 to determine whether the sponsor has the ability to support the sponsored immigrant under section 213A of the Immigration and Nationality Act. This form standardizes evaluation of a sponsor's ability to support the sponsored immigrant and ensures that basic information required to assess eligibility is provided by sponsors.

Form I–864A is a contract between the sponsor and the sponsor's household members. It is only required if the sponsor used income of their household members to reach the required 125 percent of the Federal poverty guidelines. The contract holds these household members jointly and severally liable for the support of the sponsored immigrant. The information collection required on Form I–864A is necessary for public benefit agencies to enforce the Affidavit of Support in the event the sponsor used income of their household members to reach the required income level and the public benefit agencies are requesting reimbursement from the sponsor.

USCIS uses Form I–864EZ in exactly the same way as Form I–864; however, USCIS collects less information from the sponsors as less information is needed from those who qualify in order to make a thorough adjudication.

USCIS uses Form I–864W to determine whether the intending immigrant meets the criteria for exemption from section 213A requirements. This form collects the immigrant's basic information, such as name and address, the reason for the exemption, and accompanying documentation in support of the immigrant's claim that they are not subject to section 213.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–864 is 453,345 and the estimated hour burden per response is 6 hours; the estimated total number of respondents for the information collection Form I–864A is 215,800 and the estimated hour burden per response is 1.75 hours; the estimated total number of respondents for the information collection Form I–864EZ is 100,000 and the estimated hour burden per response is 2.5 hours; the estimated total number of respondents for the information collection Form I–864W is 98,119 and the estimated hour burden per response is 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 3,445,839 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $159,608,680.

Dated: September 1, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–19375 Filed 9–7–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[DOI–BLM–AK–0000–2021–0006–EIS]

Notice of Availability of the Draft Coastal Plain Oil and Gas Leasing Program Supplemental Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), the Bureau of Land Management (BLM) announces the availability of the Draft Coastal Plain Oil and Gas Leasing Program Supplemental Environmental Impact Statement (Leasing SEIS).

DATES: To afford the joint lead agencies the opportunity to consider comments

in the Final Leasing SEIS, please ensure that the BLM receives your comments within 45 days following the date the Environmental Protection Agency (EPA) publishes its Notice of Availability (NOA) of the Draft Leasing SEIS in the **Federal Register**. The EPA publishes these NOAs on Fridays. The BLM will be holding virtual and in-person public meetings. The dates of the comment period as well as information about public meetings and subsistence hearings will be available on the project website in the **ADDRESSES** section.

ADDRESSES: The Draft Leasing SEIS is available for review on the BLM ePlanning project website at *https://eplanning.blm.gov/eplanning-ui/project/2015144/510.*

Written comments related to the Draft Leasing SEIS may be submitted via the ePlanning project website at *https://eplanning.blm.gov/eplanning-ui/project/2015144/510.*

Documents pertinent to this proposal may be examined at the BLM Alaska State Office, BLM Alaska Arctic District Office, and the United States Fish and Wildlife Service (USFWS) Arctic National Wildlife Refuge Office.

- BLM Alaska State Office Public Room, 222 W 7th Avenue, Anchorage, AK 99513
- BLM Alaska Arctic District Office, 222 University Avenue, Fairbanks, AK 99709
- USFWS Arctic National Wildlife Refuge Office, 101 12th Avenue, Room 235, Fairbanks, AK 99701

FOR FURTHER INFORMATION CONTACT: Serena Sweet, BLM Supervisory Planner, telephone (907) 271–4345, or email *ssweet@blm.gov;* Stephanie Kuhns, BLM Planning and Environmental Specialist, telephone (907) 271–4208, email *skuhns@blm.gov;* or Bobbie Jo Skibo, Coastal Plain Oil and Gas Program Coordinator, telephone (907) 441–1539, email *bobbiejo_skibo@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 for contacting Ms. Sweet, Ms. Kuhns, or Ms. Skibo. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Draft Leasing SEIS was developed by the BLM and USFWS as joint lead agencies to address deficiencies in the 2019 Coastal Plain Oil and Gas Leasing Program Environmental Impact Statement and the 2020 Record of Decision approving the Arctic National Wildlife Refuge Coastal Plain Oil and Gas Leasing Program (85 FR 51754).

The joint lead agencies prepared this Draft Leasing SEIS in accordance with NEPA to implement an oil and gas leasing program in the Coastal Plain of the Arctic National Wildlife Refuge (Coastal Plain). This Draft Leasing SEIS serves to inform BLM's implementation of the Public Law 115–97, Section 20001(c)(1) requirement to hold two lease sales. It may also inform management of post-lease activities, including seismic surveys, exploratory drilling, oil and gas development, and transportation of oil and gas in and from the Coastal Plain. Specifically, the Draft Leasing SEIS considers and analyzes the environmental impacts of various leasing alternatives and the indirect impacts that could result from hypothetical development.

This Draft Leasing SEIS does not permit oil and gas extraction activities. It considers three action alternatives for implementation of an oil and gas leasing program in the Coastal Plain. The decisions to be made include which lands to offer for lease and what terms and conditions would apply to leases. The decisions evaluated would not authorize any on-the-ground activity associated with the exploration or development of oil and gas resources on the Coastal Plain. Future on-the-ground actions requiring BLM approval, including proposed exploration plans and development proposals, would require further NEPA analysis based on the site-specific proposal.

Although sections 20001(a)(2) and (b)(2)(A) of Public Law 115–97 assign responsibility to the BLM for administering the oil and gas program on the Coastal Plain, it is understood that all activities, including plan development, study development, and consideration of exceptions, modifications, waivers, or any operations conducted on the surface of the Coastal Plain, would include close coordination with the USFWS as the surface management agency. In addition, the BLM would coordinate with other appropriate Federal, State, and North Slope Borough agencies; Tribal Governments; ANCSA corporations; and other Native organizations as appropriate.

All comments received during the comment period will be considered and evaluated, and substantive comments will be addressed in the Final Leasing SEIS to be completed in 2024. The most useful comments are ones that are specific and address one or more of the following:

- Identification of new information that would have a bearing on the analysis.
- Inaccuracies or discrepancies in information or any errors in our portrayal of the resources and uses of the program area.
- Suggestions for improving implementation of an oil and gas leasing program on the Coastal Plain, consistent with the purposes of the Arctic National Wildlife Refuge.
- Identification of new impacts, alternatives, or potential mitigation measures.

When you share your comments with us, please be as specific as possible. Identify the specific concern or correction you are suggesting, where it appears in the Draft Leasing SEIS, and the modification you feel is necessary or appropriate. If you have an idea for a potential mitigation measure, please tell us what it is and the benefits it would provide.

Information about public meetings and subsistence hearings will be available on the project website listed in the **ADDRESSES** section, and will be announced through additional, public notices, news releases, and mailings.

The BLM and USFWS will continue to consult with Indian Tribal Nations and Alaska Native corporations in accordance with Executive Order 13175, BLM MS 1780, and other Departmental policies. Tribal concerns, including impacts on Indian trust assets, impacts to subsistence resources, and potential impacts to cultural resources, will be given due consideration.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10)

Steven M. Cohn,

BLM Alaska State Director.

[FR Doc. 2023–19427 Filed 9–7–23; 8:45 am]

BILLING CODE 4331–10–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–043]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: September 14, 2023 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. No. 731–TA–893 (Fourth Review) (Honey from China). The Commission currently is scheduled to complete and file its determinations and views of the Commission on September 22, 2023.
5. Outstanding action jackets: none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, Acting Supervisory Hearings and Information Officer, 202–205–2000.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.
Issued: September 6, 2023.

Sharon Bellamy,

Acting Supervisory Hearings and Information Officer.

[FR Doc. 2023–19522 Filed 9–6–23; 4:15 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Electronic Devices, Including Smartphones, Computers, Tablet Computers, and Components Thereof, DN 3692;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of InterDigital, Inc.; InterDigital VC Holdings, Inc.; InterDigital Patent Holdings, Inc.; and InterDigital Madison Patent Holdings SAS on September 1, 2023. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices, including smartphones, computers, tablet computers, and components thereof. The complaint names as a respondents: Lenovo Group Limited of Hong Kong; Lenovo (United States) Inc. of Morrisville, NC; and Motorola Mobility LLC of Chicago, IL. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due, notwithstanding § 201.14(a) of the Commission's Rules of Practice and Procedure. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3692'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: September 5, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–19432 Filed 9–7–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employee Polygraph Protection Act

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Wage and Hour Division (WHD)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before October 10, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (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.

FOR FURTHER INFORMATION CONTACT: Michelle Neary by telephone at 202–693–6312, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: These third-party notifications and recordkeeping requirements help ensure polygraph examinees receive the protections and rights provided by the Employee Polygraph Protection Act (EPPA). For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 28, 2023 (88 FR 12701).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–WHD.

Title of Collection: Employee Polygraph Protection Act.

OMB Control Number: 1235–0005.

Affected Public: Businesses or other for-profits, Farms, Not-for-profit institutions.

Total Estimated Number of Respondents: 85,200.

Total Estimated Number of Responses: 757,400.

Total Estimated Annual Time Burden: 68,739 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,

Senior PRA Analyst.

[FR Doc. 2023–19372 Filed 9–7–23; 8:45 am]

BILLING CODE 4510–27–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (23–094)]

Performance Review Board, Senior Executive Service (SES)

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of Membership of SES Performance Review Board.

SUMMARY: The Civil Service Reform Act of 1978, requires that appointments of individual members to the Performance Review Board (PRB) be published in the **Federal Register**. The performance review function for the SES in NASA is being performed by the NASA PRB. The following individuals are serving on the Board:

Performance Review Board

Chairperson, Associate Administrator
Deputy Associate Administrator
Chief Human Capital Officer
Director for Executive Services
Associate Administrator for the Office of Diversity and Equal Opportunity
Associate Administrator for the Aeronautics Research Mission Directorate
Procurement Assistant Administrator
Center Director, Langley Research Center

Cheryl Parker,

Federal Register Liaison Officer.

[FR Doc. 2023–19393 Filed 9–7–23; 8:45 am]

BILLING CODE 7510–13–P

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2023–040]

State, Local, Tribal, and Private Sector Policy Advisory Committee (SLTPS–PAC); Meeting

AGENCY: Information Security Oversight Office (ISOO), National Archives and Records Administration (NARA).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: We are announcing an upcoming meeting of the State, Local, Tribal, and Private Sector Policy Advisory Committee (SLTPS–PAC) in accordance with the Federal Advisory Committee Act and implementing regulations.

DATES: The meeting will be on September 20, 2023, from 10 a.m. to 12 p.m. (EST).

ADDRESSES: This meeting will be a virtual meeting. We will send instructions on how to access the meeting to those who register according to the instructions below.

FOR FURTHER INFORMATION CONTACT: Heather Harris Pagán, ISOO Senior Program Analyst, at *SLTPS_PAC@nara.gov* or (202) 357–5351. Contact ISOO at *ISOO@nara.gov.*

SUPPLEMENTARY INFORMATION: This meeting is open to the public in accordance with the Federal Advisory Committee Act (5 U.S.C. app 2) and implementing regulations at 41 CFR 102–3. The Committee will discuss matters relating to the classified national security information program for state, local, tribal, and private sector entities.

Procedures: Please submit the name, email address, and telephone number of people planning to attend to Heather Harris Pagán at ISOO (contact information above) no later than September 18, 2023. We will provide meeting access information to those who register.

Tasha Ford,

Committee Management Officer.

[FR Doc. 2023–19453 Filed 9–7–23; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: The meeting was noticed on September 5, 2023, at 88 FR 60713.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Wednesday, September 6, 2023, from 2:00–3:00 p.m. EDT.

CHANGES IN THE MEETING: The meeting will be held on Wednesday, September 6, 2023, at 12:00–1:00 p.m.

CONTACT PERSON FOR MORE INFORMATION: Point of contact for this meeting is: Chris Blair, *cblair@nsf.gov,* 703/292–7000.

Christopher Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2023–19510 Filed 9–6–23; 11:15 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–10; NRC–2023–0155]

Northern States Power Company; Prairie Island Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to request a hearing and to petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC, the Commission) has received a license amendment application from Northern States Power Company (NSPM) for an amendment to Materials License No. SNM–2506 for the Prairie Island Independent Spent Fuel Storage Installation (PI ISFSI) located in Welch, Minnesota. The amendment request seeks to revise the technical specifications (TS) for the PI ISFSI. NSPM proposes to allow use of a Code alternative as an option to the requirements of the 2004 Edition through 2006 Addenda of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel (B&PV) Code, Section III, Division 1, Subsection NB, Paragraph NB–5130, by revising the TS to add the Code alternative to TS section 4.4, table 4.4–1, TN–40HT ASME Code Exceptions.

DATES: A request for a hearing or petition for leave to intervene must be filed by November 7, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0155 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0155. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John-Chau Nguyen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–0262; email: *John-Chau.Nguyen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC received, by letter dated July 14, 2023 (ADAMS Accession No. ML23195A187), a license amendment application from NSPM, to amend Materials License No. SNM–2506, which authorizes the storage of spent fuel at the PI ISFSI located in Welch, Minnesota. Specifically, the proposed amendment, if approved, would allow NSPM to use a Code alternative as an option to the requirements of the 2004 Edition through 2006 Addenda of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel (B&PV) Code, Section III, Division 1, Subsection NB, Paragraph NB–5130, by revising the TS to add the Code alternative to TS section 4.4, table 4.4–1, TN–40HT ASME Code Exceptions.

An NRC administrative completeness review, documented in a letter to NSPM dated August 24, 2023 (ADAMS Accession No. ML23234A135), found the application acceptable to begin a technical review.

Prior to approving the proposed amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations. The NRC's findings will be documented in a safety evaluation report. In the amendment request, NSPM asserted that the proposed amendment satisfies the categorical exclusion criteria of paragraph 51.22(c)(11) of title 10 of the Code of Federal Regulations (10 CFR). The NRC will evaluate this assertion and make findings consistent with the National Environmental Policy Act and 10 CFR part 51.

II. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult 10 CFR 2.309. If a petition is filed, the presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (*https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053*) and on the NRC's public website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate.*

III. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b) through (d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1). Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such

information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

Dated: September 1, 2023.

For the Nuclear Regulatory Commission.

Yoira K. Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023–19366 Filed 9–7–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250 and 50–251; NRC–2022–0172]

Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft environmental impact statement; request for comment; public comment meetings; opportunity to request a hearing and to petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC, the Commission) is issuing for public comment draft environmental impact statement (EIS) NUREG–1437, Supplement 5a, Second Renewal, ''Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Draft Report for Comment.'' Turkey Point Nuclear Generating Unit Nos. 3 and 4 (Turkey Point) is located in Homestead, Florida, approximately 25 miles south-southwest of Miami. Possible alternatives to the proposed action of subsequent license renewal for Turkey Point include the no-action alternative and reasonable replacement power alternatives. A new notice of opportunity to request a hearing and petition for leave to intervene—limited to contentions based on new information in the draft EIS—is also being issued.

DATES: The NRC will hold two public meetings, one in-person near Turkey Point and one through online webinar and teleconference call, on the draft EIS, including a presentation on the preliminary recommendation in the draft EIS and a transcribed public comment session. The in-person meeting will be held September 19, 2023, at 7 p.m. eastern time (ET) at the Hampton Inn & Suites, 2855 NE 9th St, Homestead, FL 33033. The virtual meeting will be held September 27, 2023, at 2 p.m. ET. Details on both meetings can be found on the NRC's Public Meeting Schedule at: *https://www.nrc.gov/pmns/mtg.* Members of the public are invited to submit comments by November 7, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Requests for a hearing or petitions for leave to intervene must be filed by November 7, 2023.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0172. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email:* Comments may be submitted to the NRC electronically using the email address *TurkeyPoint34Environmental@nrc.gov.*
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lance Rakovan, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2589; email: *Lance.Rakovan@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0172 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0172.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* NUREG–1437, Supplement 5a, Second Renewal, ''Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Draft Report for Comment,'' is available in ADAMS under Accession No. ML23242A216.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. ET, Monday through Friday, except Federal holidays.
- *Public Library:* A copy of the draft EIS is available for public review at the Naranja Branch Library, 14850 SW 280th Street, Homestead, Florida 33032.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2022–0172 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment

submissions available to the public or entering the comment into ADAMS.

II. Discussion

The NRC is issuing for public comment draft EIS NUREG–1437, Supplement 5a, Second Renewal, ''Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Draft Report for Comment.'' The draft EIS supplements NUREG–1437, Supplement 5, Second Renewal, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Final Report'' (FSEIS), issued in October 2019 (ADAMS Accession No. ML19290H346). The draft EIS includes the NRC staff's site-specific evaluation of the environmental impacts of subsequent license renewal (SLR) for Turkey Point for each of the environmental issues that were dispositioned as Category 1 issues (generic to all or a distinct subset of nuclear power plants) in the FSEIS consistent with Table B–1 in appendix B to subpart A of title 10 of the *Code of Federal Regulations* (10 CFR) part 51 and NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants,'' Revision 1, Final Report. The draft EIS considers information contained in the Florida Power & Light Company (FPL) June 9, 2022, submittal, which supplemented its environmental report in support of its 2018 SLR application that was considered in the FSEIS. The draft EIS also considers whether there is significant new information that would change the NRC staff's conclusions concerning Category 2 issues (specific to individual nuclear power plants) in the FSEIS. The NRC staff prepared the draft EIS in accordance with the Commission's decisions in Commission Legal Issuance (CLI)–22–02 (ADAMS Accession No. ML22055A496) and CLI–22–03 (ADAMS Accession No. ML22055A527), both dated February 24, 2022. These decisions directed the NRC staff to modify the expiration dates of the Turkey Point subsequent renewed licenses, which were issued on December 4, 2019, to reflect the end dates of the previous renewed licenses (*i.e.,* July 19, 2032, for Turkey Point Unit 3 and April 10, 2033, for Turkey Point Unit 4). Together, the draft EIS and the FSEIS evaluate, on a site-specific basis, all of the environmental impacts of continued operation during the SLR term for Turkey Point Unit 3 from July 19, 2032, to July 19, 2052, and for Turkey Point Unit 4 from April 10, 2033, to April 10, 2053.

Based on the draft EIS and the FSEIS, the NRC staff's preliminary recommendation is that the adverse environmental impacts of SLR for Turkey Point (*i.e.,* the continued operation of Turkey Point for a period of 20 years beyond current expiration dates) are not so great that preserving the option of SLR for energy-planning decision-makers would be unreasonable. The NRC staff based its recommendation on FPL's environmental report, as supplemented, the NRC staff's consultations with Federal, State, Tribal, and local government agencies, the NRC staff's independent environmental review, which is documented in the draft EIS and the FSEIS, and the NRC staff's consideration of public comments.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

As directed in CLI–22–03, with the completion of the draft EIS, a new notice of opportunity to request a hearing and petition for leave to intervene—limited to contentions based on new information in the draft EIS—is being issued.

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult 10 CFR 2.309. If a petition is filed, the presiding officer will rule on the petition and, if appropriate, a notice of hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (*https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053*) and on the NRC's public website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate.*

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit

adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)-(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

Dated: August 31, 2023.

For the Nuclear Regulatory Commission.

John M. Moses,

Deputy Director, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Materials Safety and Safeguards.

[FR Doc. 2023–19188 Filed 9–7–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–251 and CP2023–254; MC2023–252 and CP2023–255; MC2023–253 and CP2023–256]

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:* September 8, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *https://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 (*https://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–251 and CP2023–254; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 43 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 30, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105;

[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).

Public Representative: Jennaca D. Upperman; *Comments Due:* September 8, 2023.

2. *Docket No(s).:* MC2023–252 and CP2023–255; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 44 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 30, 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:* September 8, 2023.

3. *Docket No(s).:* MC2023–253 and CP2023–256; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 45 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 30, 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:* September 8, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–19360 Filed 9–7–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98278; File No. SR–NYSEARCA–2023–56]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 6.91P–O(g)(1)

September 1, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 18, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Rule 6.91P–O(g)(1) to expand the existing Complex Strategy Limit. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Rule 6.91P–O(g) regarding risk checks of Electronic Complex Orders (or ECOs) to expand the existing Complex Strategy Limit.[4] Specifically, the Exchange proposes to impose a limit on complex strategies per underlying symbol, as described below.[5] The Exchange also notes that at least one other options exchange likewise may impose a limit on new complex order strategies.[6]

Rule 6.91P–O(g) describes the ''ECO Risk Checks,'' which are designed to help OTP Holders and OTP Firms (collectively OTPs) to effectively manage risk when trading ECOs.[7] Rule 6.91P–O(g)(1) sets forth the ''Complex Strategy Limit,'' which establishes a limit on the maximum number of new complex strategies that may be requested to be created per Market Participant Identifier or MPID, which limit would be announced by Trader Update.[8] Under current functionality, when an MPID reaches the limit on the maximum number of new complex strategies, the Exchange rejects all requests to create new complex strategies from that MPID for the rest of the trading day.

Notwithstanding the established Complex Strategy Limit, Rule 6.91P–O(g)(1) also authorizes the Exchange to reject a request to create a new complex strategy from any MPID whenever the Exchange determines it is necessary in the interests of a fair and orderly market. The established Complex Strategy Limit (the ''Strategy Limit''), and the Exchange's discretion related thereto, is a system protection tool that enables the Exchange to prevent any single MPID from creating more than a limited number of complex strategies during the trading day.

The Exchange proposes to modify Rule 6.91P–O(g)(1) to adopt another limit for the number of permissible complex strategies requested to be created by an MPID in a trading day, except that the new limit would be based on the number of complex strategies in the same underlying symbol (the ''Strategy Limit per Symbol''). Like the existing Strategy Limit, the proposed Strategy Limit per Symbol would operate as a system protection tool that enables the Exchange to prevent any single MPID from creating more than a limited number of complex strategies in a particular symbol during the trading day.

The Exchange has observed that the high volume of requests to create

[4] Rule 6.91P–O(a)(7) defines an ''Electronic Complex Order'' or ''ECO'' to mean any Complex Order, as defined in Rule 6.62P–O (f). Rule 6.62P–O(f) (providing a Complex Order is ''any order involving the simultaneous purchase and/or sale of two or more option series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.'').

[5] *See* proposed Rule 6.91P–O(g)(1) (Complex Strategy Limits). A ''complex strategy'' means a particular combination of leg components and their ratios to one another. New complex strategies can be created when the Exchange receives either a request to create a new complex strategy or an ECO with a new complex strategy. *See* Rule 6.91P–O(a)(4).

[6] *See, e.g.,* Cboe Rule 5.33(a) (providing, in its definition of ''complex strategy'' that Cboe ''may limit the number of new complex strategies that may be in the [Cboe] System or entered for any EFID (which EFID limit would be the same for all Users) at a particular time'').

[7] An Options Trading Permit or ''OTP'' is issued by the Exchange for effecting approved securities transactions on the Exchange. *See* Rule 1.1. An ''OTP Holder'' is a natural person, in good standing, who has been issued an OTP and an ''OTP Firm'' is a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that holds an OTP or upon whom an individual OTP Holder has conferred trading privileges on the Exchange. *See id.* The Exchange notes that an OTP may be acting as a Market Maker, which market participant is subject to heightened requirements. *See, e.g.,* Rule 6.37AP–O(b), (c).

[8] Per Rule 1.1, an MPID refers to the identifier assigned to the orders and quotes of a single OTP Holder or OTP Firm for the execution and clearing of trades on the Exchange by that permit holder. An OTP Holder or OTP Firm may obtain multiple MPIDs and each such MPID may be associated with one or more sub-identifiers of that MPID.'' *See id.*

complex strategies in the same underlying symbol can tax Exchange resources and result in latency in providing acknowledgements to OTPs for all series in that same underlying symbol. As such, the proposed Strategy Limit per Symbol would augment and add granularity to the existing Complex Strategy Limit by allowing the Exchange to establish separate limits based on the underlying symbol. The Exchange believes that MPIDs may benefit from this added granularity. For example, an MPID that sends a significant number of complex series creation requests for a particular underlying symbol may breach the Strategy Limit per Symbol for that underlying. However, that MPID would continue to have the ability to request complex strategies in other symbols—unless or until that MPID breaches the Strategy Limit per Symbol in a different symbol or—in the aggregate—breaches the Complex Strategy Limit. Thus, the Exchange believes that the proposed change would benefit all market participants because it would curtail (or remove) the latency that has at times resulted from the Exchange receiving a significant number of requests for new complex strategies in the same underlying.

To accommodate the proposed change, the Exchange proposes to reorganize and re-word certain of the existing text without changing functionality. As proposed, Rule 6.91P–O(g)(1) would be re-named (in plural) ''Complex Strategy Limits'' (as opposed to a singular ''Complex Strategy Limit'') and would state the following:

> The Exchange will establish limits, which will be announced by Trader Update, on (A) the maximum number of new complex strategies (irrespective of the underlying symbol) that an MPID may request be created (the ''Strategy Limit''); and (B) the maximum number of new complex strategies in a particular underlying symbol that an MPID may request be created (the ''Strategy Limit per Symbol''). When an MPID breaches the Strategy Limit, the Exchange will reject for the rest of the trading day, all requests from that MPID to create new complex strategies. When an MPID breaches the Strategy Limit per Symbol in a particular underlying, the Exchange will reject for the rest of the trading day all requests from that MPID to create complex strategies in that underlying symbol. Notwithstanding the established Strategy Limit and Strategy Limit per Symbol, the Exchange may reject a request to create a new complex strategy from any MPID whenever the Exchange determines it is necessary in the interests of a fair and orderly market.[9]

For example, if the Strategy Limit is 100, an MPID has already requested and created 100 complex strategies in a trading day, the Exchange will reject any request for the 101st complex strategy for the remainder of the trading day. The same logic applies for the Strategy Limit per Symbol such that if this limit is 50 and an MPID has already requested and created 50 complex strategies in the underlying symbol XYZ in a trading day, the Exchange will reject any request for the 51st complex strategy in XYZ for the remainder of the trading day.

The Exchange believes that this proposed modification is merely an extension of existing functionality that would help the Exchange add granularity to, and better calibrate, its risk settings related to the number of Complex Strategies per Symbol for an MPID per trading day and is therefore non-controversial.

Implementation

The Exchange will announce by Trader Update the implementation date of the proposed rule change, which implementation will be no later than 90 days after the effectiveness of this rule change.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[10] in general, and furthers the objectives of Section 6(b)(5),[11] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange has observed that the high volume of requests to create complex strategies in the same underlying symbol can tax Exchange resources and result in latency in providing acknowledgements to OTPs for all series in that underlying symbol. As such, the proposed Strategy Limit per Symbol would augment and add granularity to the existing Complex Strategy Limit by allowing the Exchange to establish separate limits based on the underlying symbol. The Exchange believes that MPIDs may benefit from this added granularity. For example, an MPID that sends a significant number of complex series creation requests for a particular underlying symbol may breach the Strategy Limit per Symbol for that underlying. However, that MPID would continue to have the ability to request complex strategies in other symbols—unless or until that MPID breaches the Strategy Limit per Symbol in a different symbol or—in the aggregate—breaches the Complex Strategy Limit. Thus, the proposed change would remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest because it would curtail (or remove) the latency that has at times resulted from the Exchange receiving a significant number of requests for new complex strategies in the same underlying.

The Exchange believes that the proposed change to expand the limits placed on Complex Strategies per MPID would promote just and equitable principles of trade because it would modify existing functionality in a manner that would enable the Exchange to add granularity to, and better calibrate, its risk settings related to the number of Complex Strategies in the same underlying symbol requested in a trading day.

Finally, the proposed rule change would help maintain a fair and orderly market because it would enhance an existing system protection tool to enable the Exchange to prevent any single MPID from creating more than a limited number of complex strategies in the same underlying symbol during the trading day.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change would impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed Strategy Limit per Symbol would apply equally to all market participants that request new complex strategies. As stated herein, the proposed rule change would provide the Exchange the ability to better calibrate risk settings related to the number of Complex Strategies per Symbol for an MPID per trading day, which in turn should benefit all market participants because (as described above) it would curtail (or remove) the latency that has at times resulted from the Exchange receiving a significant number of requests for new complex strategies in the same underlying.

[9] *See* proposed Rule 6.91P–O(g)(1) (Complex Strategy Limits).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

The Exchange believes that the proposed rule change would not impose a burden on competing options exchanges. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. When an exchange offers enhanced functionality (like the proposed Strategy Limit per Symbol) that distinguishes it from the competition and participants find it useful, it has been the Exchange's experience that competing exchanges will move to adopt similar functionality. Thus, the Exchange believes that this type of competition amongst exchanges is beneficial to the entire marketplace as it can result in enhanced processes, functionality, and technologies.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEARCA–2023–56 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–NYSEARCA–2023–56. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEARCA–2023–56 and should be submitted on or before September 29, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19356 Filed 9–7–23; 8:45 am]

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[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98279; File No. SR–NYSEARCA–2023–57]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 6.62P–O(g)(1)

September 1, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 18, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Rule 6.62P–O(g)(1) regarding Complex Qualified Contingent Cross Orders. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Rule 6.62P–O(g)(1) regarding Complex Qualified Contingent Cross (''QCC'') Orders to allow Complex QCC Orders in non-standard ratios (as defined below) to be processed electronically.

Rule 6.62P–O(f) provides that a Complex Order is any order involving the simultaneous purchase and/or sale of two or more option series in the same underlying security (the ''legs'' or ''components'' of the Complex Order), for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) (referred to herein as the ''standard ratio'' or ''standard ratio requirement'').The Exchange currently permits certain Complex Orders with ratios greater than three-to-one or less than one-to-three (''non-standard ratios'') for execution on the Exchange's trading floor.[4] This proposed change is competitive as at least one other options exchange permits Complex QCC Orders in non-standard ratios to be processed electronically.[5] As such, the Exchange proposes to add new Rule 6.62P–O(g)(1)(G) to specify that Complex QCC Orders may be processed electronically in non-standard ratios.[6]

Rule 6.62P–O(g)(1) provides that a QCC Order must be comprised of an originating order to buy or sell at least 1,000 contracts that is identified as being part of a qualified contingent trade coupled with a contra-side order or orders totaling an equal number of contracts.[7] A Complex QCC Order is a QCC Order that has more than one option leg and each option leg must have at least 1,000 contracts.[8] Like QCC Orders, each Complex QCC Order must be a part of a ''qualified contingent trade'' (''QCT''), which is a transaction consisting of two or more component orders, one of which must be a stock leg.[9] The Exchange notes that there may be instances when an order sender must submit a Complex QCC in a non-standard ratio to meet the QCT criteria (*e.g.,* to be fully hedged).[10]

The proposed rule change would have no impact on the pricing of Complex QCCs because the same (existing) pricing requirements apply to all Complex QCC Orders that are electronically processed by the Exchange. Specifically, no option leg of a Complex QCC Order will trade at a price worse than the Exchange BBO [11] and a Complex QCC Order will be rejected based on its price if:

- ''any option leg cannot execute in compliance with paragraph (g)(1)(C) of this Rule'', *i.e.,* cannot meet the pricing requirements for single-leg QCC Orders''; [12]
- ''the best-priced Complex Order(s) on the Exchange contain(s) displayed Customer interest and the Complex QCC Order price does not improve such displayed Customer interest by 0.01;'' [13] or
- ''the price of the QCC Order is worse than the best-priced Complex Orders in the Consolidated Book.'' [14]

Thus, under this proposal, the Exchange would ensure that every component leg of a Complex QCC Order (regardless of ratio) would trade at a price that is equal to or better than the Exchange BBO and better than displayed Customer interest on the Exchange in the same manner as it does today. In other words, the proposed rule change continues to protect interest in the leg markets as well as displayed Customer interest on the Exchange.

Implementation

The Exchange will announce by Trader Update the implementation date of the proposed rule change, which implementation will be no later than 90 days after the effectiveness of this rule change.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market

[4] *See, e.g.,* Rule 6.62P–O(h)(6)(B) (regarding Stock/Complex Orders, which are a subset of Complex Orders (per Rule 6.62P–O(f)), that are only available for trading in Open Outcry and are not subject to the standard ratio requirement).

[5] In June 2022, Cboe Exchange, Inc. (''Cboe'') began supporting the electronic processing of certain stock-option orders in non-standard ratios, including Complex QCC Orders. *See* Cboe Exchange Alert, ''Schedule Update—Cboe Options Introduces New Net, Leg Price Increments and Enhanced Electronic, Open Outcry Handling for Complex Orders with Non-Conforming Ratios, Reference ID: C2022060301 available online at *https://cdn.cboe.com/resources/release_notes/2022/Schedule-Update-Cboe-Options-Introduces-New-Net-Leg-Price-Increments-and-Enhanced-Electronic-Open-Outcry-Handling-for-Complex-Orders-with-Non-Conforming-Ratios.pdf* (providing, in relevant part, that beginning June 12, 2022, ''automated handling via COA, COB, AIM, and QCC will be available for applicable non-conforming orders, except in SPX/SPXW). *See also* Securities Exchange Act Release Nos. 94204 (February 9, 2022), 87 FR 8625 (February 15, 2022) (SR–CBOE–2021–046) (order approving Cboe's proposal, as amended, to permit complex orders with ratios less than one-to-three and greater than three-to-one to be eligible for electronic processing and to trade in penny increments); 95006 (May 31, 2022), 87 FR 34334 (June 6, 2022) (SR–CBOE–2022–024) (allowing Cboe to retain discretion to determine on class-by-class basis eligibility for electronic processing of complex orders with ratios less than one-to-three and greater than three-to-one (*i.e.,* ratios other than the standard ratio requirement). The current proposal is limited to allowing Complex QCC Orders regardless of ratio to be traded electronically. If the Exchange opts to allow other (non-QCC) Complex Orders in any ratio to be traded electronically, the Exchange will submit a separate rule filing.

[6] *See* proposed Rule 6.62P–O(g)(1)(G) (''Complex QCC Orders are eligible for electronic processing regardless of the ratio in the component legs.''). The Exchange notes that other options exchanges offer Complex QCC Orders, however, the rules of these options exchanges are silent as to whether they permit Complex QCC Orders in non-standard ratios to be processed electronically. *See, e.g.,* Nasdaq ISE, LLC (''ISE'') Options 3, Section 12(d) (describing Complex Qualified Cross Orders).

[7] *See* Rule 6.62P–O(g)(1)(B) for the definition of a Qualified Contingent Trade.

[8] *See* Rule 6.62P–O(g)(1) (defining Complex QCC Orders). *See also* Rule 6.62P–O(g)(1)(D) regarding pricing requirements for Complex QCCs. This proposal does not alter the pricing requirements for Complex QCC Orders and such requirements apply regardless of whether a Complex QCC Order has a standard (or non-standard) ratio.

[9] *See* Rule 6.62P–O(g)(1)(B)(i). *See* generally Rule 6.62P–O(g)(1)(B) (setting forth criteria for a Qualified Contingent Trade).

[10] *See* Rule 6.62P–O(g)(1)(B)(vi) (providing that the QCT transaction must be ''fully hedged (without regard to any prior existing position) as a result of other components of the contingent trade.'').

[11] *See* Rule 6.62P–O(g)(1)(D) (providing that ''no option leg [of a Complex QCC Order] will trade at a price worse than the Exchange BBO'').

[12] *See* Rule 6.62P–O(g)(1)(D)(i). *See also* Rule 6.62P–O(g)(1)(C) (Execution of QCC Orders) (''A QCC Order with one option leg will be rejected if received when the NBBO is crossed or if it will trade at a price that (i) is at the same price as a displayed Customer order on the Consolidated Book and (ii) is not at or between the NBB'' and requiring that ''[a] QCC Order with one option leg will never trade at a price worse than the Exchange BBO.'').

[13] *See* Rule 6.62P–O(g)(1)(D)(ii). The Exchange proposes to amend current Rule 6.62P–O(g)(1)(D)(ii) to clarify that the Complex QCC Order must price improve any displayed Customer interest by ''at least'' one penny ($0.01), which would make the Rule more accurate. *See* proposed Rule 6.62P–O(g)(1)(D)(ii).

[14] *See* Rule 6.62P–O(g)(1)(D)(iii). The Exchange proposes to amend current Rule 6.62P–O(g)(1)(D)(iii) to clarify that this provision refers to the price of the ''Complex'' QCC Order, which would make the Rule more accurate. *See* proposed Rule 6.62P–O(g)(1)(D)(iii). The Exchange would continue to reject Complex QCC Orders (regardless of ratio) if ''the prices of the best-priced Complex Orders in the Consolidated Book are crossed''; or ''for any option leg there is no NBO.'' *See* Rule 6.62P–O(g)(1)(D)(iii), (iv), respectively.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

system and, in general, to protect investors and the public interest.

In particular, the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because it will enable the Exchange to compete on equal footing with other exchanges that permit trading of Complex QCCs with non-standard ratios.[17] The proposed rule change would continue to protect investors and the public interest because the (approved) pricing requirements for Complex QCC Orders would continue to apply to Complex QCC Orders with non-standard ratios. As such, the proposal would ensure that the Complex QCC Order is priced equal to or better than the best-priced Complex Order(s) and, if there is displayed Customer interest on such order(s), that the execution price of the Complex QCC Order improves the price of the displayed Customer interest and improves the price of displayed Customer interest on each component leg of the Complex QCC Order.

In addition, the proposed change would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest because it would provide another venue for electronically executing Complex QCC Orders with non-standard ratios. The proposed change would also increase opportunities for execution of Complex QCC Orders with non-standard ratios, which benefits all investors. The Exchange also believes that the proposed rule change would not permit unfair discrimination among market participants, as all market participants may opt to trade Complex QCC Orders with non-standard ratios.

The Exchange believes that the proposed clarifying changes would ensure accuracy of the proposed rule, which benefits all investors.[18]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that its proposed rule change will impose any burden on intra-market competition as it would apply equally to all market participants that opt to submit Complex QCC Orders with non-standard ratios for electronic processing, which orders the Exchange will process in a uniform manner.

The Exchange does not believe that its proposed rule change will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act, rather the Exchange believes that its proposal will promote inter-market competition. As noted here, the proposed change is competitive as another options exchange currently permits Complex QCC Orders with non-standard ratios to be traded electronically. The Exchange's proposal will enhance inter-market competition by providing an additional venue where investors may electronically execute Complex QCC Orders with non-standard ratios, giving investors greater flexibility and a choice of where to send their orders. Market participants may find it more convenient to access one exchange over another or may choose to concentrate volume at a particular exchange to maximize the impact of volume-based incentive programs or may prefer the trade execution services of one exchange over another.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6) thereunder.[20] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–NYSEARCA–2023–57 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–NYSEARCA–2023–57. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number

[17] *See supra* note 5.

[18] See supra notes 13–14.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

SR–NYSEARCA–2023–57 and should be submitted on or before September 29, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19357 Filed 9–7–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98276; File No. SR–LCH SA–2023–005]

Self-Regulatory Organizations; LCH SA; Order Approving Proposed Rule Change Relating to Portfolio Margining

September 1, 2023.

I. Introduction

On May 30, 2023, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change (''Proposed Rule Change'') to revise its portfolio margining program (''Program'') and make other unrelated changes. The Proposed Rule Change was published for comment in the **Federal Register** on July 19, 2023.[3] The Commission has not received any comments on the Proposed Rule Change. For the reasons discussed below, the Commission is approving the Proposed Rule Change.

II. Description of the Proposed Rule Change

LCH SA is a clearing agency that offers clearing of, among other things, credit-default swaps (''CDS'').[4] LCH SA is registered with the Commission for clearing CDS that are security-based swaps (''SBS'') and with the Commodity Futures Trading Commission (''CFTC'') for clearing CDS that are swaps. As part of its CDS clearing business, LCH offers clearing of CDS submitted by Clearing Members on behalf of their U.S. clients. As part of this U.S. client clearing, LCH previously proposed, and the Commission approved, certain changes to its rules and procedures to allow for portfolio margining.[5]

Portfolio margining is the practice by which transactions in SBS are cleared and held on a commingled basis with transactions in swaps. Under such a portfolio margining arrangement, Clearing Members are able to maintain reduced levels of margin that are commensurate with the risks of the portfolio based on correlations in a Clearing Member's cleared CDS positions consisting of both swaps and SBS. LCH is required to conduct its portfolio margining program pursuant to the terms and conditions of an exemptive order issued by the Commission,[6] as well as an exemptive order issued by the Commodity Futures Trading Commission (''CFTC'').[7] Under these orders, LCH SA's Clearing Members that are registered future commission merchants (''FCM'') and broker-dealers (''BD'') are authorized to clear and hold SBS transactions a commingled basis with cleared swaps on behalf of their clients (''FCM/BD Clients'').

The purpose of the Proposed Rule Change is to revise and update LCH SA's portfolio margining program (the ''Program''). The Proposed Rule Change would amend certain provisions of the Rule Book and Procedures regarding collateral, the client collateral buffer, and the release of collateral to a Clearing Member. The Proposed Rule Change would update LCH SA's Liquidity Risk Modelling Framework (''LRMF'') with respect to the liquidity resources and requirements applicable to FCM/BD Clearing Members. Finally, The Proposed Rule Change will also make other miscellaneous amendments to LCH SA's Rule Book and Procedures. These miscellaneous amendments cover Time References, Real Time Session, and Personnel Requirements.

A. Portfolio Margining Program

As discussed above, LCH first established the Program in 2021. Currently, the basis for the Program is primarily Article 6.2.1.1 of the Rule Book and Section 3 of the Procedures. As discussed further below, the Proposed Rule Change would delete Article 6.2.1.1 from the Rule Book, replace it with a new Regulation 7, and revise Section 3 of the Procedures.

Article 6.2.1.1(iii) of the Rule Book and Regulation 7

Article 6.2.1.1(iii) currently provides that an FCM/BD Clearing Member that is both an FCM and a BD may elect to clear and hold FCM/BD Cleared Transactions that are SBS for FCM/BD Clients in the FCM/BD Swaps Client Account Structure on a commingled basis with Cleared Swaps and margin such combined positions on a portfolio basis in compliance with Applicable Laws, provided that each FCM/BD Client is an eligible contract participant as defined in Section 1a(18) of the Commodity Exchange Act. As mentioned, the Proposed Rule Change would delete this provision and replace with a new Regulation 7, as part of the FCM/BD CDS Clearing Regulations. New Regulation 7 would maintain the requirements currently found in Article 6.2.1.1(iii) while also clarifying operation of the program.

Paragraph (a) of Regulation 7, In General, would define Program as the ability of FCM/BD Clearing Members, on behalf of their FCM/BD clients, to portfolio margin FCM/BD Cleared Transactions [8] that are SBS with FCM/BD Cleared Transactions that are Cleared Swaps.[9]

Paragraph (b) of Regulation 7, Participation, would state that FCM/BD Clearing Members may participate in the Program by providing LCH SA materials that LCH SA may require from time to time.[10] This section would also provide that, in providing these materials to LCH SA, the FCM/BD Clearing Member shall be deemed to represent that: (i) it is both an FCM and a BD and neither such status has been

[21] 17 CFR 200.30–3(a)(12), (59).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 97888 (July 13, 2023), 88 FR 46221 (July 19, 2023) (File No. SR–LCH–2023–005) (''Notice'').

[4] Capitalized terms used but not defined herein have the meanings specified in the LCH SA Rule Book (''Rule Book''), CDS Clearing Supplement (''Supplement''), CDS Clearing Procedures (''Procedures''), and FCM/BD CDS Clearing Regulations (''Regulations''), as applicable.

[5] *See* Order Approving Proposed Rule Change to Adopt ICC's Enhanced Margin Methodology, Exchange Act Release No. 66001 (Dec. 16, 2011).

[6] Exchange Act Release 34–93501 Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With the Portfolio Margining of Cleared Swaps and Security-Based Swaps That Are Credit Default Swaps'', 86 FR 61357 (November 5, 2021) (''Portfolio Margining Order''). The Portfolio Margining Order replaced a similar Commission order issued in 2012. See Order Granting Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-based Swaps, Exchange Act Release No. 68433 (Dec. 12, 2012) 77 FR 75211 (Dec. 19, 2012).

[7] *See* Treatment of Funds Held in Connection with Clearing by LCH SA of Single-Name Credit Default Swaps, Including Spun-Out Component Transactions (Nov. 1, 2021), *available at https://www.cftc.gov/media/6711/lchsa4dorder11022021/download*.

[8] The Proposed Rule Change would define the term ''FCM/BD Portfolio Margining Transaction'' to mean an FCM/BD Cleared Transaction that is an SBS and which is held in the FCM/BD Swaps Client Account Structure pursuant to the Portfolio Margining Program. The Proposed Rule Change would add references to this new defined term, where relevant, in the Regulations, the Procedures, and the Rule Book.

[9] The Definitions section of the Regulations will be amended to define the ''Portfolio Margining Program'' by making a direct reference to Regulation 7(a) in the Regulations.

[10] A ''Clearing Member'' is defined as a general member or a select member, as the context requires.

revoked; (ii) it is in compliance with the applicable requirements of the Portfolio Margining Order and the CFTC Portfolio Margining Order; and (iii) each relevant FCM/BD Client is an eligible contract participant as defined in Section 1a(18) of the Commodity Exchange Act.

Paragraph (c) of Regulation 7, Operation, would provide that, following the portfolio margining start date, all FCM/BD Cleared Transactions that are SBS for the relevant FCM/BD Client will be treated as FCM/BD Portfolio Margining Transactions and will be held (along with any associated collateral) in the FCM/BD Swaps Client Account Structure on a commingled basis with FCM/BD Cleared Transactions that are Cleared Swaps for such FCM/BD client. Further, all such FCM/BD Portfolio Margining Transactions will constitute Cleared Swaps for purposes of the CDS Clearing Rules and the resulting combined positions will be margined on a portfolio basis in respect of the relevant FCM/BD Client. Finally, this section would provide that the relevant FCM/BD Client shall be deemed to acknowledge and agree that any property used to margin, guarantee or secure the FCM/BD Portfolio Margining Transactions will not receive customer protection treatment under the Exchange Act or Securities Investor Protection Act of 1970 and will instead receive customer protection treatment under the commodity broker liquidation provisions of the U.S. Bankruptcy Code and the rules and regulations promulgated thereunder.

In addition to new Regulation 7, the Proposed Rule Change would amend other sections of the Regulations to make conforming amendments. In the definitions section, the Proposed Rule Change would add, among other things, add defined terms for Portfolio Margining Program, SEC Portfolio Margining Order, and FCM/BD Portfolio Margining Transaction.[11] The Proposed Rule Change also would amend the definition of the LCH Cleared Swaps Client Segregated Depository Account to include FCM/BD Portfolio Margining Transactions.[12] Similarly, the Proposed Rule Change would amend the definition of the LCH SBS Client Segregated Depository Account to exclude any FCM/BD Portfolio Margining Transactions.[13]

The Proposed Rule Change also would amend Regulation 2, which covers depository accounts. Going forward, LCH SA will assume that all FCM/BD clients will elect to portfolio margin all their SBS transactions in an FCM/BD Cleared Swaps Client Segregated Depository Account rather than a separate FCM/BD SBS Client Segregated Depository Account. The Proposed Rule Change therefore would amend Regulation 2(a) so that FCM/BD Clearing Members would establish and maintain an FCM/BD SBS Client Segregated Depository Account only if required. The Proposed Rule Change also would amend Regulation 2(b) to similarly provide that LCH SA would only establish and maintain an LCH SBS Client Segregated Depository Account[14] for an FCM/BD Clearing Member upon request. Finally, the Proposed Rule Change would amend Regulation 2(c) to confirm that all Collateral deposited with LCH SA by FCM/BD Clearing Members in connection with cleared swaps will include collateral deposited in connection with FCM/BD Portfolio Margining Transactions and will be held in an LCH cleared swaps segregated depository account.

The Procedures

Section 3 of the Procedures covers Collateral, Variation Margin, and Cash Payments. The Proposed Rule Change would revise Section 3 in the expectation that all FCM/BD clients will elect to portfolio margin their SBS transactions.

To that end, the Proposed Rule Change would amend Section 3 so that LCH SA would establish and maintain SBS-related accounts only when required. Specifically, LCH SA would maintain the following accounts only when required: (i) an FCM/BD SBS Client Collateral Account to record the Collateral held by LCH SA for the benefit of such FCM/BD Clearing Member's SBS customers with respect to SBS; (ii) a TARGET2 Account[15] used to make Collateral calls in relation to the Client Margin Requirements with respect to SBS; (iii) a U.S. Dollar (''USD'') account to credit USD Cash Collateral which is transferred by FCM/BD Clearing Members to be recorded in their FCM/BD SBS Client Collateral Account; and (iv) a segregated depository account in the Bank of New York Mellon (''BNYM'') US to register BNYM eligible collateral[16] which is transferred by FCM/BD Clearing Members in connection with SBS other than SBS that constitute FCM/BD Portfolio Margining Transactions. Going forward, any reference to these accounts would be preceded by the condition that such account is established.

Similarly, the Proposed Rule Change would amend Section 3 so that FCM/BD Clearing Members would establish and maintain SBS-related accounts only when required. Specifically, FCM/BD Clearing Members would maintain the following accounts only when required: (i) a TARGET2 Account for the purposes of the Collateral Calls in respect of its Client Margin Requirements with respect to SBS; (ii) a BNYM cash account for the purposes of satisfying its Cash Payments obligations in respect of its Client Cleared Transactions that are SBS. Going forward, any reference to these accounts would be preceded by the condition that such account is established.

Rule Book

The Proposed Rule Change would amend certain definitions set out in the Rule Book to recognize that FCM/BD Portfolio Margining Transactions will be treated as Cleared Swaps and governed by new FCM/BD Regulation 7. As with

[11] As mentioned above, the term ''FCM/BD Portfolio Margining Transaction'' would mean an FCM/BD Cleared Transaction that is an SBS and which is held in the FCM/BD Swaps Client Account Structure pursuant to the Portfolio Margining Program. The Proposed Rule Change would add references to this new defined term, where relevant, in the Regulations, the Procedures, and the Rule Book. *See supra* note 8.

[12] Cleared Swaps Client Segregated Depository account is defined as the omnibus account (which will consist of one or more accounts at one or more permitted depositories which are commingled for purposes of the applicable provisions of the Commodity Exchange Act and Commodity Future Trading Commission (''CFTC'') regulations) maintained by LCH SA for the benefit of cleared swaps customers of its FCM/BD Clearing Members.

[13] LCH SBS Client Segregated Depository Account will be defined in the Regulations to mean one or more accounts at one or more Banks which are commingled for purposes of the applicable provisions of the Exchange Act and SEC Regulations) maintained by LCH SA for the benefit of SBS customers of its FCM/BD Clearing Members with a bank, which is segregated in accordance with the Exchange Act and Commission Regulations and contains collateral deposited by such FCM/BD Clearing Members on behalf of their SBS customers in connection with FCM/BD Cleared Transactions that are SBS cleared for such SBS customers by such FCM/BD Clearing Members, excluding any FCM/BD portfolio margining transactions.

[14] The Regulations define an LCH SBS Client Segregated Depository Account to mean an omnibus account (which will consist of one or more accounts at one or more Banks which are commingled for purposes of the applicable provisions of the Exchange Act and SEC Regulations) maintained by LCH SA for the benefit of SBS Customers of its FCM/BD Clearing Members with a Bank, which is segregated in accordance with the Exchange Act and SEC Regulations and contains Collateral deposited by such FCM/BD Clearing Members on behalf of their SBS Customers in connection with FCM/BD Cleared Transactions that are SBS cleared for such SBS Customers by such FCM/BD Clearing Members, excluding any FCM/BD Portfolio Margining Transactions.

[15] As defined in the Rule Book, TARGET2 is the system known as Trans-European Automated Real-time Gross Settlement Express Transfer 2. A ''TARGET2 Account'' is an account held by a TARGET2 participant in TARGET2 payment module with a Eurosystem Central Bank.

[16] ''BNYM US'' and ''Eligible Collateral'' are defined below.

Article 6.2.1.1(iii), discussed earlier, the current definitions implement portfolio margining as adopted by LCH SA in 2021. With the adoption of new FCM/BD Regulation 7, the Proposed Rule Change would revise references to current definitions or Articles in the Rule Book to reflect the new Portfolio Margining Program.[17]

The Proposed Rule Change first would amend the defined term Cleared Swap. Currently, Cleared Swap is defined as an FCM/BD cleared transaction (i) constituting a Cleared Swap as defined in CFTC Regulation 22.1 or (ii) constituting an SBS that is held in the FCM/BD swaps client account structure set out in Article 6.2.1.1(i) in pursuant to Article 6.2.1.1(iii). The Proposed Rule Change would delete most of (ii) and replace with a reference to FCM/BD Portfolio Margining Transaction.[18] Under the Proposed Rule Change, a Cleared Swap would be an FCM/BD cleared transaction (i) constituting a Cleared Swap as defined in CFTC Regulation 22.1 or (ii) constituting an FCM/ND Portfolio Margining Transaction.

The Proposed Rule Change next would the defined term Cleared Swaps Customer. Cleared Swaps Customer is currently defined as (i) a Cleared Swaps Customer, as defined in CFTC Regulation 22.1, of an FCM/BD Clearing Member with respect to Cleared Swaps, that is an eligible contract participant, and (ii) a person that would be a Cleared Swaps Customer of an FCM/BD Clearing Member with respect to any transaction constituting an SBS that is a Cleared Swap. The Proposed Rule Change would amend (ii) to include a person that is treated as a Cleared Swaps Customer in connection with maintaining FCM/BD Portfolio Margining Transactions. Under the Proposed Rule Change, a Cleared Swaps Customer would be (i) a Cleared Swaps Customer, as defined in CFTC Regulation 22.1, of an FCM/BD Clearing Member with respect to Cleared Swaps, that is an eligible contract participant, and (ii) a person that is treated as a Cleared Swaps Customer in connection with maintaining FCM/BD Portfolio Margining Transactions in the FCM/BD Swaps Client Account Structure of an FCM/BD Clearing Member pursuant to the Portfolio Margining Program.

The Proposed Rule Change would likewise amend the definition of Cleared Swaps Customer Collateral. Currently, Cleared Swaps Customer Collateral is Cleared Swaps Customer Collateral, as defined in CFTC Regulation 22.1, with respect to Cleared Swaps, including with respect to any transaction constituting an SBS that is a Cleared Swap, as if such transaction is a Cleared Swap for purposes of the definition of Cleared Swaps Customer Collateral in CFTC Regulation 22.1. As revised, this definition will provide that Cleared Swaps Customer Collateral is Cleared Swaps Customer Collateral, as defined in CFTC Regulation 22.1, with respect to Cleared Swaps, including with respect to any transaction constituting an SBS that is an FCM/BD Portfolio Margining Transaction.

The Rule Book also contains definitions related to the accounts associated with customer transactions in SBS and Swaps. Among others, these include the FCM/BD SBS Client Collateral Account, FCM/BD Swaps Client Collateral Account, FCM/BD SBS Client Financial Account, FCM/BD Swaps Client Financial Account, FCM/BD SBS Client Margin Account, FCM/BD Swaps Client Margin Account, FCM/BD SBS Client Trade Account, and FCM/BD Swaps Client Trade Account. With respect to these defined terms, the Proposed Rule Change would (i) remove references to Article 6.2.1.1(iii) (which is being deleted, as discussed above) and (ii) add references to the new defined term FCM/BD Portfolio Margining Transaction.

Finally, the Proposed Rule Change would add a new defined term for Portfolio Margining Program. That term would have the same meaning as set out in the Regulations.

B. Collateral and Accounts

The Proposed Rule Change would also amend provisions of the Rule Book and the Procedures regarding permitted Collateral (including Eligible Collateral and Eligible Currency [19]), the Client Collateral Buffer, and the release of collateral to a Clearing Member.

Eligible Collateral and Eligible Currency

With regard to Eligible Collateral, the Proposed Rule Change would amend Section 3 of the Procedures to replace certain references to US Treasury Bills (''US T-Bills''). Specifically, the Proposed Rule Change would delete references to US T-Bills recorded in an FCM/BD Clearing Member's FCM/BD Client Collateral Account. The Proposed Rule Change would refer instead to BNYM US Eligible Collateral. This new defined term would mean Eligible Collateral to be held in LCH SA's segregated depository account opened in the books BNYM US. LCH SA is making this particular change because there are also other securities, in addition to US T-Bills, that could be held with BNYM.

With regard to Eligible Currency, the Proposed Rule Change would amend the definition to provide that Pound Sterling is only eligible in certain circumstances. Going forward, Pound Sterling will no longer be an Eligible Currency for purposes of the FCM/BD Client Account Structure of an FCM/BD Clearing Member. As a result, Eligible Currencies for FCM/BD Client Account Structure will be limited to the Euro and USD. Practically speaking, this means going forward CCM Clearing Members [20] can deposit Pound Sterling with respect to their Clients while FCM/BD Clearing Members cannot. LCH is making this change to comply with certain regulatory requirements applicable to client collateral.[21]

Further to this point, the Proposed Rule Change would delete from Section 3.8 provisions that currently require LCH SA to open certain bank accounts. LCH SA uses these bank accounts to

[17] In particular, the Proposed Rule Change would remove references to Article 6.2.1.1(iii). As noted earlier, with the implementation of the more comprehensive Portfolio Margining Program set out in Section 7 of the Regulations, the Proposed Rule Change would delete Article 6.2.1.1(iii) as unnecessary.

[18] The Proposed Rule Change would add a definition for FCM/BD Portfolio Margining Transaction to the Rule Book. That term would have the same meaning as set out in the Regulations. As discussed above, under the Regulations, an FCM/BD Portfolio Margining Transaction is an FCM/BD Cleared Transaction that is an SBS and which is held in the FCM/BD Swaps Client Account Structure pursuant to the Portfolio Margining Program.

[19] The term ''Eligible Collateral'' is defined as securities and other types of non-Cash Collateral as set out in Section 3 of the Procedures accepted by LCH SA for the purposes of satisfying a Clearing Member's Margin Requirements or novating Original Transaction; the term ''Eligible Currency'' is defined to mean cash in such currencies as set out in Section 3 of the Procedures accepted by LCH SA as Cash Collateral. The term ''Collateral'' is defined as Eligible Collateral and/or Cash Collateral. The term ''Cash Collateral'' is defined as any cash provided in an Eligible Currency which is transferred to LCH SA by way of full title transfer for the purpose of satisfying a Clearing Member's Margin Requirements and/or its Contribution Requirement and/or novating Original Transactions, as the case may be.

[20] A CCM is a Clearing Member of LCH SA and party to the CDS admission agreement. If a CCM wishes to provide CDS CCM client clearing services, it must either (i) be a general member or (ii) provide such CDS CCM client clearing services to its affiliated firms only. A Clearing Member cannot be admitted as a CCM and an FCM/BD Clearing Member at the same time. *See* Notice, 88 FR at 46229. The Proposed Rule Change would update the definition of CCM in the Rule Book to replace an incorrect reference to FCM/BD Clearing Member.

[21] LCH SA explained in the Notice that it LCH SA will not allow the transfer of Pound Sterling on behalf of FCM/BD Clients to be credited to an LCH SA's account opened with Euroclear Bank because Euroclear Bank is not an eligible Permitted Depository within the meaning of CFTC Regulations 22.1 and 22.4. *See* Notice, 88 FR at 46225.

credit non-Euro, non-USD Cash Collateral which is transferred by an FCM/BD Clearing Member to be recorded in its FCM/BD Swaps Client Collateral Account or FCM/BD SBS Client Collateral Account. Because LCH SA will only treat Euro and USD as Eligible Currency for FCB/BD Clients going forward, LCH SA would no longer need to establish these accounts.

The Proposed Rule Change would also make this same change to Client Collateral Buffer, including the FCM/BD Client Collateral Buffer.[22] The Client Collateral Buffer is the value of Collateral transferred by a Clearing Member to LCH SA, which is the Clearing Member's own property, and which allows that Clearing Member to satisfy margin requirements in respect of a Client's account. The Clearing Member could use the buffer, for example, to satisfy the Notional and Collateral Checks performed by LCH SA in respect of Eligible Intraday Transactions comprising one or more Client Trade Legs.

Currently, LCH SA accepts as Client Collateral Buffer only Euro-denominated Cash Collateral. Under the Proposed Rule Change, LCH SA would accept (i) Cash Collateral[23] or Eligible Collateral as CCM Client Collateral Buffer and (i) Cash Collateral or Eligible Collateral as being acceptable by LCH SA to be registered in the FCM/BD Client Collateral Account, as FCM/BD Client Collateral Buffer. As discussed above, Pound Sterling would no longer be an Eligible Currency for purposes of the FCM/BD Client Account Structure of an FCM/BD Clearing Member going forward. Thus, this change would mean in effect that LCH SA would accept Pound Sterling as CCM Client Collateral Buffer but not as FCM/BD Client Collateral Buffer.

Section 3 of the Procedures addresses how Clearing Members may transfer Collateral to LCH SA. The Proposed Rule Change would amend these provisions to effectuate the distinction between Pound Sterling as collateral, and Euros/USD. Specifically, the Proposed Rule Change would amend Sections 3.7(f), 3.8 (f), 3.8(g), 3.10, 3.15(a), and 3.17(a) to refer specifically to the transfer of Euro-denominated cash, non-Euro denominated Cash Collateral, USD-denominated Cash Collateral, Eligible Collateral provided with full title transfer, Eligible Collateral, and BNYM Eligible Collateral, respectively, to be maintained as Client Collateral Buffer, provided that such Clearing Member is permitted to maintain that type of Collateral as Client Collateral Buffer.

Finally, the Proposed Rule Change would amend Appendix 1 of the Rule Book to effectuate the distinction between Pound Sterling as collateral, and Euros/USD. Appendix 1 of the Rule Book describes LCH SA's default management process for its CDS business. Under Appendix 1 currently, in the event of an Event of Default occurring in respect of a Clearing Member, LCH SA will: (i) if the Defaulting Clearing Member is a CCM, transfer an amount of Cash Collateral denominated in Euro which is equal to the CCM Allocated Client Collateral Buffer for the relevant CCM Client Account Structure from the CCM House Collateral Account to the relevant CCM Client Collateral Account; or (ii) if the Defaulting Clearing Member is an FCM/BD Clearing Member, transfer an amount of Collateral which is equal to the FCM/BD Allocated Client Collateral Buffer for the relevant FCM/BD Client Margin Requirement from the FCM/BD Buffer Financial Account to the relevant FCM/BD Client Financial Account. Since an amount of Collateral equal to the value of the CCM Allocated Client Collateral Buffer needs to be transferred from the House Collateral Account of a Defaulting Clearing Member that is a CCM to the relevant CCM Client Collateral Account, and since the Client Collateral Buffer for CCMs could be maintained in Pounds as well as Euro, LCH SA would need first to liquidate into Euro any Cash Collateral that is not Euro. The Proposed Rule Change would make equivalent changes to the provisions dealing with the transfer of an amount in Euro equivalent to the CCM Allocated Client Collateral Buffer of a CCM in the event of: (i) an early termination trigger date, in accordance with Article 8.5.2 (a)(i) and (b)(i) of Appendix 1 of the Rule Book and (ii) an LCH Default in accordance with the Article 1.3.1.3 (iv) of the Rule Book, save that under these circumstances, LCH SA would not be permitted to liquidate any pledged Eligible Collateral taken into account in that CCM Client Collateral Buffer.

Client Collateral Buffer Threshold and Return of Excess Collateral

Currently, LCH SA allows Clearing Members to set a minimum value of Collateral to maintain as Client Collateral Buffer. This amount is known as the ''Client Collateral Buffer Threshold.'' Currently, if the value of the Collateral attributed to the FCM/BD Buffer Financial Account exceeds the FCM/BD Client Collateral Buffer Threshold, the amount of the excess, if related to Cleared Swaps, will be reclassified as FCM/BD Swaps Unallocated Client Excess Collateral and, if related to SBS will be reclassified as FCM/BD SBS Client Excess Collateral. The Proposed Rule Change would update how Clearing Members can update or increase the amount of the threshold, as well as revise the treatment of Collateral that exceeds the threshold.

With respect to the amount of the threshold, currently Section 2.3(d) of the Procedures provides that a Clearing Member looking to change the Client Collateral Buffer Threshold or House Excess Collateral Threshold[24] must submit a request to LCH on the business day before the intended change. Thus, the change is not implemented until the next business day. The Proposed Rule Change would revise Section 2.3(d) to allow Clearing Members to set or update these thresholds on the business day such request is made, instead of the next business day. LCH SA is making this change to meet Clearing Members' expectations to be able to update their thresholds more quickly than is currently possible.

[22] The FCM/BD Client Collateral Buffer's definition includes both the FCM/BD Swaps Client Collateral Buffer and the FCM/BD SBS Client Collateral Buffer. The FCM/BD Swaps Client Collateral Buffer is defined in the Rule Book to mean the aggregate value of Collateral transferred by an FCM/BD Clearing Member to LCH SA, comprising such FCM/BD Clearing Member's own property, and recorded in such FCM/BD Clearing Member's FCM/BD Swaps Buffer Account which may be used by LCH SA to meet obligations in respect of the Cleared Swaps of Cleared Swaps Customers, including for the purpose of satisfying the notional and collateral checks performed by LCH SA in respect of eligible intraday transactions. The FCM/BD Swaps Client Collateral Buffer is similarly defined.

[23] Cash Collateral is defined in the Rule Book as any cash provided in an Eligible Currency which is transferred to LCH SA by way of full title transfer in accordance with Section 3 of the Procedures for the purpose of satisfying a Clearing Member's Margin Requirements and/or its Contribution Requirement and/or novating Original Transactions, as the case may be.

[24] The House Excess Collateral Threshold is The minimum value of Collateral, that a CCM or FCM/BD Clearing Member wishes to maintain as House Excess Collateral in its House Collateral Account.

Relatedly, the Proposed Rule Change would amend Article 4.2.2.3 of the Rule Book. It currently provides that only a CCM Clearing Member, and not an FCM/BD Clearing Member, may increase the amount of the Client Collateral Buffer. The Proposed Rule Change would amend this article to confirm that an FCM/BD Clearing Member may also increase the amount of Client Collateral Buffer above the Client Collateral Buffer Threshold.[25] LCH SA is making the proposed revisions regarding the possibility for an FCM/BD Clearing Member to increase the amount of FCM/BD Client Collateral Buffer above the FCM/BD Client Collateral Buffer Threshold to provide for the more efficient handling of Collateral held on behalf of FCM/BD Clients.

Given that, under the Proposed Rule Change, Clearing Members would be allowed to increase the Collateral Buffer Threshold, the Proposed Rule Change also would revise how LCH treats Collateral deposited in excess of that threshold. Currently, under Article 4.2.2.5, where (i) the FCM/BD Margin Balance of an FCM/BD Client Financial Account exceeds the relevant FCM/BD Client Margin Requirement prior to the Morning Call or (ii) the value of the Collateral attributed to the FCM/BD Buffer Financial Account exceeds the FCM/BD Client Collateral Buffer Threshold, LCH SA treats such excess as FCM/BD Swaps Unallocated Client Excess Collateral or FCM/BD SBS Client Excess Collateral.[26] An FCM/BD Clearing Member may then request the return of such excess collateral, subject to the conditions set out in Section 3 of the Procedures and Article 6.2.5 of the Rule Book.

The proposed amendments to Article 4.2.2.5 would remove the reclassification of any value of the Collateral above the FCM/BD Client Collateral Buffer Threshold as FCM/BD Swaps Unallocated Client Excess Collateral, or FCM/BD SBS Client Excess Collateral, where appropriate. Instead, if the value of the Collateral attributed to the FCM/BD Buffer Financial Account exceeds the FCM/BD Client Collateral Buffer Threshold, the FCM/BD Clearing Member may request to have such excess returned to it, subject to the conditions set out in Section 3 of the Procedures and Article 6.2.5 of the Rule Book. Moreover, Article 4.2.2.5 as amended would also give FCM/BD Clearing Members the alternative of requesting the transfer of any FCM/BD Swaps Unallocated Client Excess Collateral, or FCM/BD SBS Client Excess Collateral, where appropriate, to the FCM/BD Buffer Financial Account and its reclassification as FCM/BD Client Collateral Buffer.

Article 6.2.5.1(ii) of the Rule Book currently states that if a FCM/BD Clearing Member delivers Collateral to LCH SA on behalf of one or more FCM/BD clients in an amount that would cause an FCM/BD Swaps Client Financial Account to contain FCM/BD Swaps Client Excess Collateral, then LCH SA may (i) reject the deposit, (ii) transfer the excess back to the Clearing Member, or (iii) accept the deposit and transfer the excess to the FCM/BD Swaps Unallocated Client Collateral Financial Account. The Proposed Rule Change would revise Article 6.2.5.1(ii) so that LCH SA would accept the deposit and treat the excess as FCM/BD Swaps Client Collateral Buffer. Under 6.2.5.1(iii)(c) as amended, the FCM/BD Clearing Member could then request the return of any amount of excess FCM/BD Swaps Client Collateral Buffer, in accordance with Section 3 of the Procedures.

Finally, the Proposed Rule Change would amend 6.2.5.1(iv)(d) to reflect the ability of an FCM/BD Clearing Member to increase the FCM/BD Swaps Client Collateral Buffer and treat excess collateral as Buffer, as discussed above. Currently, Article 6.2.5.1(iv)(d) states that upon the request of an FCM/BD Clearing Member, LCH SA will return FCM/SBS Swaps Unallocated Client Excess Collateral to the Clearing Member. In doing so, the FCM/BD Clearing Member represents that the request complies with CFTC regulations and that the returned Collateral will remain segregated as required by CFTC regulations and LCH SA's Rule Book. As amended, an FCM/BD Clearing Member could request LCH SA to (i) return FCM/BD Swaps Unallocated Client Excess Collateral to it in accordance Section 3 of the Procedures or (ii) reclassify such FCM/BD Swaps Unallocated Client Excess Collateral as FCM/BD Swaps Client Collateral Buffer and record the value of such Collateral to the relevant FCM/BD Swaps Buffer Financial Account. In doing so, the FCM/BD Clearing Member would represent and warrant that the request complies with CFTC Regulations and has been made by an individual who is properly authorized to make the request. If an FCM/BD Clearing Member requests that LCH SA return FCM/BD Swaps Unallocated Client Excess Collateral to it, the Clearing Member would further represent to LCH SA that the Collateral will remain segregated as by CFTC Regulations and LCH SA's CDS Clearing Rules. If an FCM/BD Clearing Member requests that LCH SA reclassify such FCM/BD Swaps Unallocated Client Excess Collateral as FCM/BD Swaps Client Collateral Buffer and record the value of such Collateral to the relevant FCM/BD Swaps Buffer Financial Account, the Clearing Member would further represent to LCH SA that the request reflects the true characterization of the Collateral, including in particular that the Collateral is the property of the FCM/BD Clearing Member. The FCM/BD Clearing Member would also be required to provide such additional information as LCH SA may reasonably request.

Article 6.2.5.2 of the Rule Book addresses FCM/BD SBS Excess Collateral and FCM/BD SBS Client Collateral Buffer. Article 6.2.5.2 applies to the FCM/BD SBS Client Account Structure, which LCH SA would only establish if required, as discussed above. Article 6.2.5.2 parallels the procedures in Article 6.2.5.1 above with regard to FCM/BD Swaps Client Collateral. The Proposed Rule Change would make the same amendments to Article 6.2.5.2 as it is making to 6.2.5.1.

Return of Collateral

The Proposed Rule Change would also amend certain provisions of Section 3 of the Procedures to clarify the process by which a Clearing Member may request the return of Collateral. Specifically, the Proposed Rule Change would make these changes to Section 3.7, 3.8, and 3.15.

Section 3.7 applies to the return Euro-denominated Cash Collateral. Section 3.7(g)(iv) currently describes how an FCM/BD Clearing Member may request the return of FCM/BD Swaps Unallocated Client Excess Collateral that is Euro-denominated Cash Collateral. Section 3.7(g)(v) currently describes how an FCM/BD Clearing Member may request the return of FCM/BD SBS Client Excess Collateral that is Euro-denominated Cash Collateral. In either case, the Clearing Member may request the return of excess collateral provided the amount requested does not exceed the amount of collateral in the account. The Proposed Rule Change would combine 3.7(g)(iv) and (v) into single provision that would apply to any Euro-denominated Cash Collateral recorded in a Clearing Member's FCM/BD Client Collateral Account. As defined in the Rule Book, FCM/BD Client Collateral Account means an

[25] Article 4.2.2.3 of the Rule Book further provides that transfers to the Client Collateral Buffer will be made in accordance with Section 2 and Section 3 of the Procedures.

[26] ''Client Excess Collateral'' is defined as the CCM Client Excess Collateral or the FCM/BD Client Excess Collateral, as the context requires.

FCM/BD Swaps Client Collateral Account and/or an FCM/BD SBS Client Collateral Account. Thus, this new provision would apply to both Swaps and SBS. Under this new provision, LCH SA would return Euro-denominated Cash Collateral recorded in a Clearing Member's FCM/BD Client Collateral Account if LCH SA determines that it will continue to hold Collateral sufficient to cover the FCM/BD Client Margin Requirement for each FCM/BD Client Margin Account and to satisfy the FCM/BD Clearing Member's Client Collateral Buffer Threshold.

Section 3.8 applies to the return of non-Euro-denominated cash collateral. Here the Proposed Rule Change would carry forward the distinction between Pound Sterling as collateral, and Euros/USD discussed above. For example, the Proposed Rule Change would add a provision to explain how a CCM could request the return of non-Euro denominated Cash Collateral recorded as CCM Client Collateral Buffer. The Proposed Rule Change also would revise 3.8(i), which describes how an FCM/BD Clearing Member may request the return of USD-denominated Cash Collateral recorded in its FCM/BD Client Account. Under the revised provision, LCH SA would return USD-denominated Cash Collateral recorded in the FCM/BD Client Account if it holds sufficient Collateral (other than that which is to be returned) to cover the FCM/BD Client Margin Requirement for each FCM/BD Client Margin Account and to satisfy the FCM/BD Clearing Member's obligation in respect of its FCM/BD Client Collateral Buffer Threshold. These revisions are a result of CCM Clearing Members being able to use Pound Sterling in their Client Collateral going forward but not FCM/BD Clearing Members.

Like this change to Section 3.8, the Proposed Rule Change would amend Section 3.10.1(c) and Section 3.10.2(d) to set out the same process by which a CCM may request the return of Eligible Collateral transferred with full title, on a bilateral basis, and pursuant to a triparty arrangement, respectively. The Proposed Rule Change would amend Section 3.15(b) in the same way, to set out the process by which a CCM may request the release of Pledged Eligible Collateral.

Type of Accounts

The Proposed Rule Change would also amend Section 3 of the Procedures to clarify the use of TARGET2 and BNYM accounts by LCH SA and its Clearing Members.

With regard to TARGET2 accounts, the Proposed Rule Change would specify in 3.18(b) the TARGET2 accounts that LCH SA would use for making or receiving payments in Euro. The Proposed Rule Change also would specify in 3.18(b) the TARGET2 accounts that would be used for satisfying FCM/BD Clearing Members' cash payment obligations with respect to Client Cleared Transactions. Relatedly, the Proposed Rule Change would amend Section 3.7(d)(iii) to provide that, in respect of the FCM/BD client account structure of an FCM/BD Clearing Member, there will be no aggregation of payments between Euro-denominated cash payments and Euro-denominated Cash Collateral transfers through TARGET2 because Euro-denominated cash payments will be made by using the LCH CCM Client TARGET 2 Account whereas the transfer of Euro-denominated Cash Collateral will be made by using the LCH FCM/BD swaps client TARGET2 account or the LCH FCM/BD SBS Client TARGET2 Account.

With regard to BNYM accounts,[27] the Proposed Rule Change would amend Section 3.18(c) to consolidate the number of accounts that LCH SA maintains. Currently, LCH SA maintains separate accounts for Client transactions in Swaps and Client transactions in SBS. The Proposed Rule Change would remove the separate accounts and consolidate them into one Client account. Thus, going forward, LCH SA will maintain only two BNYM accounts, each for the purpose of debiting or crediting USD to satisfy Cash Payments and/or Variation Margin Collateral Transfer obligations. One account will be for a Clearing Member's own transactions, and the other will be for the transactions of the Clearing Member's Clients. LCH SA is consolidating these accounts in the expectation that all FCM/BD clients will elect to portfolio margin their SBS transactions.

Finally, the Proposed Rule Change would delete from the Procedures references to the former time slot for the cash payments in respect of Client Variation Margin requirements of an FCM/BD Clearing Member given that time slot no longer exists.

C. Miscellaneous Amendments

i. Time Reference

Article 1.2.8.1 of the Rule Book currently provides that, where reference is made in the CDS Clearing Documentation to a time or deadline, it will mean Central European Time (''CET''), unless otherwise stipulated. The Proposed Rule Change would revise this Article to provide that where reference is made in the CDS Clearing Documentation to a time or deadline, it will be understood to mean Paris Time, unless otherwise stipulated in the CDS Clearing Documentation. The Proposed Rule Change would remove all references to CET from the Procedures and the Supplement. With respect to the Supplement in particular, the Proposed Rule Change would provide instead that any reference to a time of day shall be deemed to be a reference to the time zone as set out in Section 1.2.8 of the Rule Book unless otherwise provided.

The Proposed Rule Change also would amend Section 5.18 of the Procedures in this regard. Section 5.18 currently states that all references to times and deadlines in Section 5.18 are to London local time unless otherwise specified.

ii. Real Time Session

LCH SA's ''Real Time Session'' is, in essence, its operating hours. For example, Article 3.1.4.1 of the Rule Book provides that an Intraday Transaction may be submitted to LCH SA during the Real Time Session on any Clearing Day, and Article 3.1.4.3 states that if an Intraday Transaction is received for clearing by LCH SA outside of the Real Time Session, it will be deemed to have been submitted at the Start of the Real Time Session on the following Clearing Day. Currently, the Rule Book defines ''Real Time Session'' to mean the period commencing at the Start of Real Time and ending at the End of Real Time in respect of each Clearing Day.[28] Moreover, the Rule Book defines ''Start of Real Time'' as the time as specific in a Clearing Notice. The Proposed Rule Change would not alter these definitions, but it would adopt a new clearing notice. This new clearing notice would provide that, unless notified otherwise, ''Start of Real Time (SoRT)'' would mean on each clearing day, the earlier of: (i) the time when all relevant Clearing Members have satisfied the morning call; and (ii) 09.05 (Paris time). Moreover, the new clearing notice would provide that End of Real Time means 16.30 (New York time) instead of 19.30 CET.

Relatedly, the Proposed Rule Change would amend Article 2.3.3.5 of the Rule Book. Article 2.3.3.5 requires each Clearing Member to ensure that appropriate personnel are available for communications with LCH SA during

[27] As noted above, USD is the only Eligible Currency and US Treasury bills are the only Eligible Collateral held in BNYM accounts.

[28] ''Start of Real Time'' and ''End of Real Time'' are defined as the time as specified in a clearing notice.

Opening Hours on each Business Day. The Proposed Rule Change would instead require each Clearing Member to have appropriate personnel available for communications with LCH SA during the Real Time Session, instead of only at opening hours.

The Proposed Rule Change would make an equivalent change to Section 5(c) of the Procedures. Currently, Section 5(c) specifies LCH SA's opening hours, provides that the LCH SA operations team is available during those hours, and further provides the hours of availability for LCH SA's technical helpdesk. The Proposed Rule Change would replace these different times with one, under which LCH SA would be open during the Real Time Session and its operations team would be available during the Real Time Session. As a result of these changes, the Proposed Rule Change would remove defined term ''Opening Hours'' from the definitions section of the Rule Book since it would no longer be used.[29]

iii. Other Changes

Finally, the Proposed Rule Change would make other minor amendments for consistency or clarity to the Rule Book, the Procedures, and the Regulations.

D. Amendments to Liquidity Risk Modelling Framework

The Proposed Rule Change would amend LCH SA's LRMF. As discussed below, these amendments would for the most part clarify that FCM/BD clients' funds are segregated. As such, they are not available resources to LCH SA in a default management context unless the liquidity requirement is driven by the FCM/BD Clearing Member of such FCM/BD Clients. LCH SA is making these changes to comply with applicable regulations. The Proposed Rule Change also would make a few amendments to the LRMF to add clarity, as discussed below.

The Proposed Rule Change would first make a clarifying update to Section 1.1.1. Section 1.1.1 explains that the CDS business line gathers clearing activity for a wide selection of Euro index and single names. The Proposed Rule Change would update this description to include clearing activities related to the clearing of US, Australia, and Asia sovereign index and single names. This change would reflect the current composition of LCH SA's CDS business line.

The Proposed Rule Change would amend Section 1.6.1, which addresses Liquidity Sources. The Proposed Rule Change would clarify that LCH SA has the right to consider available for liquidity purposes cash posted by Clearing Members to meet margin requirements and their excess cash, except cash received from FCM/BD clearing member(s) on behalf of their FCM/BD clients or excess cash for FCM/BD Clients. That cash would be excluded unless the liquidity requirement is driven by the relevant FCM/BD clearing member.

The proposed amendment to 1.6.1 also would clarify that LCH SA has the right to consider available for liquidity purposes all the resources collected if deposited under the full title transfer regime. Collateral deposited by FCM/BD Clearing Members on behalf of their FCM/BD Clients would not be deposited under the full title transfer regime. Instead, such Collateral would be subject to a security interest. Accordingly, the Proposed Rule Change would update a footnote, which currently provides a list of Collateral which is not transferred by way of full title transfer, to add a reference to Collateral received from FCM/BD Clients.

The Proposed Rule Change next would update Section 1.6.1.1, which addresses Collateral transfer to the 3G pool, to reflect the fact that non-cash collateral deposited via a single pledged account is a way to post Collateral for activities not limited to CDS related activities only and to provide that USD securities received from FCM/BD Clients would not be deposited via full title transfer accounts.

The Proposed Rule Change would amend Section 1.6.1.2, which addresses assessment of assets' liquidity, to prohibit LCH SA from re-hypothecating non-cash collateral collected from FCM/BD clients. LCH SA would not be able to use such cash for liquidity unless the FCM/BD Clearing Member of such FCM/BD clients is in default. The Proposed Rule Change would apply the same treatment to securities resulting from FCM/BD Clients' cash which LCH SA invested.

Section 1.6.1.3 contains a table that summarizes LCH SA's liquidity sources. The Proposed Rule Change would add to this table explanations to exclude the following from consideration as liquidity sources: (i) Collateral received from FCM/BD Clearing Members on behalf of FCM/BD Clients; (ii) excess cash for FCM/BD Clients that can be generated on an intraday basis; and (iii) securities resulting from investment of FCM/BD Clients' cash. As mentioned above, these sources would only be available if the liquidity requirement is driven by the FCM/BD Clearing Member of such FCM/BD Clients.

The Proposed Rule Change next would amend the description of the liquidity need ''repayment of excess cash by members'' in Section 4.1.2, which covers Model inputs and Variable selection. The Proposed Rule Change would provide that, when calculating the liquid resources available to be compared against the Operational Target,[30] the cash received from the FCM/BD Clearing Members on behalf of their FCM/BD Clients is excluded. In two associated footnotes, the Proposed Rule Change would specify that Securities in DKK, NOK, SEC, AUD, CAD, CHF, JPY are excluded from liquidity assets as well as collateral belonging to FCM/BD clients.

Section 4.1.5 describes certain assumptions that LCH SA makes when the Operational Target as well as certain sources of liquidity that LCH SA uses when calculating the target. One the sources of liquidity is LCH SA's cash deposit at Banque de France overnight. The Proposed Rule Change would specify that this cash deposit does not include cash from FCM/BD Clients. Moreover in Section 4.1.5, paragraph c., the Proposed Rule Change would correct a typographical error in the penultimate sentence.

The Proposed Rule Change would amend Sections 4.2.2, which covers model inputs and variable selection, and 4.2.4, which covers mathematical formula, derivation and algorithm, and numerical approximation, to explain that when LCH SA calculates its liquidity coverage ratio, the resources of FCM/BD clients are segregated and unavailable. LCH SA would only consider these resources to be available where the relevant FCM/BD Clearing Member is assumed to be in default. Even in that case, the possibility to use the resource held on behalf of FCM/BD clients for liquidity purposes would be capped to the obligations of the FCM/BD Client.

The Proposed Rule Change would next amend Section 4.2.5.3, which covers stress scenario selection. Here the Proposed Rule Change would correct a minor typographical error. It would refer to CDSClear rather than CDS when describing the market stress scenario considered in the LCR. The amendment is made for consistency purposes and is not linked to the FCM/BD related initiative.

[29] ''Opening Hours'' is currently defined as 8:00 to 19:30 each business day.

[30] The Operational Target represents the amount of liquidity to be held to satisfy the liquidity needs related to the operational management of the CCP in a stressed environment that does not lead to a member's default.

In Section 4.3.2, which covers model inputs and variable selection, and 4.3.4, which covers mathematical formula, derivation and algorithm, and numerical approximation, the Proposed Rule Change would specify that, in the calculation of the LCR for the interoperable CCP, the resources held on behalf of FCM/BD clients must be considered segregated and therefore unavailable for liquidity purposes.

Finally, in Appendix 6.3 (Reminder of LCH SA's Sources of Liquidity and Related Risk Drivers), the Proposed Rule Change would add two footnotes to specify that cash held on behalf of FCM/BD clients (allocated and in excess) is excluded unless the liquidity requirement is driven by the relevant FCM/BD Clearing Member. With respect to the source of liquidity coming from Non-Euro non-cash collateral posted in full title transfer, the Proposed Rule Change would specify in a footnote that securities in DKK, NOK, SEK, CAD, AUD, CHF and JPY are excluded from the liquidity resources. This amendment is not linked to the FCM/BD related initiative but made for consistency purposes. With respect to the liquidity source coming from the collateral of investment activity, the Proposed Rule Change would add a footnote to specify that securities coming from FCM/BD clients investment shall be excluded unless the relevant FCM/BD Clearing Member is in default.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act requires the Commission to approve a Proposed Rule Change of a self-regulatory organization if it finds that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the organization.[31] For the reasons given below, the Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,[32] Rule 17Ad–22(e)(21),[33] and Rule 17Ad–22(e)(1)[34] thereunder.

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of LCH SA be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of LCH SA or for which it is responsible.[35] As discussed in more detail below, the Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act.[36]

The proposed changes to the Procedures would require that LCH SA and Clearing Members establish and use certain accounts to hold and transfer cash and other collateral for satisfying margin requirements in connection with client positions in SBS and establish procedures for the return of excess collateral related to client positions in SBS. In requiring the establishment and use of certain accounts to hold and transfer cash and other collateral for satisfying margin requirements, and in establishing procedures for the return of excess collateral related to client positions in SBS, these proposed changes would help to assure the safeguarding of securities and funds in LCH SA's custody and control.

As part of the Portfolio Margining Program, The Proposed Rule Change also would amend the definition of the LCH Cleared Swaps Client Segregated Depository Account to include FCM/BD Portfolio Margining Transactions. Similarly, under the Proposed Rule Change LCH would, upon request, maintain a segregated depository account in BNYM to register BNYM eligible collateral. These requirements should help safeguard client funds by ensuring the funds are held in a segregated account.

The Proposed Rule Change also would amend the Rule Book to require Clearing Members to have appropriate personnel available for communications with LCH SA. It also would amend time references in the CDS clearing documentation to clarify they mean CET, unless otherwise stipulated. Having personnel available should help to ensure that LCH SA can promptly communicate with Clearing Members as needed to clear and settle transactions. Similarly, clarifying references to time should help ensure prompt and accurate settlement.

Therefore, for the reasons discussed above, the Commission finds that the Proposed Rule Change is consistent with the Section 17A(b)(3)(F) of the Act.[37]

B. Consistency With Rule 17Ad–22(e)(21) Under the Act

Rule 17Ad–22(e)(21) requires covered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to be efficient and effective in meeting the requirements of its participants and the markets it serves, and have the covered clearing agency's management regularly review the efficiency and effectiveness of its clearing and settlement arrangements.[38] In adopting Rule 17Ad–22(e)(21), the Commission provided guidance as to what a covered clearing agency generally should consider in establishing and maintaining policies and procedures that address efficiency and effectiveness.[39]

The Proposed Rule Change, in revising the Program, would give FCM/BD Clearing Members the ability, on behalf of their FCM/BD clients, to portfolio margin FCM/BD Cleared Transactions that are SBS with FCM/BD Cleared Transactions that are Cleared Swaps. Under the Program, Clearing Members and their Clients are able to maintain reduced levels of margin that are commensurate with the risks of the portfolio based on correlations in a Clearing Member's cleared CDS positions consisting of both swaps and SBS. This allows Clearing Members to have increased efficiency by using margin from swaps and SBS by reducing costs for Clearing Members and their Clients.

Additionally, as discussed above, LCH SA also proposes to allow Clearing Members to set or update its house excess Collateral threshold or Client Collateral Buffer Threshold on the business day such request will be made, instead of the next business day. This allows Clearing Members to update Collateral faster, which should allow for more efficient exchange of Collateral.

The Proposed Rule Change would require each Clearing Member to have appropriate personnel available for communications with LCH SA during the Real Time Session, instead of only at opening hours. This change would allow for faster communication between Clearing Members and LCH SA by ensuring there is no delay because of lack of personnel.

The Commission believes, therefore, that the Proposed Rule Change is consistent with the requirements of Rule 17Ad–22(e)(21) under the Act.[40]

C. Consistency With Rule 17Ad–22(e)(1)

Rule 17Ad–22(e)(1) requires that LCH SA establish, implement, maintain, and

[31] 15 U.S.C. 78s(b)(2)(C).

[32] 15 U.S.C. 78q–1(b)(3)(F).

[33] 17 CFR 240.17Ad–22(e)(21)

[34] 17 CFR 240.17Ad–22(e)(1).

[35] 15 U.S.C. 78q–1(b)(3)(F).

[36] 15 U.S.C. 78q–1(b)(3)(F).

[37] 15 U.S.C. 78q–1(b)(3)(F).

[38] 17 CFR 240.17Ad–22(e)(21).

[39] *See* Standards for Covered Clearing Agencies, Securities Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70841 (Oct. 13, 2016).

[40] 17 CFR 240.17Ad–22(e)(21).

enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.[41]

The Commission believes that the other changes related to the Default Management Process, as discussed above, would help to ensure that the legal basis for LCH SA's activities is well-founded and clear. LCH SA proposes to amend Article 4.2.2 regarding the stages of defaults where a Clearing Member is a CCM. Specifically, LCH SA proposes to add additional conditions regarding the transfer of Collateral. This helps to ensure clarity in the CDS Default Management Process.

LCH SA is amending its Procedures and Rule book to create a standard to create an enforceable legal basis for its portfolio margining is the practice by which transactions in SBS are cleared and held on a commingled basis with transactions in swaps. This standard is based on the Portfolio Margining Order and the CFTC Portfolio Margining Order. This Program creates a clear and well-founded legal basis based on the guidance from both the CFTC and the Commission.

As discussed above, LCH SA proposes to make clarifying amendments to its Liquidity Risk Modeling Framework. For example, as discussed above, the Proposed Rule Change would amend the description of the liquidity need repayment of excess cash by members. The Proposed Rule Change would provide that, when calculating the liquid resources available, the cash received from the FCM/BD Clearing Members on behalf of their FCM/BD Clients is excluded. This helps ensure LCH SA has clear standards when calculating liquid resources available.

Thus, the Commission finds that these aspects of the Proposed Rule Change are consistent with Rule 17Ad–22(e)(1).[42]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act, and in particular, 17A(b)(3)(F) of the Act,[43] Rule 17Ad–22(e)(21),[44] and Rule 17Ad–22(e)(1)[45] thereunder.

It is therefore ordered pursuant to Section 19(b)(2) of the Act that the Proposed Rule Change (SR–LCH SA–2023–005) be, and hereby is, approved.[46]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[47]

Sherry R. Haywood,

Assistant Secretary.

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[41] 17 CFR 240.17Ad–22(e)(1).

[42] 17 CFR 240.17Ad–22(e)(1).

[43] 15 U.S.C. 78q–1(b)(3)(F).

[44] 17 CFR 240.17Ad–22(e)(21)

[45] 17 CFR 240.17Ad–22(e)(1).

[46] In approving the Proposed Rule Change, the Commission considered the proposal's impacts on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[47] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98277; File No. SR–CBOE–2023–043]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 4.3 (Criteria for Underlying Securities) To Accelerate the Listing of Options on Certain IPOs

September 1, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 24, 2023, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend Rule 4.3. The text of the proposed rule change is provided below.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Rules of Cboe Exchange, Inc.

* * * * *

Rule 4.3. Criteria for Underlying Securities

(a)–(b) No change.

Interpretations and Policies

.01 The [Board of Directors]*Exchange* has established guidelines to be considered [by the Exchange in]*when* evaluating potential underlying securities for Exchange option transactions. Absent exceptional circumstances with respect to subparagraphs (a)(1), (a)(2), (b)(1), or (b)(2) listed below, at the time the Exchange selects an underlying security for Exchange option transactions, the following guidelines with respect to the issuer shall be met.

(a) No change.

(b) Guidelines applicable to the market for the security are:

(1) No change.

(2) (A) If the underlying security is a ''covered security'' as defined under Section 18(b)(1)(A) of the Securities Act of 1933[,]*: (i)* the market price per share of the underlying security has been at least $3.00 for the previous three consecutive business days preceding the date on which the Exchange submits a certificate to the OCC for listing and trading. For purposes of this Interpretation .01(b)(2)(A), the market price of such underlying security is measured by the closing price reported in the primary market in which the underlying security is traded*; however, (ii) the requirements set forth in clause (i) will be waived during the three days following an underlying security's initial public offering day if the underlying security has a market capitalization of at least $3 billion based on upon the offering price of its initial public offering, in which case options on the underlying security may be listed and traded starting on or after the second business day following the initial public offering day.*

* * * * *

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 4.3. The Exchange proposes a listing rule change that is substantially similar in all material respects to the proposal approved for NYSE American LLC (''NYSE American'').[3] NYSE American filed a proposed rule change,[4] which the Securities and Exchange Commission (the ''Commission'') recently approved, to modify the standard for the listing and trading of options on ''covered securities'' to reduce the time to market in NYSE American Rule 915 (Criteria for Underlying Securities). At this time, the Exchange proposes to adopt a substantively identical rule.

Proposal

Exchange Rule 4.3, Interpretation and Policy .01 sets forth the guidelines to be considered by the Exchange in evaluating potential underlying securities that are ''covered securities,'' as defined in Section 18(b)(1)(A) of the Securities Act of 1933 (hereinafter ''covered security'' or ''covered securities''), for Exchange option transactions.[5] Currently, the Exchange permits the listing of an option on an underlying covered security that, amongst other things, has a market price of at least $3.00 per share for the previous three consecutive business days preceding the date on which the Exchange submits a certificate to The Options Clearing Corporation (''OCC'') to list and trade options on the underlying security (the ''three-day lookback period'').[6] Under the current rule, if an initial public offering (''IPO'') occurs on a Monday, the earliest date the Exchange could submit its listing certificate to OCC would be on Thursday, with the market price determined by the closing price over the three-day lookback period from Monday through Wednesday. The option on the IPO'd security would then be eligible for trading on the Exchange on Friday (*i.e.,* within four business days of the IPO inclusive of the day the listing certificate is submitted to OCC).

The Exchange notes that the three-day look back period helps ensure that options on underlying securities may be listed and traded in a timely manner while also allowing time for OCC to accommodate the certification request. However, there are certain large IPOs that issue high-priced securities—well above the $3.00 per share threshold—that would obviate the need for the three-day lookback period. The Exchange understands from market participants that the proposed changes would help options on covered securities with a market capitalization of at least $3 billion based upon the offering prices of their IPOs come to market earlier. The proposed change, which the Exchange expects will be harmonized across options exchanges, is designed to provide investors the opportunity to hedge their interests in IPO investments in a shorter amount of time than what is currently permitted.[7] The Exchange believes that options serve as a valuable tool to the trading community and help markets function efficiently by mitigating risk. To that end, the Exchange believes that the absence of options in the early days after an IPO may heighten volatility in the trading of IPO'd securities.[8]

Accordingly, the Exchange proposes to modify Rule 4.3, Interpretation and Policy .01(b)(2) to waive the three-day lookback period for covered securities that have a market capitalization of at least $3 billion based upon the offering price of the IPO of such securities and to allow options on such securities to be listed and traded starting on or after the second business day following the initial public offering day (*i.e.,* not inclusive of the day of the IPO).[9] NYSE American noted in its rule change that it reviewed trading data for IPO'd securities dating back to 2017 and is unaware of any such security that achieved a market capitalization of $3 billion based upon the offering price of its IPO that would not have also qualified for listing options based on the three-day lookback requirement.[10] Specifically, NYSE American stated in its rule change that it determined that 202 of the 1,179 IPOs that took place between January 1, 2017, and October 21, 2022 met the $3 billion market capitalization/IPO offering price threshold.[11] Further, NYSE American stated that options on all 202 of those IPO shares subsequently satisfied the three-day lookback requirement for listing and trading, *i.e.,* none of these large IPOs closed below the $3.00/share threshold during its first three days of its trading.[12] As such, the Exchange believes the proposed capitalization threshold of $3 billion based upon the offering price of its IPO is appropriate.

Under the proposed rule, if an IPO for a company with a market capitalization of $3 billion based upon the offering price of its IPO occurs on a Monday, the Exchange could submit its listing certificate to OCC (to list and trade options on the IPO'd security) as soon as all the other requirements for listing are satisfied. If, on Tuesday, all requirements are deemed satisfied, options on the IPO'd security could then be eligible for trading on the Exchange on Wednesday (*i.e.,* starting on or after the second business day following the IPO day). Thus, the proposal could potentially accelerate the listing of options on IPO'd securities by two days.

The Exchange believes the proposed change would allow options on IPO'd securities to come to market sooner without sacrificing investor protection. The Exchange represents that trading in options on IPO'd securities—like all other options traded on the Exchange—is subject to surveillances administered by the Exchange and/or FINRA on

[3] *See* Securities Exchange Act Release No. 98013 (July 27, 2023) 88 FR 50927 (August 2, 2023) (SR–NYSEAMER–2023–27) (Order Granting Approval of a Proposed Rule Change to Amend Rule 915 (Criteria for Underlying Securities) to Accelerate the Listing of Options on Certain IPO).

[4] *Id.*

[5] Current Exchange Rule 4.3(a) requires that, for underlying securities to be eligible for listing and trading on the Exchange, securities must be duly registered and be an NMS stock (as defined in Rule 600 of Regulation NMS under the Act) and be characterized by a substantial number of outstanding shares that are widely held and actively traded. The Exchange also proposes to replace the term ''Board of Directors'' with Exchange and make conforming nonsubstantive changes to the introductory paragraph of Rule 4.3, Interpretation and Policy .01, as it is outdated. The Board of Directors delegated authority to determine listing criteria to Exchange management. Exchange management currently determines guidelines for evaluating potential underlying securities for Exchange option transactions, as set forth in Rule 4.3(b).

[6] *See* Exchange Rule 4.3, Interpretation and Policy .01(b)(2)(A). The Exchange is not proposing to make any changes to the guidelines for listing securities that are not a ''covered security.'' *See* Exchange Rule 4.3, Interpretation and Policy .01(b)(2)(B).

[7] While the Exchange acknowledges that market participants may utilize options for speculative purposes (in addition to as a hedging tool), the Exchange believes (as set forth below) that its existing surveillance technologies and procedures adequately address potential violations of exchange rules and federal securities laws applicable to trading on the Exchange.

[8] *See* proposed Rule 4.3, Interpretation and Policy .01(b)(2)(A)(ii).

[9] The Exchange acknowledges that the Options Listing Procedures Plan (or ''OLPP'') requires that the listing certificate be provided to OCC no earlier than 12:01 a.m. and no later than 11:00 a.m. (Chicago time) on the trading day prior to the day on which trading is to begin. *See* OLPP, at p. 3., available here: *https://www.theocc.com/getmedia/198bfc93-5d51-443c-9e5b-fd575a0a7d0f/options_listing_procedures_plan.pdf.* The OLPP is a national market system plan that, among other things, sets forth procedures governing the listing of new options series.

[10] *See supra* note 5.

[11] *Id.*

[12] *Id.*

behalf of the Exchange.[13] Those surveillances are designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange represents that those surveillances are adequate to reasonably monitor Exchange trading of options on IPO'd securities in all trading sessions and to reasonably deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[14] As such, the Exchange believes that its existing surveillance technologies and procedures, coupled with NYSE American's findings related to the IPOs reviewed as described herein, adequately address potential concerns regarding possible manipulation or price stability.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[15] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[16] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[17] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed change would facilitate options transactions and would remove impediments to and perfect the mechanism of a free and open market and a national market system, which would, in turn, protect investors and the public interest by providing an avenue for options on IPO'd securities to come to market earlier. The Exchange notes that the three-day look back period helps ensure that options on underlying securities may be listed and traded in a timely manner while also allowing time for OCC to accommodate the certification request. However, there are certain large IPOs that issue high-priced securities—well above the $3.00 per share threshold—that would obviate the need for the three-day lookback period. As noted above, NYSE American noted that it reviewed trading data for IPO'd securities dating back to 2017 and was unaware of an IPO'd security with a market capitalization of $3 billion or more (based upon the offering price of its IPO) that subsequently would have failed to qualify for listing and trading as options under the three-day lookback requirement.[18] The Exchange believes that the proposed amendment, which the Exchange expects to be harmonized across options exchanges, would remove impediments to and perfect the mechanism of a free and open market and a national market system by providing an avenue for investors to hedge their interest in IPO investments in a shorter amount of time than what is currently permitted. The Exchange believes that options serve as a valuable tool to the trading community and help markets function efficiently by mitigating risk. To that end, the Exchange believes that the absence of options in the early days after an IPO may heighten volatility to IPO'd securities.[19]

Further, as noted herein, the Exchange believes the proposed change would allow options on IPO'd securities to come to market sooner without sacrificing investor protection. The Exchange represents that trading in options on IPO'd securities—like all other options traded on the Exchange—is subject to surveillances administered by the Exchange and/or FINRA on behalf of the Exchange.[20] Those surveillances are designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange represents that those surveillances are adequate to reasonably monitor Exchange trading of options on IPO'd securities in all trading sessions and to reasonably deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[21] As such, the Exchange believes that its existing surveillance technologies and procedures, coupled with NYSE American's findings related to the IPOs reviewed as described herein, adequately address potential concerns regarding possible manipulation or price stability.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange expects other options exchanges will adopt substantively similar proposals, such that there would be no burden on intermarket competition from the Exchange's proposal. Accordingly, the proposed change is not meant to affect competition among the options exchanges. For these reasons, the Exchange believes that the proposed rule change reflects this competitive environment and does not impose any undue burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become

[13] FINRA currently conducts certain surveillances on behalf of the Exchange pursuant to a regulatory services agreement. To the extent that FINRA may conduct any surveillances on behalf of the Exchange pursuant to the regulatory services agreement (which surveillances may vary over time), the Exchange is responsible for FINRA's performance under the regulatory services agreement. The Exchange is also a party to a bilateral Rule 17d–2 Agreement with FINRA and various multi-party Rule 17d–2 Agreements with FINRA and other national securities exchanges that trade options (*e.g.,* Rule 17d–2 Agreements governing options sales practice and options position limits) and to national market systems plans with the other national securities exchanges that trade options (*e.g.,* the national market system plan that governs options insider trading for which FINRA is the current plan processor).

[14] *See supra* note 9.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] *Id.*

[18] *See supra* note 5.

[19] *See supra* note 9.

[20] FINRA currently conducts certain surveillances on behalf of the Exchange pursuant to a regulatory services agreement. To the extent that FINRA may conduct any surveillances on behalf of the Exchange pursuant to the regulatory services agreement (which surveillances may vary over time), the Exchange is responsible for FINRA's performance under the regulatory services agreement. The Exchange is also a party to a bilateral Rule 17d–2 Agreement with FINRA and various multi-party Rule 17d–2 Agreements with FINRA and other national securities exchanges that trade options (*e.g.,* Rule 17d–2 Agreements governing options sales practice and options position limits) and to national market systems plans with the other national securities exchanges that trade options (*e.g.,* the national market system plan that governs options insider trading for which FINRA is the current plan processor).

[21] *See supra* note 9.

operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [22] and Rule 19b–4(f)(6) [23] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [24] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[25] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange requested the waiver, stating its desire to harmonize its rules to those of NYSE American to ensure fair competition among the options exchanges. Further, the proposed change would allow options on IPO'd securities to come to market sooner (*i.e.,* at least two business days post-IPO not inclusive of the day of the IPO) without sacrificing investor protection. For these reasons, and because the proposed rule change does not raise any novel legal or regulatory issues, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[26]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[24] 17 CFR 240.19b–4(f)(6).

[25] 17 CFR 240.19b–4(f)(6)(iii).

[26] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CBOE–2023–043 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–CBOE–2023–043. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CBOE–2023–043 and should be submitted on or before September 29, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19355 Filed 9–7–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No, 34–98280; File No. SR–PHLX–2023–40]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Proposed Rule Change To Amend Equity 4, Rules 3301A and 3301B To Establish New ''Contra Midpoint Only'' and ''Contra Midpoint Only With Post-Only'' Order Types and To Make Other Corresponding Changes to the Rulebook

September 1, 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 28, 2023, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Equity 4, Rules 3301A and 3301B [3] to establish new ''Contra Midpoint Only'' and ''Contra Midpoint Only with Post-Only'' Order Types, and to make other corresponding changes to the Rulebook.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

[27] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] References herein to Phlx Rules in the 3000 Series shall mean Rules in Phlx Equity 4.

any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Equity 4, Rule 3301A(b) to establish ''Contra Midpoint Only'' or ''CMO'' and ''Contra Midpoint Only with Post-Only'' or ''CMO+PO'' as new Order Types on the Exchange.

A CMO is a Non-Displayed Order Type priced at the midpoint between the National Best Bid and the National Best Offer (the ''NBBO'' and the midpoint of the NBBO, the ''Midpoint''). The Exchange will remove a CMO resting on the Order Book upon entry of certain types of incoming Orders that are likely to result in unfavorable executions, including because the incoming Orders are likely to indicate price movements that would be more favorable to the resting CMO user than the prevailing price. Thus, the CMO provides protection to the resting CMO user against executions at the prevailing Midpoint price that the user may deem unfavorable. As explained below, once the System removes a CMO under these circumstances, the Exchange would submit a new CMO at the then-current Midpoint price automatically on behalf of the user.[4]

A CMO+PO is like a CMO, except that it provides for ''post-only'' functionality, meaning that like a Midpoint Peg Post-Only Order,[5] a CMO+PO will execute upon entry only in circumstances where economically beneficial to the party entering the Order.

The CMO and CMO+PO are Order Types that the Exchange has developed to provide market participants with options that allow them to make their own determinations with regards to various trade-offs that exist when executing their strategies in the markets. One such trade off might be the amount of liquidity they can obtain in the near term versus the potential for market movement relative to the Midpoint price. Some participants may value avoiding immediate executions in order to wait for a better price while others would rather obtain the liquidity instead of waiting.

In this regard, CMO resembles an order type that the Exchange's sister market, the Nasdaq Stock Market LLC (''Nasdaq''), introduced in 2018—the Midpoint Extended Life Order (''M–ELO'').[6] Like CMO, M–ELO is also a non-displayed Order Type that executes only at the Midpoint. It is eligible to execute only against other M–ELOs, and it protects users from interacting with time-sensitive orders by requiring them to wait a period of time (a ''Holding Period'') before their M–ELO is eligible to execute (originally one-half second, and subsequently reduced to 10 milliseconds).[7] In 2019, Nasdaq enhanced the M–ELO concept by adding the Midpoint Extended Life Order Plus Continuous Book (''M–ELO+CB'').[8] A M–ELO+CB behaves exactly like a M–ELO, except that it may also interact with Midpoint Orders on Nasdaq's Continuous Book (and thus have access to larger sources of liquidity) to the extent that such Midpoint Orders, in turn, opt to rest on the Continuous Book for at least 10 milliseconds before becoming eligible to execute against a M–ELO+CB. CMO and CMO+PO are variations on the M–ELO/M–ELO+CB theme. M–ELOs only trade against other Orders from like-minded participants that are willing to wait the required time period before trading. CMOs and CMO+POs, by contrast, can trade in a wider array of situations, but like M–ELO, they will not trade in instances where the incoming order is likely to impact the prevailing price of the security. This will provide users of CMOs and CMO+POs with opportunities for more liquidity interaction than M–ELO but without a delay mechanism. On the other hand, CMOs and CMO+POs will provide more protection to users than regular Midpoint Orders, but with less opportunity to interact with liquidity. Instead of imposing a waiting period, the Exchange will remove a resting CMO when it faces incoming orders that have the potential to shift the Midpoint, while also providing an opportunity to a participant to receive price improvement when the System resubmits its CMO or CMO+PO to take advantage of a shift in the Midpoint.

The specific proposed characteristics of the CMO are as follows:

A CMO is a non-displayed Order Type with the Midpoint Pegging Attribute that will be priced and ranked in time order at the Midpoint. A user may cancel a CMO at any time.

The System will remove a CMO Order automatically if a CMO is resting at the Midpoint on the PSX Book, an incoming Order is priced through the price of the CMO, the CMO would otherwise trade against the incoming Order,[9] and one or more of the following conditions apply, which the Exchange anticipates are indicative of a pending price shift in favor of the CMO user:

- The incoming Order is Displayed and its size is greater than that of the resting CMO; or
- The incoming Order is not Displayed, it is priced at or better than the far side of the NBBO, and its size is greater than that of the resting CMO.

Again, in the first of these scenarios, the Exchange observes that the incoming Order has the potential to cause the NBBO to shift, such that removal of the CMO will be preferable to allowing the CMO to execute at a Midpoint price that may be stale. The System will then automatically re-submit a new CMO on behalf of the user after removing the original CMO. In the second scenario, the incoming Order may not cause a shift in the NBBO, due to its hidden nature, but because it is priced aggressively at the far side of the NBBO, it still offers a CMO user an opportunity for an execution that is more favorable than the prevailing midpoint price. CMO functionality enables a participant to avail itself of this opportunity.

The following examples illustrate this concept. In the first example, assume that the National Best Bid is $10.00 and the National Best Offer is $11.00. Participant A enters Order 1, which is a CMO to buy 100 shares of X that is priced at $10.50—the midpoint of the NBBO. While Order 1 is resting on the Exchange Book, Participant B enters Order 2, which is a Displayed Order to sell 200 shares of X at $10.40. In this instance, Order 2 is larger than Order 1. If Order 1 was not a CMO and it had

[4] In certain instances below, the Exchange uses the term ''removal'' rather than the term ''cancellation'' to describe how the System would behave when handling a CMO. When the Exchange removes a CMO from its Order Book, it would not send a cancellation message when doing so, thus limiting the potential for information leakage.

[5] *See* Rule 3301A(b)(6).

[6] *See* Securities Exchange Act Release No. 34–82825 (Mar. 7, 2018), 83 FR 10937 (Mar. 13, 2018) (order approving SR–NASDAQ–2017–074).

[7] In 2020, the Commission issued an order approving the Nasdaq's proposal to shorten the Holding Period for M–ELO and M–ELO+CB Orders from one-half second to 10 milliseconds. *See* Securities Exchange Act Release No. 34–88743 (April 24, 2020), 85 FR 24068 (April 30, 2020) (order approving SR–NASDAQ–2020–011).

[8] *See* Securities Exchange Act Release No. 34–86938 (September 11, 2019), 84 FR 48978 (September 17, 2019) (order approving SR–NASDAQ–2019–048).

[9] For example, if the incoming Order is filled fully by resting interest with price/time priority ahead of the resting CMO Order, then the System will not remove the CMO Order from the Order Book.

executed against Order 2 at $10.50, then Participant A would have missed out on the favorable impact of Order 2 shifting the midpoint of the NBBO lower to $10.20. To avoid this outcome, however, the System would remove Order 1 from the Exchange Book and resubmit it as Order 3, priced at $10.20. Participant C then enters Order 4 to sell 100 shares of X at 10.20. Order 3 would then execute against Order 4 at $10.20, thus providing Participant A with price improvement.

In a second example, assume again that the National Best Bid is $10.00 and the National Best Offer is $11.00. Participant A again enters Order 1, which is a CMO to buy 100 shares of X that is priced at $10.50. While Order 1 is resting on the Exchange Book, Participant B enters Order 2, which this time is a Non-Displayed Order to sell 200 shares at $10.00. CMO functionality would activate for Order 1 both because Order 2 is larger than Order 1 and because Order 2 is priced at the far side of the NBBO. The System would resubmit Order 1 as Order 3, priced at $10.00. Order 3 would then execute at $10.00, again providing price improvement to Participant A.[10]

Additionally, because a CMO inherently possesses the Midpoint Pegging Attribute, it will behave in accordance with Rule 3301B(d), which governs Orders with Midpoint Pegging. Thus, consistent with Rule 3301B(d), the following behavior applies to CMOs:

- A CMO user may only enter a CMO Order during Market Hours.
- A CMO will have its price set upon initial entry and will thereafter have its price reset in accordance with changes to the relevant Inside Quotation. A CMO will receive a new timestamp whenever its price is updated [11] and therefore will be evaluated with respect to possible execution in the same manner as a newly entered Order. If the price to which a CMO is pegged becomes unavailable, pegging would lead to a price at which the CMO cannot be posted, or if the Inside Bid and Inside Offer become crossed, then the CMO will be removed from the PSX Book and will be re-entered once there is a permissible price, provided however, that the System will cancel the CMO if no permissible pegging price becomes available within one second after the CMO was removed and no longer available on the PSX Book (the Exchange may, in the exercise of its discretion modify the length of this one second time period by posting advance notice of the applicable time period on its website).[12]
- If at the time of entry, there is no price to which a CMO, that has not been assigned a Time in Force of Immediate-or-Cancel, can be pegged or pegging would lead to a price at which the Order cannot be posted, or if the Inside Bid and Inside Offer are Crossed, then the CMO will not be immediately available on the PSX Book and will be entered once there is a permissible price; provided however, that the System will cancel the CMO if no permissible pegging price becomes available within one second after Order entry (the Exchange may, in the exercise of its discretion, modify the length of this one second time period by posting advance notice of the applicable time period on its website).
- A CMO will have its price set upon initial entry to the Midpoint, unless the CMO has a limit price, and that limit price is lower than the Midpoint for a CMO to buy (higher than the Midpoint for CMO to sell), in which case the Order will be ranked on the PSX Book at its limit price. If the Inside Bid and Inside Offer are locked, a CMO will be priced at the locking price. However, even if the Inside Bid and Inside Offer are locked, an Order with CMO that locked an Order on the PSX Book would execute.
- If a CMO has been assigned a Discretion Order Attribute, the CMO may execute at any price within the discretionary price range, even if beyond the limit price specified with respect to the Midpoint Pegging Order Attribute. If CMO is priced at its limit price, the price of the CMO may nevertheless be changed to a less aggressive price based on changes to the Inside Quotation.

Unlike other Orders with the Midpoint Pegging Attribute, CMOs cannot be assigned a Routing Attribute, such that provisions of the Midpoint Pegging Rule that govern Midpoint Pegged Orders with Routing do not apply to CMOs.

As noted above, a CMO will not be accepted outside of Market Hours. A CMO remaining unexecuted at the end of Market Hours will be cancelled by the System.

The System will cancel CMOs when a trading halt is declared, and the System will reject any CMOs entered during a trading halt.[13]

A CMO user may opt to apply the Minimum Quantity, Trade Now, or Discretion Order Attributes and a Time-In-Force to a CMO. Again, the Non-Display and Midpoint Pegging Attributes always apply to CMOs.

A CMO+PO will possess all the characteristics and attributes of a CMO, as described above, as well as those of a Managed Midpoint Peg Post-Only Order, as set forth in Rule 3301A(b)(6), with certain exceptions set forth below.

Like a Midpoint Peg Post-Only Order, a CMO+PO is a Non-Displayed Order that is priced at the Midpoint and executes upon entry only in circumstances where economically beneficial to the party entering the Order.

Like a Midpoint Peg Post-Only Order, the price of the CMO+PO will be updated repeatedly to equal the midpoint between the NBBO; provided, however, that the CMO+PO will not be priced higher (lower) than its limit price. In the event that the Midpoint between the NBBO becomes higher than (lower than) the limit price of a CMO+PO to buy (sell), the price of the CMO+PO will stop updating and the CMO+PO will post (with a Non-Display Attribute) at its limit price, but will resume updating if the Midpoint becomes lower than (higher than) the limit price of the CMO+PO to buy (sell). Similarly, if a CMO+PO is on the PSX Book and subsequently the NBBO is crossed, or if there is no NBBO, the Order will be removed from the PSX Book and will be re-entered at the new Midpoint once there is a valid NBBO that is not crossed. The CMO+PO receives a new timestamp each time its price is changed.

All CMO+POs will be cancelled if they remain on the PSX Book at the end of Market Hours.[14] Also like a Midpoint Peg Post-Only Order, a CMO+PO may not possess the Discretion or Routing Order Attributes, and a CMO+PO must be priced at more than $1 per share. Finally, unlike a Midpoint Peg Post-Only Order, RASH may be used to enter

[10] There also may be scenarios where use of CMO might not ultimately benefit market participants, such as where the amount of price improvement associated with use of CMO is outweighed by the fee a participant would incur when its CMO is deemed to remove liquidity from the Exchange Book.

[11] A CMO will also receive a new timestamp whenever it is resubmitted after removal.

[12] A user may enter a CMO using RASH or OUCH.

[13] The Exchange also proposes to amend the Exchange's Rule governing Midpoint Pegging, at Rule 3301B(d), to add language stating that ''Orders with Midpoint Pegging will be cancelled by the System when a trading halt is declared, and any Orders with Midpoint Pegging entered during a trading halt will be rejected.'' Such language exists in a corresponding rule of the rulebook of the Exchange's sister exchange, the Nasdaq Stock Market, LLC, see Nasdaq Rule 4703(d), but was mistakenly omitted from Rule 3301B(d).

[14] A CMO+PO entered prior to the beginning of Market Hours will be rejected. A CMO+PO will be cancelled by the System when a trading halt is declared, and any CMO+PO entered during a trading halt will be rejected.

a CMO+PO with a Time in Force of IOC (as well as OUCH, which can be used for such purposes with respect to a MPPO), and in such cases the Order will be canceled after determining whether it can be executed.

CMO and CMO+PO executions will be reported to Securities Information Processors and provided in the Exchange's proprietary data feed without any new or special indication.

As part of the surveillance the Exchange currently performs, CMOs and CMO+POs will be subject to real-time surveillance to determine if they are being abused by market participants. The Exchange is committed to determining whether there is opportunity or prevalence of behavior that is inconsistent with normal risk management behavior. Manipulative abuse is subject to potential disciplinary action under the Exchange's Rules, and other behavior that is not necessarily manipulative but nonetheless frustrates the purposes of the CMO or CMO+PO may be subject to penalties or other participant requirements to discourage such behavior, should it occur.[15]

The Exchange plans to implement CMO and CMO+PO within thirty days after Commission approval of the proposal. The Exchange will make the CMO and CMO+PO available to all members and to all securities upon implementation. The Exchange will announce the implementation date by Equity Trader Alert.[16]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[17] in general, and furthers the objectives of Section 6(b)(5) of the Act,[18] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. In particular, the proposal is consistent with the Act because it would create additional options with respect to how participants can manage trading at the Midpoint. These additional options allow participants to tune their interactions more finely in the market, which can lead to more efficient trading opportunities on the Exchange for investors with similar investment objectives.[19] Much like the analogous M–ELO Order Type, which Nasdaq introduced a few years ago, CMO and CMO+PO would provide market participants with a means to avoid certain execution scenarios which they may deem unfavorable. Unlike M–ELO, however, which imposes a waiting period upon participants to bring like-minded participants together, the CMO and CMO+PO would have no such waiting period. That is, the Exchange designed CMO and CMO+PO for participants that want Midpoint or better executions but have a greater urgency to execute their orders and are not concerned about interacting with other participants acting with similar or more urgency. At the same time, the CMO and CMO+PO will avoid interacting with orders that have the potential to shift the Midpoint, even without a holding period, by providing for the System to remove a CMO or CMO+PO from the Order Book when faced with incoming Orders that cross the Midpoint or otherwise have the potential to shift the Midpoint. The System will then automatically enter a new CMO to take advantage of a better ensuing Midpoint.

The CMO and CMO+PO will be available for voluntary use by all Exchange members. Although the proposal would enable market participants that use CMOs to avoid potentially adverse executions, while causing participants to miss executions to the extent that their incoming Orders trigger removal of CMOs, this treatment is fair. That is, the proposal would facilitate the provision of market-enhancing midpoint liquidity by providing a mechanism by which participants could post such liquidity safely and without fear of adverse executions. Exchange functionality which permits like-minded participants the ability to achieve their objectives in an efficient manner will improve overall execution quality on the market. Moreover, the protections that these Order Types provide are tailored to mitigate the risk of adverse executions, even though the entry of either an incoming Displayed Order larger than a CMO or an incoming spread-crossing Non-Displayed Order larger than a CMO would not necessarily result in an adverse execution in every conceivable circumstance.[20] As the chart below demonstrates, mark-outs are significantly worse after executions against incoming contra-orders in the two scenarios covered by the proposed Rule than they are after executions in other scenarios. This data suggests that the CMO and CMO+PO would, indeed, help participants avoid poor quality executions that would likely occur otherwise.

[15] Punitive fees or other participant requirements tied to CMO and CMO+PO usage will be implemented by rule filing under Section 19(b) of the Act, 15 U.S.C. 78s(b), should the Exchange determine that they are necessary to maintain a fair and orderly market.

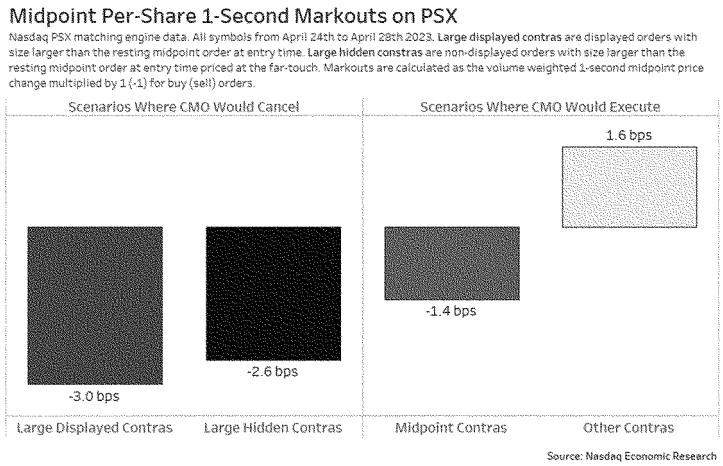
[16] The Exchange plans to propose a fee structure for the CMO and CMO+PO in a subsequent Commission rule filing.

[17] 15 U.S.C. 78f(b).

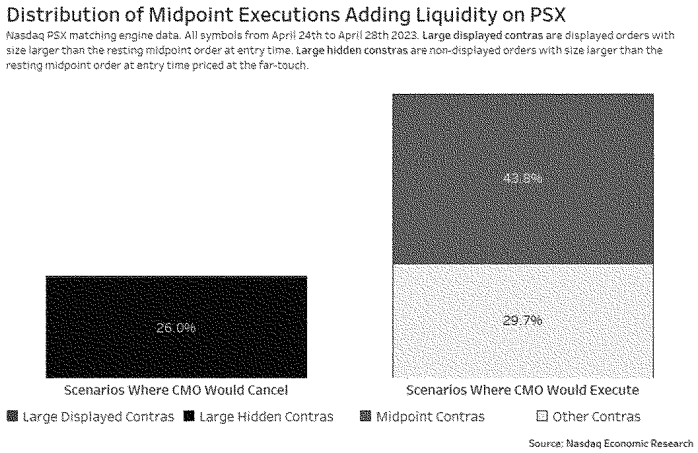
[18] 15 U.S.C. 78f(b)(5).

[19] *Cf.* Securities Exchange Act Release No. 34–82825 (March 7, 2018), 83 FR 10937 (March 13, 2018) (SR–NASDAQ–2017–074) (approving the Midpoint Extended Life Order (''M–ELO'') because it could ''create additional and more efficient trading opportunities on the Exchange for investors with longer investment time horizons, including institutional investors, and could provide these investors with an ability to limit the information leakage and the market impact that could result from their orders.'').

[20] *Cf.* Order Approving a Proposed Rule Change to Add a New Discretionary Limit Order Type Called D-Limit, Securities Exchange Act Release No. 34–89686 (August 26, 2020), 85 FR 54438 (September 1, 2020) (SR–IEX–2019–15) (''D-Limit orders will encourage long term investors to participate in the displayed exchange market by protecting them against one particular strategy employed by short term traders. It is not unfairly discriminatory for an exchange to address that advantage in a narrowly tailored manner that promotes investor protection and the public interest. Accordingly, the Commission concludes that IEX's proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.'').



The Exchange also notes that the scenarios in which CMO and CMO+PO would apply constitute only a quarter of all midpoint executions adding liquidity on the Exchange.



Like all other Order Types, the Exchange will conduct real-time surveillance to monitor the use of CMOs and CMO+POs to ensure that such usage is appropriately tied to the intent of the Order Type. Transactions in CMOs and CMO+POs will be reported to the Securities Information Processor and will be provided in the Exchange's proprietary data feed in the same manner as all other transactions occurring on the Exchange, without any new or special indication that it is a CMO or CMO+PO execution. The Exchange believes that doing so is important to ensuring that investors are protected from any market impact that may occur if CMO executions were reported with a special indication.

The Exchange does not believe that the proposed CMO or CMO+PO will negatively affect the quality of the market. To the contrary, the Exchange believes that the addition of CMO and CMO+PO will draw new market participants to the Exchange's transparent and well-regulated market. The CMO and CMO+PO will allow investors an opportunity to find like-minded counterparties at the Midpoint on the Exchange, while also limiting executions users may deem unfavorable and providing opportunities for price improvement. Insofar as the CMO and CMO+PO would provide new options for participants to achieve efficient, high-quality midpoint executions, the CMO and CMO+PO stands to increase participation on the Exchange and to improve the quality of executions on the Exchange.

Lastly, it is consistent with the Act to amend the Exchange's Rule governing Midpoint Pegging, at Rule 3301B(d), to add language stating that ''Orders with Midpoint Pegging will be cancelled by the System when a trading halt is declared, and any Orders with Midpoint Pegging entered during a trading halt will be rejected.'' Such language exists in a corresponding rule of the rulebook of the Exchange's sister exchange, the Nasdaq Stock Market, LLC, at Nasdaq Rule 4703(d), but was mistakenly omitted from Rule 3301B(d). In additional to correcting an inadvertent omission of this language from the Exchange's Rulebook, the proposed text codifies existing Exchange practice and corresponds to participant expectations for the behavior of Orders with Midpoint Pegging during trading halts.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes that the introduction of the CMO and CMO+PO will draw new market participants to the Exchange while also providing a new option for existing participants that wish to achieve high-quality Midpoint (or better) executions, but do not wish for their Orders to be subject to a

Holding Period (as in M–ELO or M–ELO+CB orders on Nasdaq) or care about their counterparties being subject to the same. To the extent the proposed change is successful in attracting additional market participants or increasing existing participation on the Exchange, the Exchange believes that the proposed change will promote competition among trading venues by making the Exchange a more attractive trading venue for investors and participants.

Additionally, adoption of the CMO and CMO+PO will not burden competition among market participants. The CMO and CMO+PO will be available to all Exchange members and it will be available on an optional basis. Thus, any member that seeks to avail itself of the benefits of a CMO or CMO+PO can choose accordingly. Although the proposal provides potential benefits for investors that select the CMO and CMO+PO, the Exchange believes that all market participants will benefit to the extent that this proposal contributes to a healthy and attractive market that is attentive to the needs of all types of investors.

The proposal also will not adversely impact market participants that choose not to use these Order Types because no changes need to be made to participants' systems to account for it. As discussed above, CMO and CMO+PO executions will be reported the same as other executions, without any new or special indicator.

In any event, the Exchange notes that it operates in a highly competitive market in which market participants can readily choose between competing venues if they deem participation in the Exchange's market is no longer desirable. In such an environment, the Exchange must carefully consider the impact that any change it proposes may have on its participants, understanding that it will likely lose participants to the extent a change is viewed as unfavorable by them. Because competitors are free to modify the incentives and structure of their markets, the Exchange believes that the degree to which modifying the market structure of an individual market may impose any burden on competition is limited. Last, to the extent the proposed change is successful in attracting additional market participants or additional activity by existing participants, the Exchange also believes that the proposed change will promote competition among trading venues by making the Exchange a more attractive trading venue for participants and investors.

The Exchange perceives no competitive impact associated with amending the Exchange's Rule governing Midpoint Pegging, at Rule 3301B(d), to add language stating that ''Orders with Midpoint Pegging will be cancelled by the System when a trading halt is declared, and any Orders with Midpoint Pegging entered during a trading halt will be rejected.'' This proposal merely adds language that had been mistakenly omitted from the Exchange's Rulebook, but which exists in the corresponding rules of the Nasdaq Stock Market, LLC, and codifies existing Exchange practice as to Orders with Midpoint Pegging during a trading halt.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–PHLX–2023–40 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–PHLX–2023–40. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available 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–PHLX–2023–40 and should be submitted on or before September 29, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19358 Filed 9–7–23; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

SBA Council on Underserved Communities Meeting

AGENCY: Small Business Administration (SBA).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time, and agenda for the fourth meeting of the SBA Council on Underserved Communities. The meeting will be in person for Council members and streamed live to the public.

DATES: The meeting will be held on Wednesday, September 13th, 2023, from 9:30 a.m. to 12:30 p.m. Eastern Time.

ADDRESSES: The Council on Underserved Communities will meet at

[21] 17 CFR 200.30–3(a)(12).

SBA Headquarters at 409 3rd St SW, Washington, DC 20024 and will be live streamed on Zoom for the public. Registration Link Here: *https://www.zoomgov.com/webinar/register/WN_ZHcCxD0RTv-MOMMer0D8Tg.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., appendix 2), SBA announces the meeting of the SBA Council on Underserved Communities (the ''Council''). The Council is tasked with providing advice, ideas and opinions on SBA programs and services and issues of interest to small businesses in underserved communities. For more information, please visit *http://www.sba.gov/cuc.*

The purpose of the meeting is to provide the Council with information on SBA's efforts to support small businesses in underserved communities, as well as provide an opportunity for the Council to discuss its goals for the coming months. The Council will provide insights based on information they have heard from their communities and discuss areas of interest for further research and recommendation development.

FOR FURTHER INFORMATION CONTACT: The meeting will be live streamed to the public, and anyone wishing to submit questions to the SBA Council on Underserved Communities can do so by submitting them via email to *underservedcouncil@sba.gov.*

Additionally, if you need accommodations because of a disability or require additional information, please contact Tomas Kloosterman, SBA, Office of the Administrator, 409 Third Street SW, Washington, DC 20416, 202–843–0475 or *Tomas.Kloosterman@sba.gov.*

Dated: September 5, 2023.

Andrienne Johnson,

SBA Committee Management Officer.

[FR Doc. 2023–19444 Filed 9–7–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18118 and #18119; Florida Disaster Number FL–00192]

Presidential Declaration Amendment of a Major Disaster for the State of Florida

AGENCY: Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Florida (FEMA–4734–DR), dated 08/31/2023.

Incident: Hurricane Idalia.

Incident Period: 08/27/2023 and continuing.

DATES: Issued on 09/03/2023.

Physical Loan Application Deadline Date: 10/30/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/31/2024.

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: The notice of the President's major disaster declaration for the State of Florida, dated 08/31/2023, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Columbia, Gilchrist, Hernando, Jefferson, Madison, Pasco, Pinellas.

Contiguous Counties (Economic Injury Loans Only):

Florida: Baker, Hillsborough, Leon, Polk, Union, Wakulla.

Georgia: Brooks, Clinch, Thomas.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–19401 Filed 9–7–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18118 and #18119; FLORIDA Disaster Number FL–00192]

Presidential Declaration of a Major Disaster for the State of Florida

AGENCY: Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Florida (FEMA–4734–DR), dated 08/31/2023.

Incident: Hurricane Idalia.

Incident Period: 08/27/2023 and continuing.

DATES: Issued on 08/31/2023.

Physical Loan Application Deadline Date: 10/30/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/31/2024.

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 President's major disaster declaration on 08/31/2023, 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 (Physical Damage and Economic Injury Loans): Citrus, Dixie, Hamilton, Lafayette, Levy, Suwannee, Taylor.

Contiguous Counties (Economic Injury Loans Only):

Florida: Alachua, Columbia, Gilchrist, Hernando, Jefferson, Madison, Marion, Sumter.

Georgia: Echols, Lowndes.

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 18118 8 and for economic injury is 18119 0.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator Office of Disaster Recovery & Resilience.

[FR Doc. 2023–19445 Filed 9–7–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18016 and #18017; VERMONT Disaster Number VT–00046]

Presidential Declaration Amendment of a Major Disaster for the State of Vermont

AGENCY: Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Vermont (FEMA–4720–DR), dated 07/14/2023.

Incident: Severe Storms, Flooding, Landslides, and Mudslides.

Incident Period: 07/07/2023 through 07/17/2023.

DATES: Issued on 08/31/2023.

Physical Loan Application Deadline Date: 10/12/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 04/15/2024.

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: Alan 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: The notice of the President's major disaster declaration for the State of Vermont, dated 07/14/2023, is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 10/12/2023.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–19448 Filed 9–7–23; 8:45 am]

BILLING CODE 8026–09–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2023–0035]

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov*.

Submit your comments online referencing Docket ID Number [SSA–2023–0035].

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, Mail Stop 3253 Altmeyer, 6401 Security Blvd., Baltimore, MD 21235, Fax: 833–410–1631, Email address: *OR.Reports.Clearance@ssa.gov*.

Or you may submit your comments online through *https://www.reginfo.gov/public/do/PRAMain,* referencing Docket ID Number [SSA–2023–0035].

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than November 7, 2023. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Agreement to Sell Property—20 CFR 416.1240—1245—0960—0127. Individuals or couples who are otherwise eligible for Supplemental Security Income (SSI) payments, but whose resources exceed the allowable limit, may receive conditional payments if they agree to dispose of the excess non-liquid resources and make repayments. SSA uses Form SSA–8060–U3 to document this agreement, and to ensure the individuals understand their obligations. Respondents are applicants for and recipients of SSI payments who will be disposing of excess non-liquid resources.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
SSA–8060–U3	20,000	1	20	6,667	*$29.76	**$198,410

*We based this figures on average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).

**This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. Work Activity Report (Self-Employment)—20 CFR 404.1520(b), 404.1571—404.1576, 404.1584—404.1593, and 416.971—416.976—0960–0598. SSA uses Form SSA–820–BK to determine initial or continuing eligibility for: (1) Title II Social Security disability benefits (SSDI); or (2) Title XVI SSI payments. Under Titles II and XVI of the Social Security Act, recipients receive disability benefits and SSI payments based on their inability to engage in substantial gainful activity (SGA) due to a physical or mental condition. Therefore, when the recipients resume work, they must report their work so SSA can evaluate and determine by law whether they continue to meet the disability requirements. SSA uses Form SSA–820–BK to obtain information on self-employment activities of Social Security Title II and XVI disability applicants and recipients. We use the data we obtain to evaluate disability claims, and to help us determine if the claimant meets current disability provisions under Titles II and XVI. Since applicants for disability benefits or payments must prove an inability to perform any kind of SGA generally available in the national economy for which we expect them to qualify based on age, education, and work experience, any work an applicant performed until, or subsequent to, the date the disability allegedly began, affects our disability determination. The respondents are

applicants and claimants for SSI payments or SSDI benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office or for teleservice centers (minutes) **	Total annual opportunity cost (dollars) **
SSA–820–BK (in Office)	12,144	1	30	6,072	*$12.81	**24	***$140.013
SSA–820–BK (phone)	36,428	1	30	18,214	*12.81	**19	***381,085
SSA–820–BK (paper)	48,571	1	30	24,286	*12.81	0	***311,104
SSA–820–APP (online submission)	2,857	1	30	1,429	*12.81	0	***18,305

* We based this figure on average DI payments, as reported in SSA's disability insurance payment data (*https://www.ssa.gov/legislation/2023factsheet.pdf*).
** We based this figure on the average FY 2022 wait times for field offices and teleservice centers, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

3. Social Security's Public Credentialing and Authentication Process—20 CFR 401.45 and 402—0960–0789.

Background

Authentication is the foundation for secure, online transactions. Identity authentication is the process of determining, with confidence, that someone is who he or she claims to be during a remote, automated session. It comprises three distinct factors: something you know; something you have; and something you are. Single-factor authentication uses one of the factors, and multi-factor authentication uses two or more of the factors.

SSA's Public Credentialing and Authentication Process

SSA offers consistent authentication across SSA's secured online services. We allow our users to request and maintain only one User ID, consisting of a self-selected username and password, to access multiple Social Security electronic services. Designed in accordance with the OMB Memorandum M–04–04 and the National Institute of Standards and Technology (NIST) Special Publication 800–63, this process provides the means of authenticating users of our secured electronic services and streamlines access to those services.

SSA's public credentialing and authentication process:

- Issues a single User ID to anyone who wants to do business with the agency and meets the eligibility criteria;
- Partners with an external Identity Services Provider (ISP) to help us verify the identity of our online customers;
- Complies with relevant standards;
- Offers access to some of SSA's workloads online, while providing a high level of confidence in the identity of the person requesting access to these services;
- Offers an in-person process for those who are uncomfortable with or unable to use the internet process;
- Balances security with ease of use; and
- Provides a user-friendly way for the public to conduct extended business with us online instead of visiting local servicing offices or requesting information over the phone. Individuals have real-time access to their Social Security information in a safe and secure web environment.

Public Credentialing and Authentication Process Features

We collect and maintain the users' personally identifiable information (PII) in our Central Repository of Electronic Authentication Data Master File Privacy Act system of records, which we published in the **Federal Register** (75 FR 79065). The PII may include the users' name; address; date of birth; Social Security number (SSN); phone number; and other types of identity information [*e.g.,* address information of persons from the W–2 and Schedule Self Employed forms we receive electronically for our programmatic purposes as permitted by 26 U.S.C. 6103(l)(1)(A)]. We may also collect knowledge-based authentication data, which is information users establish with us or that we already maintain in our existing Privacy Act systems of records.

We retain the data necessary to administer and maintain our e-Authentication infrastructure. This includes management and profile information, such as blocked accounts; failed access data; effective date of passwords; and other data allowing us to evaluate the system's effectiveness. The data we maintain also may include archived transaction data and historical data.

We use the information from this collection to identity proof and authenticate our users online, and to allow them access to their personal information from our records. We also use this information to provide second factor authentication. We are committed to expanding and improving this process so we can grant access to additional online services in the future.

Offering online services is not only an important part of meeting SSA's goals, but is vital to good public service. In increasing numbers, the public expects to conduct complex business over the internet. Ensuring SSA's online services are both secure and user-friendly is a high priority.

We awarded a competitively bid contract to an ISP, Equifax,[1] to help us verify the identity of our online customers. We use this ISP, in addition to our other authentication methods, to help us prove, or verify, the identity of our customers when they are completing online or electronic transactions with us.

Social Security's Authentication Strategy

We remain committed to enhancing our online services using authentication processes that balance usability and security. We will continue to research and develop new authentication tools while monitoring the emerging threats.

The following are key components of our authentication strategy:

- Enrollment and Identity Verification—Individuals who meet the following eligibility requirements may enroll:
  - Must have a valid email address;
  - Must have a valid Social Security number (SSN);
  - Must have a domestic address of record (includes military addresses); and
  - Must be at least 18 years of age.

We collect identifying data and use SSA and ISP records to verify an

[1] Equifax is a global information solutions provider. Equifax's solutions help Social Security to manage risk and mitigate fraud.

individual's identity. Individuals have the option of obtaining an enhanced, stronger, User ID by providing certain financial information (*e.g.,* Medicare wages, self-employed earnings, or the last eight digits of a credit card number) for verification. We also ask individuals to answer out-of-wallet questions so we can further verify their identities. Individuals who are unable to complete the process online can present identification at a field office to obtain a User ID.

- Establishing the User Profile—The individual self-selects a username and password, both of which can be of variable length and alphanumeric. We provide a password strength indicator to help the individual select a strong password. We also ask the individual to choose challenge questions for use in restoring a lost or forgotten username or password.
- Provide a Second Factor—We ask the individual to provide a text message enabled cell phone number or an email address. We consider the cell phone number or email address the second factor of authentication. We send a security code to the individual's selected second factor. We require the individual to confirm its receipt by entering the security code online. Subsequently, each time the individual attempts to sign in to his or her online account, we will also send a message with a one-time security code to the individual's selected second factor. The individual must enter the security code along with his or her username and password. The code is valid for only 10 minutes. If the individual does not enter the code within 10 minutes, the code expires, and the individual must request another code.
- Enhancing the User ID—If individuals opt to enhance or upgrade their User IDs, they must provide certain financial information for verification. We mail a one-time-use upgrade code to the individual's verified residential address. When the individual receives the upgrade code in the mail, he or she can enter this code online to enhance the security of the account. With extra security, we continue to require the individuals to sign in using their username, password, and a one-time security code we send to their second factor email address or cell phone number (whichever the users listed in their account).
- Sign in and Use—Our authentication process provides an individual with a User ID for access to our sensitive online Social Security services. Second factor authentication requires the individual to sign in with a username, password, and a one-time security code sent to the individual's selected second factor. SSA expanded its existing capabilities to require second factor authentication for every online sign in. We also allow for maintenance of the second factor options. An individual who forgets the password can reset it automatically without contacting SSA.

Social Security's Enrollment Process

The enrollment process is a one-time only activity. SSA requires the individuals to agree to the ''Terms of Service'' detailed on our website before we allow them to begin the enrollment process. The ''Terms of Service'' inform the individuals what we will and will not do with their personal information, and the privacy and security protections we provide on all data we collect. These terms also detail the consequences of misusing this service.

To verify the individual's identity, we ask the individual to give us minimal personal information, which may include:

- Name;
- SSN;
- Date of birth;
- Address—mailing and residential;
- Telephone number;
- Email address;
- Financial information;
- Cell phone number; and
- Selecting and answering password reset questions.

We send a subset of this information to the ISP, who then generates a series of out-of-wallet questions back to the individual. The individual must answer all or most of the questions correctly before continuing in the process. The exact questions generated are unique to each individual.

This collection of information, or a subset of it, is mandatory for respondents who want to do business with SSA via the internet. We collect this information via the internet, on SSA's public-facing website. We also offer an in-person identification verification process for individuals who cannot, or are not willing, to register online. For this process, the individual must go to a local SSA field office and provide identifying information. We do not ask for financial information with the in-person process.

We only collect the identity verification information one time, when the individual registers for a credential. We ask for the User ID (username and password) every time an individual signs in to our automated services. If individuals opt for the enhanced or upgraded account, they also either receive an email message or a text message on their cell phones (this serves as the second factor for authentication) each time they sign in.

The respondents are individuals who choose to use the internet or Automated Telephone Response System to conduct business with SSA.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) **
Internet Registrations	11,788,914	1	8	1,571,855	* $29.76		*** $46,778,405
Internet Sign-Ins	124,989,089	1	1	2,083,151	* 29.76		*** 6,194,574
Intranet Registration (RCS)	54,908	1	8	7,321	* 29.76	** 24	*** 871,492
Totals	136,832,911			3,662,327			** 53,844,471

* We based this figure on average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm#00-0000*).

** We based these figures on the average FY 2022 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

II. SSA submitted the information collection below to OMB for clearance. Your comments regarding this information collection would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than October 10, 2023. Individuals can obtain

copies of this OMB clearance package by writing to the *OR.Reports.Clearance@ssa.gov*.

1. Authorization for the Social Security Administration to Obtain Wage and Employment Information from Payroll Data Providers—0960–0807. Section 824 of the Bipartisan Budget Act (BBA) of 2015, Public Law 114–74, authorizes SSA to enter into information exchanges with payroll data providers for the purposes of improving program administration and preventing improper payments in the SSDI and SSI programs. SSA uses Form SSA–8240, ''Authorization for the Social Security Administration to Obtain Wage and Employment Information from Payroll Data Providers,'' to secure the authorization needed from the relevant members of the public to obtain their wage and employment information from payroll data providers. Ultimately, SSA uses this wage and employment information to help determine program eligibility and payment amounts.

The public can complete Form SSA–8240 using the following modalities: a paper form; the internet; and an in-office or telephone interview, during which an SSA employee documents the wage and employment information authorization information on one of SSA's internal systems (the Modernized Claims System (MCS); the SSI Claims System; eWork; or iMain). The individual's authorization will remain effective until one of the following four events occurs:

- SSA makes a final adverse decision on the application for benefits, and the applicant has filed no other claims or appeals under the Title for which SSA obtained the authorization;
- the individual's eligibility for payments ends, and the individual has not filed other claims or appeals under the Title for which SSA obtained the authorization;
- the individual revokes the authorization verbally or in writing; or
- the deeming relationship ends (for SSI purposes only).

SSA requests authorization on an as-needed basis as part of the following processes: (a) SSDI and SSI initial claims; (b) SSI redeterminations; and (c) SSDI Work Continuing Disability Reviews. The respondents are individuals who file for, or are currently receiving, SSDI or SSI payments, and any person whose income and resources SSA counts when determining an individual's SSI eligibility or payment amount.

Type of Request: Revision of an OMB approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office or for teleservice centers (minutes) **	Total annual opportunity cost (dollars) **
SSA–8240 (paper)	150,000	1	8	20,000	* $12.81	.....	*** $256,200
Web Title II & Title XVI Electronic (MCS, MSSICS, and eWork)	697,580	1	3	34,879	* 12.81	* 21	*** 3,574,400
Internet	147,820	1	3	7,391	* 12.81	0	*** 94,679
Totals	995,400	.....	.....	62,270	.....	.....	*** 3,925,279

* We based this figure on the average DI payments based on SSA's current FY 2023 data (*https://www.ssa.gov/legislation/2023factsheet.pdf*).
** We based this figure by averaging the average FY 2023 wait times for field offices and teleservice centers, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. Notice to Electronic Information Exchange Partners to Provide Contractor List—0960–0820. The Federal standards Privacy Act of 1974; E-Government act of 2002; and the National Institute of Standard Special Publications 800–53–4, requires SSA to maintain oversight of the information it provides to Electronic Information Exchange Partners (EIEPs). EIEPs obtain SSA data for the administration of federally funded and state-administered programs. SSA has a responsibility to monitor and protect the personally identifiable information SSA shares with other Federal and State agencies, and private organizations through the Computer Matching and Privacy Protection Act, and the Information Exchange Agreements (IEA). Under the terms of the State Transmission Component IEA, and agency IEA, EIEPs agree to comply with Electronic Information Exchange security requirements and procedures for State and local Agencies exchanging electronic information with SSA. SSA's Technical Systems Security Requirements document provides all agencies using SSA data ensure SSA information is not processed; maintained; transmitted; or stored in; or by means of data communications channel; electronic devices; computers; or computer networks located in geographic or virtual areas not subject to U.S. law. SSA conducts tri-annual compliance reviews of all State and local agencies, and Tribes with whom we have an IEA, to verify appropriate security safeguards remain in place to protect the confidentiality of information SSA supplies. SSA requires any organization with an electronic data exchange agreement, to provide the SSA Regional Office contact a current list of contractors, or agents who have access to SSA data upon request. SSA uses Form SSA–731, Notice to Electronic Information Exchange Partners to Provide Contractor List to collect this. The respondents are Federal agencies; State, local, or tribal agencies; who exchange electronic information with SSA.

Type of Request: Revision to an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
SSA–731	300	1	20	100	* $29.76	** $2,976

* We based this figure on average State, local and tribal government worker's salaries (*https://www.bls.gov/oes/current/oes_nat.htm*).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: September 1, 2023.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2023–19371 Filed 9–7–23; 8:45 am]

BILLING CODE 4191–02–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36719]

Red River Valley & Western Railroad Company—Acquisition and Operation Exemption—Rail Line of BNSF Railway Company

Red River Valley & Western Railroad Company (RRVW), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire from BNSF Railway Company (BNSF) and to operate an approximately 0.4-mile rail line, extending from milepost 54.55 to milepost 54.95 in Casselton, Cass County, N.D. (the Line).[1]

According to the verified notice, RRVW reached an agreement with BNSF in 2006 for acquisition and operation of the Line. RRVW states that the parties' transaction was consummated in 2006 and that RRVW has been operating over the Line since that time.[2] RRVW states, however, that it recently discovered that it inadvertently neglected to seek acquisition and operation authority for the Line from the Board when it acquired the Line from BNSF. RRVW now seeks after-the-fact Board authorization for its prior acquisition and operation of the Line.[3]

RRVW certifies that the proposed acquisition of the Line does not involve any interchange commitments. RRVW further certifies that its projected revenues as a result of this transaction will not (and did not) result in the creation of a Class II or Class I rail carrier. Pursuant to 49 CFR 1150.42(e), if a carrier's projected annual revenues will exceed $5 million, it must, at least 60 days before the exemption becomes effective, post a notice of its intent to undertake the proposed transaction at the workplace of the employees on the affected lines, serve a copy of the notice on the national offices of the labor unions with employees on the affected lines, and certify to the Board that it has done so. However, RRVW has filed a request for partial waiver of the 60-day advance labor notice requirements to allow the exemption to take effect as soon as its waiver request is granted, but no earlier than 30 days after the filing of RRVW's notice of exemption. RRVW's waiver request will be addressed in a separate decision. The Board will establish the effective date of the exemption in its separate decision on the waiver request.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than September 15, 2023.

All pleadings referring to Docket No. FD 36719 should be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, one copy of each pleading must be served on RRVW's representative, William A. Mullins, Baker & Miller PLLC, 2401 Pennsylvania Avenue NW, Suite 300, Washington, DC 20037.

According to RRVW, this action is categorically excluded from environmental review under 49 CFR 1105.6(c)(1)(i) and from historic reporting requirements under 49 CFR 1105.8(b)(1).

Board decisions and notices are available at *www.stb.gov.*

Decided: September 5, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2023–19443 Filed 9–7–23; 8:45 am]

BILLING CODE 4915–01–P

[1] On September 1, 2023, RRVW filed an errata to its verified notice of exemption to note that the Line is an approximately 0.4-mile rail segment, rather than a 0.5-mile rail segment as previously indicated in its notice filed on August 23, 2023.

[2] RRVW states that, in 1987, it received authority from the agency to acquire the tracks, physical assets, and common carrier obligation for 656 miles of various rail lines from BNSF. *See Red River Valley & W. R.R.—Acquis. & Operation Exemption—Certain Lines of Burlington N. R.R.,* FD 31071 (ICC served July 22, 1987). According to RRVW, the Line was not part of that original transaction but provides a connection from the lines acquired in 1987 to one of RRVW's customers, Tharaldson Ethanol.

[3] RRVW is not seeking retroactive effectiveness for the exemption.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2023–0038]

Initial Decision That Certain Frontal Driver and Passenger Air Bag Inflators Manufactured by ARC Automotive Inc. and Delphi Automotive Systems LLC Contain a Safety Defect; and Scheduling of a Public Meeting

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of initial decision and public meeting.

SUMMARY: NHTSA will hold a public meeting regarding its initial decision that certain frontal and passenger air bag inflators manufactured by ARC and Delphi through January 2018 contain a defect related to motor vehicle safety and should be recalled.

DATES: The public meeting will be held at DOT headquarters in Washington, DC, beginning at 9:30 a.m. on October 5, 2023.

ADDRESSES: You may submit written submissions to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: 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:* 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: All submissions must include the agency name and docket number. Note that all written submissions received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Please see the Privacy Act discussion below. We will consider all written submissions received before the close of business on Friday, October 20, 2023.

Docket: For access to the docket to read background documents or written submissions received, go to *https://www.regulations.gov* at any time or to

1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. Telephone: 202–366–9826.

Privacy Act: In accordance with 49 U.S.C. 30118(b)(1), NHTSA will make a final decision only after providing an opportunity for manufacturers and any interested person to present information, views, and arguments. DOT posts written submissions submitted by manufacturers and interested persons, without edit, including any personal information the submitter 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.*

Confidential Business Information: If you wish to submit any information under a claim of confidentiality, you must submit your request directly to NHTSA's Office of the Chief Counsel. Requests for confidentiality are governed by 49 CFR part 512. NHTSA is currently treating electronic submission as an acceptable method for submitting confidential business information (CBI) to the agency under part 512. If you would like to submit a request for confidential treatment, you may email your submission to Ashley Simpson in the Office of the Chief Counsel at *Ashley.Simpson@dot.gov* or you may contact her for a secure file transfer link. At this time, you should not send a duplicate hardcopy of your electronic CBI submissions to DOT headquarters. If you claim that any of the information or documents provided to the agency constitute confidential business information within the meaning of 5 U.S.C. 552(b)(4), or are protected from disclosure pursuant to 18 U.S.C. 1905, you must submit supporting information together with the materials that are the subject of the confidentiality request, in accordance with part 512, to the Office of the Chief Counsel. Your request must include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR 512.8) and a certificate, pursuant to § 512.4(b) and part 512, appendix A. In addition, you should submit a copy, from which you have redacted the claimed confidential business information, to the Docket at the address given above.

FOR FURTHER INFORMATION CONTACT: Ashley Simpson, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (202) 366–8726. Persons wishing to attend the public meeting or make oral statements must register at *https://www.nhtsa.gov/events/public-meeting-arc-delphi-air-bag-inflators* before the close of business on September 22, 2023. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on registering for the public meeting.

The publicly available information on which this initial decision is based will be available on the agency's website at *https://www.nhtsa.gov/recalls?nhtsaId=EA16003, https://www.nhtsa.gov/recalls?nhtsaId=PE15027,* and on the public docket under Docket No. NHTSA–2023–0038.

SUPPLEMENTARY INFORMATION: Pursuant to 49 U.S.C. 30118(a) and 49 CFR 554.10, NHTSA has made an initial decision that certain frontal driver and passenger air bag inflators manufactured by ARC Automotive Inc. (ARC) and Delphi Automotive Systems LLC (Delphi) through January 2018 contain a defect related to motor vehicle safety. These air bag inflators may rupture when the vehicle's air bag is commanded to deploy, causing metal debris to be forcefully ejected into the passenger compartment of the vehicle. A rupturing air bag inflator poses an unreasonable risk of serious injury or death to vehicle occupants. At least seven people have been injured and one person has been killed by these rupturing air bag inflators within the United States. Based on its investigation, NHTSA believes that ruptures may result from the weld slag produced by the friction welding manufacturing process. Should weld slag of a sufficient size become dislodged, it can cause a blockage of the inflator exit orifice when the air bag deploys. A blockage of sufficient size will cause an over pressurization and rupture of the inflator, leading to the potential forced propulsion of shrapnel or metal fragments from the inflator into the passenger compartment. Additional inflator ruptures are expected to occur in the future, risking more serious injuries and deaths, if they are not recalled and replaced.

A. Inflators Subject to This Initial Decision

The inflators subject to this initial decision are hybrid, toroidal inflators manufactured by ARC and Delphi for use in driver and passenger air bag modules, subsequently incorporated into passenger vehicles. ARC has been manufacturing driver hybrid, toroidal inflators since 2000. In July 2001, ARC granted Delphi a license to manufacture driver inflators for use in Delphi's driver air bag modules.[1] Delphi stopped manufacturing the inflators in 2004, having manufactured approximately 11 million inflators under the agreement. ARC continued to manufacture the driver inflators and began to manufacture passenger inflators in 2010. In January 2018, ARC fully implemented an automated borescope examination process on its production lines that manufactured toroidal inflators, which is used to detect excessive weld slag or other debris in the inflator center support, mitigating the risk of a field rupture due to exit orifice blockage. The agency is unaware of a field rupture of a frontal hybrid, toroidal inflator manufactured after the implementation of the borescope examination process.

Therefore, the inflators subject to this initial decision are the approximately 41 million frontal hybrid, toroidal driver and passenger inflators manufactured by ARC from 2000 through the implementation of the borescope examination process in January 2018, and the approximately 11 million driver hybrid, toroidal inflators manufactured by Delphi under its licensing agreement with ARC.[2] For simplicity, the inflators subject to this initial decision are described as the ''subject inflators.'' The subject inflators were incorporated into air bag modules used in vehicles manufactured by 12 vehicle manufacturers: BMW of North America, LLC, FCA US LLC, Ford Motor Company, General Motors LLC, Hyundai Motor America, Inc., Kia America, Inc., Maserati North America, Inc., Mercedes-Benz USA LLC, Porsche Cars North America, Inc., Tesla Inc., Toyota Motor North America, Inc., and Volkswagen Group of America, Inc.

[1] The Delphi entity that manufactured these inflators no longer exists. NHTSA indicated in its April 27, 2023 recall request letter that it was acquired by Autoliv ASP, Inc. (''Autoliv''). Autoliv has since provided NHTSA with some information indicating that it may not have legal liability for the Delphi-manufactured inflators. At this time, NHTSA has not verified the entity that has legal responsibility under 49 U.S.C. Chapter 301 for those inflators. However, as described herein, the vehicle manufacturers that used the inflators as original equipment would be responsible for carrying out any recalls.

[2] NHTSA's April 27, 2023 recall request letter estimated the number of subject inflators as approximately 67 million. Since that time, NHTSA has lowered its estimate of the population to approximately 52 million inflators, correcting for over-inclusive responses reported to the agency by certain manufacturers over the course of the investigation. The exact population of inflators and vehicles (including the specific vehicle makes, models, and model years) subject to any recall that may result will be determined by the manufacturers. *See* 49 CFR 573.6(c)(3).

B. Known Inflator Ruptures Resulting in Death and Injuries

The agency is currently aware of seven confirmed subject inflator ruptures in the United States. These seven ruptures involve both single stage and dual stage air bag inflators (as explained below), inflators manufactured at different times and in three different manufacturing facilities, and inflators incorporated into air bag modules by four different module suppliers and used in four different vehicle manufacturers' vehicles:

- On January 29, 2009, a driver side air bag inflator ruptured in a Model Year (MY) 2002 Chrysler Town and Country minivan in Ohio. The air bag module was produced by Key Safety Systems, Inc. later d/b/a Joyson Safety Systems and used a dual stage ARC inflator. The inflator was manufactured in Knoxville, Tennessee. The driver was severely injured during the incident.
- On April 8, 2014, a driver side air bag inflator ruptured in a MY 2004 Kia Optima in New Mexico. The air bag module was manufactured by Delphi and had a single stage ARC inflator. The inflator was manufactured in Knoxville, Tennessee. The driver sustained injuries to the face and legs.
- On September 22, 2017, a driver side air bag inflator ruptured in a MY 2010 Chevrolet Malibu in Pennsylvania. The air bag module was produced by ZF–TRW and used a dual stage ARC inflator. The inflator was manufactured in Xian, China. The driver sustained injuries to the face and head.
- On August 15, 2021, a driver side air bag inflator in a MY 2015 Chevrolet Traverse ruptured in Michigan. The air bag module was produced by Toyoda Gosei and used a dual stage ARC inflator. The inflator was manufactured in Reynosa, Mexico. The air bag module was a replacement module. The vehicle had been in a prior frontal collision and the original air bag module deployed with no issue. The original air bag module was also produced by Toyoda Gosei and used a dual stage ARC inflator. The driver was killed.
- On October 20, 2021, a driver side air bag inflator in a MY 2015 Chevrolet Traverse ruptured in Kentucky. The air bag module was produced by Toyoda Gosei and used a dual stage ARC inflator. The inflator was manufactured in Reynosa, Mexico. The driver sustained injuries to the face.
- On December 18, 2021, a passenger side air bag inflator ruptured in a MY 2016 Audi A3 e-Tron in California. The air bag module was produced by Key Safety Systems, Inc. d/b/a Joyson Safety Systems and used a dual stage ARC inflator. The inflator was manufactured in Reynosa, Mexico. The driver and passenger were injured.
- On March 22, 2023, a driver side air bag inflator in a MY 2017 Chevrolet Traverse ruptured in Michigan. The air bag module was produced by Toyoda Gosei and used a dual stage ARC inflator. The inflator was manufactured in Reynosa, Mexico. The driver sustained injuries to the face.

NHTSA is also aware of at least two confirmed field ruptures outside of the United States, again involving the same universe of inflators of varying origins and uses:

- On July 11, 2016, a driver side air bag inflator ruptured in a MY 2009 Hyundai Elantra in Canada. The air bag module was produced by Mobis and used a single stage ARC air bag inflator. The inflator was manufactured in Xian, China. The driver was killed.
- On October 16, 2017, a passenger side air bag inflator ruptured in a MY 2015 Volkswagen Golf in Turkey. The air bag module was produced by Key Safety Systems, Inc. later d/b/a Joyson Safety Systems and used a single stage ARC inflator. The inflator was manufactured in Knoxville, Tennessee. The driver sustained no injuries. There was no passenger in the vehicle.

C. Background Regarding Air Bags

Air bags are safety equipment designed to protect vehicle occupants in the event of a crash. Air bags have been used in passenger vehicles since the 1970s and were mandated by NHTSA in 1991. All new vehicles were required to have frontal air bags by September 1998. Paired with seat belts, air bags control the movement of the occupant's upper body and head during a moderate to severe crash—defined as a frontal or near-frontal impact with a solid, fixed barrier at 8 to 14 mph or higher. Upon such an occurrence, a signal to the air bag system's electronic control unit initiates the ignition of the inflator propellant to generate the gas to immediately fill the air bag cushion.

The subject inflators are hybrid, toroidal inflators. A hybrid inflator uses stored gas that is excited by the propellant to fill the air bag cushion. Toroidal inflators are round, non-cylindrical inflators. The subject inflators include both single stage and dual stage inflators. Single stage inflators deploy at a preset speed and at full force. Dual stage inflators deploy at two different stages depending on the size of the occupant as measured by the load sensor in the front seat and the severity of the impact.[3] The subject inflators were incorporated into air bag modules produced by multiple suppliers. The air bag ''inflator'' is a component of the air bag ''module''—the inflator is the part that generates the gas that fills the air bag cushion. The air bag module is typically comprised of a mounting bracket, inflator, cushion (bag that fills with gas), cover (the decorative part that matches the interior of the vehicle), and connecting wires.

Although air bags, when properly deployed, provide significant safety benefits—NHTSA estimates that frontal air bags have saved more than 50 thousand lives over the past 30 years—the rupture of an air bag inflator during deployment is rare and extremely dangerous. Although the incidence of rupture is rare, NHTSA and the industry have acted to address confirmed ruptures through recalls. Other confirmed inflator field ruptures in the United States, excluding illegal counterfeit products, have resulted in recalls.[4] There is widespread acceptance in the industry that rupturing air bag inflators are safety defects requiring a recall.[5]

[3] The two inflation stages can deploy sequentially or simultaneously. Typically, the first stage is approximately 80% of the full force of the air bag, and the second stage is approximately 20% of the full force of the air bag. The second stage can deploy simultaneously with the first stage should the severity of the impact warrant dual deployment. The second stage can deploy subsequent to the deployment of the first stage for lower severity impacts.

[4] In the largest air bag inflator recall, TK Holdings, Inc. (Takata) issued recalls after determining that certain driver and passenger inflators ruptured when activated. *See, e.g.,* 15E–040, 15E–041, 15E–042, 15E–043. In fact, NHTSA's recall request letter to Takata identified six inflator ruptures, one less than identified here. In that case, the safety defect was degradation of propellant. Takata subsequently recalled certain non-azide driver inflators (NADI) due to rupture risk caused by excess moisture in the propellant. 19E–080. Other inflator ruptures have also been addressed through recalls. In 2021, Key Safety Systems, Inc. d/b/a Joyson Safety Systems recalled certain curtain air bag inflators which carried a risk of rupture due to moisture corrosion. 21E–080. In 2021, FCA recalled certain Mopar side curtain air bag inflators for risk of separated inflator cap or rupture. 21E–740. Volvo Car USA, LLC conducted a recall in 2021 of certain vehicles equipped with inflators manufactured by ZF North America, Inc. for susceptibility to rupture due to excess moisture and propellant degradation. *See* 21V–766, 21V–800.

[5] Failure of an air bag module to deploy in a crash when it should have deployed also puts vehicle occupants at risk and therefore has resulted in recalls. *See, e.g.,* 22V–031. The severity of risk of a module that ruptures is even greater in that it not only fails to protect vehicle occupants from crash forces, but itself becomes the cause of injury or death by shooting metal shrapnel into the occupant compartment.

D. Legal Background on Safety Defects and Recall Responsibilities

The National Traffic and Motor Vehicle Safety Act (Safety Act), as amended, requires manufacturers to conduct a recall for safety defects in motor vehicles and motor vehicle equipment. *See* 49 U.S.C. 30118–20. Specifically, a manufacturer must notify NHTSA, owners, dealers, and distributors of any ''defect . . . related to motor vehicle safety.'' 49 U.S.C. 30118. The Safety Act defines ''defect'' as ''includ[ing] any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.'' 49 U.S.C. 30102(a)(2). ''Motor vehicle safety'' means ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.'' *Id.* § 30101(a)(8). A safety defect therefore may be determined to exist without knowing its precise cause.

A motor vehicle or component contains a ''defect'' if it is subject to a significant number of failures in normal operation. *See United States* v. *General Motors Corp.,* 518 F.2d 420, 427 (D.D.C. 1975). To establish that a significant number of failures exists, the agency need only show that the figure is more than *de minimis. See id.* at 438 n.84. The agency must also show that the failure condition occurred under circumstances which, in the absence of a defect, would not have occurred. *See United States* v. *General Motors Corp.,* 841 F.2d 400, 412 (D.C. Cir. 1988).

Any safety defect determination, whether made by NHTSA or by a manufacturer, requires notification to owners pursuant to 49 U.S.C. 30119 and a free remedy pursuant to 49 U.S.C. 30120. Under the Safety Act, an air bag inflator installed in a new vehicle is original equipment. *See id.* § 30102(a)(8), (b)(1)(C). For recall purposes, ''a defect in original equipment . . . is deemed to be a defect . . . of the motor vehicle in which the equipment was installed at the time of delivery to the first purchaser.'' *Id.* § 30102(b)(1)(F).

When a safety defect exists in original equipment used by more than one vehicle manufacturer, as in this case, the equipment supplier and each vehicle manufacturer must notify the agency by filing a recall report pursuant to 49 CFR part 573. 49 CFR 573.3(f). Vehicle manufacturers are then generally responsible for carrying out recalls for their vehicles containing defective parts, such as air bag inflators, by notifying vehicle owners and providing a free remedy. *See* 49 U.S.C. 30102(b)(1)(F), 30118–20. An equipment manufacturer is responsible under the Safety Act for recalling its replacement equipment. *See id.* 30118. Replacement equipment is ''motor vehicle equipment . . . that is not original equipment.'' *Id.* § 30102(b)(1)(D).

E. The Agency's Investigation

On July 13, 2015, NHTSA's Office of Defects Investigation (ODI) opened a Preliminary Evaluation (PE) defect investigation, identified as PE15–027, to investigate an alleged safety defect in hybrid, toroidal inflators designed and manufactured by ARC [6] for use in vehicles sold or leased in the United States.

NHTSA's investigation was prompted by reports of driver air bag inflator ruptures in a MY 2002 Chrysler Town & Country and a MY 2004 Kia Optima. Both vehicles were equipped with inflators manufactured by ARC in Knoxville, Tennessee. During the PE phase of the investigation, NHTSA obtained information from ARC identifying the air bag module manufacturers to which it supplied inflators during the time period of June 2000 through October 2004. The time frame for the initial inquiry was bracketed by the date that ARC commenced production of the hybrid toroidal inflator and the build date of the Kia Optima. NHTSA then obtained information from the module manufacturers to identify the vehicle manufacturers that used the inflators.

NHTSA also ordered vehicle and inflator manufacturers, including ARC, to report to the agency information related to any inflator field ruptures.[7] Standing General Order (SGO) 2015–02. The agency also began to work with the involved manufacturers to conduct a field recovery program to better understand the potential failure modes.

On July 11, 2016, the ARC-manufactured inflator in a MY 2009 Hyundai Elantra ruptured in Canada. That rupture, which resulted in a fatality, prompted ODI's upgrade of the investigation to the Engineering Analysis phase, then identified as EA16–003, on August 4, 2016. The ruptured inflator was manufactured by ARC in Xian, China. ARC confirmed that the ruptured inflator was substantially similar to the inflator at issue in the prior Kia Optima rupture in that the inflators underwent the same assembly and manufacturing process.

The agency continued its investigation, issuing information request letters to the manufacturers and issuing Standing General Order 2016–01. Standing General Order 2016–01 requires ARC to notify the agency of an inflator rupture occurring during a lot acceptance test,[8] hydroburst test,[9] or assembly line gas fill.[10] This initial notification must be made within 24 hours of ARC's notice of such an event. The order also requires ARC to make additional reporting about the rupture as its investigation into such a rupture progresses. SGO 2016–01 was superseded by SGO 2017–01, which revised the reportable rupture incidents to include only those occurring during lot acceptance tests.

Since issuing these Standing General Orders, vehicle manufacturers have confirmed and reported to the agency five additional field ruptures in the United States involving the subject inflators. To date, manufacturers have generally conducted small lot-specific recalls to address inflator ruptures.[11] In May 2023, General Motors LLC also initiated a recall to address a somewhat broader scope of vehicles by model and model year.[12] The vast majority of the subject inflators covered by this notice are not covered by these existing recalls.

NHTSA's investigation revealed a potential failure mechanism most likely causing the ruptures. ARC designed and manufactured the subject inflators using a method called friction welding to join

[6] Approximately 11 million of the subject inflators were designed by ARC but manufactured by Delphi.

[7] The term field rupture refers to an inflator rupture that occurs when a vehicle is in a crash.

[8] A lot acceptance test refers to the random testing of completed air bag inflators. This test is conducted at the beginning, middle, and end of a manufacturing shift, or at any time the assembly line is shifted to production of a different part. If an inflator ruptures or fails in some way during a lot acceptance test, the entire lot of inflators is quarantined. The term ''lot'' refers to the number of inflators that were manufactured in an identified manufacturing plant on a specific assembly line for a specific shift.

[9] A hydroburst test is a destructive examination of the strength of the inflator housing. An inflator subject to a hydroburst test is filled with water until its housing fails. The housing is instrumented to measure the water pressure attained. An inflator that bursts prior to attaining the pressure specifications for its housing fails the test.

[10] An assembly line gas fill refers to the process of filling the inflator with compressed gas. During that process, ruptures may occasionally occur when the compressed gas is exposed to the heat generated during the gas fill and welding of the burst disc.

[11] *See* Recalls 17V–189, 17V–529, 19V–019, 21V–782, 22V–246, 22E–040, and 22V–543. These recalls collectively cover a population of 6,289 vehicles and 74 service parts.

[12] *See* Recall 23V–334. This recall covers 995,085 MY 2014–2017 Buick Enclave, Chevrolet Traverse, and GMC Acadia vehicles.

the inflator upper and lower pressure vessels. The friction welding process, in some circumstances, produced excess weld slag, which, if loose, will be propelled toward the inflator exit orifice during an air bag deployment, along with any other debris in the inflator center support. As explained in the agency's recall request letter to ARC:

> ARC's inflator design is such that during a triggered deployment, the stored gas, excited by the propellant, has a single path through the exit orifice to exit the inflator and fill the air bag cushion. Should any debris of sufficient size be in the inflator center support, the exit orifice could become blocked. Blockage of the exit orifice could cause over pressurization of the air bag inflator. Over pressurization of the inflator has the potential to cause it to rupture resulting in metal fragments being forcefully propelled into the passenger compartment.

NHTSA's April 27, 2023 Recall Request Letter to ARC, page 2. This occurrence can lead to injury or death of the vehicle occupants in what would otherwise be a normal and safe air bag deployment.

ARC took steps to address this issue in January 2018, when it completed the borescope installation on its toroidal inflator manufacturing lines. The borescope examination process effectively allows ARC to detect the occurrence of excess weld slag or other debris in its inflators, and there are no known field ruptures in ARC's hybrid, toroidal inflators manufactured after January 2018. However, prior to the implementation of the borescope inspections, ARC and Delphi collectively manufactured and sold approximately 52 million subject inflators for use in vehicles sold or leased in the United States that may contain excess slag.

NHTSA continued its investigation, with further testing and coordination with the involved manufacturers, to determine appropriate next steps to address the risk associated with these inflators. A field recovery program of the subject inflators concluded in April 2018, in which subject inflators in MY 2001–2005 vehicles were collected from salvage yards and tested at ARC's Knoxville facility. None of the over 900 inflators ruptured in that testing program.

Further work determined that any loose debris in the center support will follow the air flow during a deployment to exit through the center support exit orifice. If the debris is smaller than the exit orifice, the debris will not block the airflow and result in a rupture. However, if the debris is larger than the diameter of the exit orifice, it will not be able to pass through the exit orifice, causing a blockage. A blockage of sufficient size will lead to an over pressurization of the inflator that results in an inflator rupture.

Despite no ruptures observed in the field recovery program testing of inflators removed from MY 2002–2005 vehicles and described above, manufacturers subsequently reported and confirmed three field ruptures of the subject inflators in 2021. The agency continued its investigation and although 2022 passed with no known incidents, another field rupture occurred in March 2023.

F. The Agency's April 2023 Request That ARC Conduct a Recall

After learning of a March 22, 2023, driver-side air bag inflator rupture in a MY 2017 Chevrolet Traverse in Michigan, in which the driver was injured, the agency determined that the then current response to the incidents (lot recalls) was insufficient and advised ARC by letter on April 27, 2023 of its tentative conclusion that the subject inflators pose an unreasonable risk of death and injury and therefore contain a safety-related defect within the meaning of the Safety Act. The earlier lot recalls were insufficient to address the safety risk, as new ruptures continued to occur outside of the recalled populations. In the April 27, 2023 letter, ODI requested that ARC initiate a recall of all subject inflators, in accordance with 49 U.S.C. 30118–20. In its May 11, 2023 response to ODI, ARC declined to submit a Part 573 recall report for the subject inflators, arguing that the agency lacks sufficient evidence to find the existence of a safety defect and minimizing the seven confirmed ruptures in the United States as merely ''occasional or isolated failures that are an inevitable part of any volume manufacturing process.'' [13] Additional arguments raised by ARC in its response are addressed further below.

G. Additional Information on the Initial Decision of a Safety Defect

Based on its investigation, NHTSA has made an initial decision, pursuant to 49 U.S.C. 30118(a) and 49 CFR 554.10, that the subject inflators contain a safety-related defect. Air bag inflators that rupture when commanded to deploy are plainly defective, as they both fail to protect vehicle occupants as they should, and, themselves, pose an unreasonable risk of serious injury or death to vehicle occupants. Air bags are essential and required items of motor vehicle equipment. *See* 49 CFR 571.208. Absent a defect, an air bag inflator inflates the air bag, helping to minimize or avoid injury to occupants in a crash. An air bag inflator that fails by rupture not only does not perform its job as a safety device, but instead actively threatens injury or death, even in a crash where the vehicle occupants would otherwise have been unharmed. This defect poses an unreasonable risk of injury or death from metal fragments forcibly propelled into the passenger compartment of a vehicle when the inflator ruptures.

As explained in NHTSA's April 27, 2023, recall request letter, identifying the root cause of the failure is not necessary to make a safety defect determination. *See United States* v. *Gen. Motors Corp.,* 518 F.2d 420, 432 (D.C. Cir. 1975). A defect can occur in the ''performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.'' 49 U.S.C. 30102(a)(3). Similarly, ''motor vehicle safety'' is ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.'' 49 U.S.C. 30102(a)(9). The D.C. Circuit explained that ''a determination of 'defect' does not require any predicate of a finding identifying engineering, metallurgical, or manufacturing failures.'' *Gen. Motors Corp.,* 518 F.2d at 432.

Here, NHTSA believes that the evidence does identify a likely cause. The manufacture of the subject inflators included a friction welding process that in some inflators produces weld slag. Upon normal deployment of an air bag in a crash, any debris, if larger than the 5-millimeter diameter of the exit orifice of the inflator center support, can become lodged in that exit orifice and block the air flow required to fill the air bag cushion. The inability of the air to exit the inflator due to the blocked exit orifice can lead to over pressurization of the air bag inflator. The over pressurization can lead to a rupture of the air bag inflator. A rupture of the air bag inflator will forcefully propel metal fragments into the passenger compartment, likely causing significant injury or death to the vehicle occupant(s).

ARC's argument that the root cause ''has not been confirmed,'' or purportedly is not the cause of some of the ruptures, is not a reason for delaying a recall. ''A determination of 'defect'

[13] *See* ARC's May 11, 2023 response to NHTSA's Recall Request letter, page 2.

may be based exclusively on the performance record of the vehicle or component.'' *Id.* ''[T]he Government need only establish a significant number of . . . failures'' where significant is defined as a ''non-*de minimis* number of failures.'' *Id.* at 438. Here, there is no dispute that ARC inflators have repeatedly ruptured and that those ruptures have severely injured and killed vehicle occupants.

While establishing the root cause is unnecessary for a recall determination, these ruptures certainly constitute evidence of failure in the performance of motor vehicle equipment. The seven ruptures confirmed thus far in the United States are not *de minimis* in equipment that is specifically manufactured to save lives and minimize or prevent injuries, but instead have *caused* deaths and injuries in survivable crashes. For these reasons, ARC's attempts to distinguish the ruptures from each other misses the point. The fact that the subject population has experienced seven confirmed ruptures, no matter the root cause, warrants the initial determination of a safety defect.

A failure of an air bag inflator has far more serious safety consequences than that of most other vehicle equipment. Therefore, fewer failures are necessary to exceed the *de minimis* threshold. This is acknowledged by the industry based on the prior history of recall precedents addressing confirmed field ruptures of other air bag inflators, as described above.

ARC inappropriately minimizes the severity of risk from its rupturing inflators by describing these events as manufacturing anomalies or a part of normal business.[14] Specifically, ARC characterized the ruptures as ''isolated events'' and ''an inevitable part of any volume manufacturing process.'' NHTSA rejects any suggestion that the seven inflator ruptures are in some way normal or to be expected, absent a safety defect. Indeed, the industry has recognized the serious safety impact of inflator ruptures even in this specific case by conducting the eight recalls that have already occurred for parts of the subject inflator population. An inflator that explosively ruptures, propelling metal fragments at a high velocity into an occupied passenger compartment of a motor vehicle—and into the occupants themselves—cannot simply be dismissed as a normal manufacturing anomaly, with vehicle owners left uninformed yet bearing the risk of the peril they and their occupants face.

Nor are after-the-fact recalls of sub-populations of the subject inflators enough to address the unreasonable risk. The subject air bag inflators have repeatedly ruptured in vehicles, injuring and killing vehicle occupants. Those rupturing inflators were manufactured at different times in plants located in three different countries, used in air bag modules manufactured by four different suppliers, and installed in vehicles produced by four different manufacturers. New ruptures have unpredictably occurred outside the sub-populations of vehicles recalled, and it is expected that additional ruptures will occur in the future. *See United States* v. *General Motors,* 565 F. 2d 754, 758 (D.C. Cir. 1977) (''[W]here a defect—a term used in the sense of an 'error or mistake'—has been established in a motor vehicle, and where this defect results in hazards as potentially dangerous as a sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future, then the defect must be viewed as one 'related to motor vehicle safety.' '') (footnotes omitted). The Safety Act is preventive, and a recall of the subject inflators should not wait for more injuries or deaths to occur. *See, e.g., United States* v. *Gen. Motors Corp.,* 565 F.2d 754, 759 (D.C. Cir. 1977) (''The purpose of the Safety Act . . . is not to protect individuals from the risks associated with defective vehicles only after serious injuries have already occurred; it is to prevent serious injuries stemming from established defects before they occur.'').

The large size of the subject population involved here does not negate the need for a recall. ARC suggested that the rupture risk of the subject inflators is properly captured by noting that only 7 of the then estimated 67 million subject inflators have been known to rupture, concluding that the rupture rate is 7 out of 67 million.[15] ARC argued that—

> the existence of seven (or, more accurately, five) field incidents among the 67 million toroidal driver and passenger inflators produced for the U.S. market during the 18-year period referenced in the RRL across multiple manufacturing lines in different plant locations does not support a finding that a systemic and prevalent defect exists across this population.
>
> ARC's May 11, 2023 Response to NHTSA's Recall Request Letter, page 2.

However, ARC's use of the entire subject inflator population as the baseline results in an inaccurate assessment of the risk. As crashes are relatively uncommon events, the vast majority of the subject inflators have not experienced a command for deployment, and the defect manifests itself only upon air bag deployment. Therefore, the rupture rate of the subject inflators is properly estimated as the ratio of inflators ruptures to total *field air bag deployments*—not to the total subject inflator population. NHTSA estimates that approximately 2,600,000 of the subject air bag inflators have deployed in the field.[16] A more accurate representation of the rupture risk of the subject inflators is, therefore, 7 out of 2.6 million.

Finally, in response to ARC's argument that it was not a proper recipient of the recall request letter (which it mischaracterizes as ''procedurally faulty''), NHTSA notes that its recall request was based on ARC's legal obligation to file notice of a safety defect with NHTSA (*See* 49 CFR 573.3(f)) and in accordance with established practice. NHTSA previously sent a recall request letter to Takata concerning six identified ruptures of its air bag inflators, which ultimately resulted in recalls carried out by the vehicle manufacturers that used the approximately 67 million defective Takata inflators.[17] As described above, when a safety defect is identified in original equipment supplied to more than one manufacturer, the equipment manufacturer and each manufacturer of vehicles in which the equipment has been installed must file Part 573 recall reports with NHTSA, which are each assigned a unique recall number. *See* 49 CFR 573.3.

To be clear, the vehicle manufacturers that used the subject inflators as original equipment would be legally responsible for carrying out any recalls of those inflators, including providing notice to

[14] ''ARC recognizes, however, that even with appropriate industry standards . . . and efforts by manufacturers to minimize the risks of failures, the manufacturing processes may not completely eliminate the risk of occasional or isolated failures.'' ARC June 14, 2023 Special Order Response at 5.

[15] As noted above, the estimated population is now corrected to approximately 52 million.

[16] This estimate assumes that: (1) In any given year, 0.4% of the vehicles with subject inflators on the road experience a frontal impact with a delta-V of 15 mph or more. (This figure was derived from the light trucks in the 2015 Fatality Analysis Reporting System (FARS), 2015 General Estimates System (GES), 2016 vehicle registration data from S&P Global Mobility's (f/k/a R.L. Polk, Inc), and 2015 Crashworthiness Data System.); (2) The subject inflators deploy at about a change in velocity of 15 mph, regardless of other conditions (such as, in the case of passenger air bags, whether a person of a threshold weight is in the passenger seat); and (3) the vehicles with subject inflators remain on the road according to the average of the car and class 1–2a light truck attrition models from NHTSA's 2016 CAFE Model.

[17] November 26, 2014 Recall Request Letter to TK Holdings Inc., *https://static.nhtsa.gov/odi/inv/2014/INRM-PE14016-60978.pdf.*

vehicle owners and a free remedy. *See* 49 U.S.C. 30118–20. That does not excuse ARC—the manufacturer and designer of the inflators—from complying with its own obligations under the Safety Act and regulations.

To address the risk that additional vehicle occupants will be killed and injured from these rupturing inflators, the agency has made this initial determination that the subject hybrid, toroidal inflators designed by ARC and manufactured by ARC and Delphi from 2000 through January 2018 are defective and pose an unreasonable risk of death or injury, and therefore should be recalled.

Pursuant to the Safety Act, NHTSA may make a final decision ''only after giving the manufacturer[s] an opportunity to present information, views, and arguments showing that there is no defect or noncompliance or that the defect does not affect motor vehicle safety. Any interested person also shall be given an opportunity to present information, views, and arguments.'' 49 U.S.C. 30118(b)(1). If NHTSA makes a final decision that the subject inflators contain a safety defect, NHTSA will order ARC to comply with the obligation to file notice of the safety defect with the agency [18] and will order the vehicle manufacturers to carry out recalls by providing notice and a free remedy. *See id.* § 30118(b)(2).

H. Public Meeting

Pursuant to 49 U.S.C. 30118(b)(1) and 49 CFR 554.10(b), NHTSA will conduct a public meeting, beginning at 9:30 a.m., October 5, 2023, in the West Atrium, U.S. Department of Transportation Building, 1200 New Jersey Avenue SE, Washington, DC, at which time ARC, the manufacturers that used the subject inflators in their vehicles, and other interested persons will have an opportunity to present information, views, and arguments on the issue of whether the subject inflators contain a safety defect. A transcript of the public meeting will be taken.

The public meeting will also be livestreamed on NHTSA's website. The livestream will allow viewing only.

Interested persons are invited to participate in this proceeding through written and/or oral statements. Written submissions must be submitted with the docket number identified in the heading of this document through the Federal eRulemaking Portal, mail, hand delivery, or fax as outlined above before the close of business on Friday, October 20, 2023.

Persons wishing to attend the public meeting or make oral statements must register at *https://www.nhtsa.gov/events/public-meeting-arc-delphi-air-bag-inflators* before the close of business on September 22, 2023. Each person wishing to attend must provide his or her name, organization, and country of citizenship. Non-U.S. citizens must also provide date of birth, title or position, and passport or diplomatic ID number, along with expiration date. Media is invited to attend in-person or watch the event's livestream. Members of the media should register by emailing *NHTSAMedia@dot.gov* with their name, outlet, and attendance preference.

Anyone wishing to make an oral statement must attend the public meeting in person and should specify in registering the amount of time that the statement is expected to last. Any exhibits should be submitted into the public docket in accordance with the instructions in this notice rather than be presented during the public meeting. The agency will prepare a schedule of oral statements. Depending upon the number of persons who wish to make oral statements and the anticipated length of those statements, the agency may limit the length of oral statements to ensure the public meeting may be completed on October 5. Registrants who request to make oral statements will be notified in advance, on or about September 29, 2023, with additional details.

NHTSA is committed to providing equal access to this event for all participants, and people who need accommodations should send a request to Carla Bridges, Office of the Chief Counsel, National Highway Traffic Safety Administration by email at *Carla.Bridges@dot.gov* before the close of business on September 22, 2023.

This will not be a formal adjudicatory proceeding. There is no cross-examination of witnesses.

Authority: 49 U.S.C. 30118(a), (b); 49 CFR 554.10; delegations of authority at 49 CFR 1.50(a) and 49 CFR 501.8.

Issued on: September 5, 2023.

Cem Hatipoglu,

Acting Associate Administrator for Enforcement.

[FR Doc. 2023–19441 Filed 9–5–23; 4:15 pm]

BILLING CODE 4910–59–P

[18] Any entity determined responsible for the Delphi-manufactured inflators may also be subject to this order.

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2016–0023]

Extension of a Previously Approved Collection: Public Charters

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Department of Transportation (DOT) invites the general public, industry and other governmental parties to comment on Public Charters. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on April 21, 2023. No comments were received.

DATES: Written comments should be submitted by October 10, 2023.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725 17th Street NW, Washington, DC 20503. Comments may also be sent via email to OMB at the following address: *oira_submissions@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Reather Flemmings (202–366–1865) and Mr. Brett Kruger (202–366–8025), Office of the Secretary, Office of International Aviation, U.S. Air Carrier Licensing/Special Authorities Division–X44, 1200 New Jersey Ave. SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2106–0005.

Title: Public Charters, 14 CFR part 380.

Form Numbers: 4532, 4533, 4534, 4535.

Type of Review: Extension of a Previously Approved Collection: The current OMB inventory has not changed.

Abstract: 14 CFR part 380 establishes regulations embodying the Department's terms and conditions for Public Charter operators to conduct air transportation using direct air carriers. Public Charter operators arrange transportation for groups of people on chartered aircraft. This arrangement is often less expensive for the travelers than individually buying a ticket. Part 380 exempts charter operators from certain provisions of the U.S. code in order that they may provide this service. A primary goal of part 380 is to seek

protection for the consumer. Accordingly, the rule stipulates that the charter operator must file evidence (a prospectus—consisting of OST Forms 4532, 4533, 4534, 4535, and supporting financial documents) with the Department for each charter program certifying that it has entered into a binding contract with a direct air carrier to provide air transportation and that it has also entered into agreements with Department-approved financial institutions for the protection of charter participants' funds. The prospectus must be accepted by the Department prior to the operator's advertising, selling or operating the charter. If the prospectus information were not collected it would be extremely difficult to assure compliance with agency rules and to assure that public security and other consumer protection requirements were in place for the traveling public. The information collected is available for public inspection (*unless the respondent specifically requests confidential treatment*). Part 380 does not provide any assurances of confidentiality.

Burden Statement: Completion of all forms in a prospectus can be accomplished in approximately two hours (30 minutes per form) for new filers and one hour for amendments (existing filings). The forms are simplified and request only basic information about the proposed programs and the private sector filer. The respondent can submit a filing to operate for up to one year and include as many flights as desired, in most cases. If an operator chooses to make changes to a previously approved charter operation, then the operator is required by regulations to file revisions to its original prospectus.

Respondents: Private Sector: Air carriers; tour operators; the general public (including groups and individuals, corporations and Universities or Colleges, etc.).

Number of Respondents: 245.

Number of Responses: 1,782.

Total Annual Burden: 891.

Frequency of Responses:

245 (respondents) × 4 = 980

401 (amendments *from the same respondents*) × 2 = 802

Total estimated responses: 980 + 802 = 1,782

The frequency of response is dependent upon whether the operator is requesting a new program or amending an existing prospectus. Variations occur due to the respondents' criteria. On average four responses (forms 4532, 4533, 4534 and/or 4535) are required for filing new prospectuses and two of the responses (forms) are required for amendments. The separate hour burden estimate is as follows:

Total Annual Burden: 891 hours.

Approximately 1,782 (responses) × 0.50 (per form) = 891

Public Comments Invited: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information collection; and (d) ways to minimize the burden of the collection of information on respondents, by the use of electronic means, including the use of automated collection techniques or other forms of information technology. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

A **Federal Register** Notice with a 60-day comment period on the information collection was published on April 21, 2023 (88 FR 24659).

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued in Washington, DC, on September 1, 2023.

Benjamin J. Taylor,

Director, Office of International Aviation.

[FR Doc. 2023–19353 Filed 9–7–23; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Requesting Comments on TD 9923, Guidance Under Section 529A: Qualified ABLE Programs

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Treasury Regulation section 1.529A–2 in Treasury Decision (TD) 9923 relating to qualified ABLE programs.

DATES: Written comments should be received on or before November 7, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include OMB Control No. 1545–2293 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to Jon Callahan, (737) 800–7639, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *jon.r.callahan@irs.gov.*

SUPPLEMENTARY INFORMATION: The IRS is currently seeking comments concerning the following information collection tools, reporting, and record-keeping requirements:

Title: Guidance under Section 529A: Qualified ABLE Programs.

OMB Number: 1545–2293.

Regulatory Number: TD 9923.

Abstract: The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014, as part of The Tax Increase Prevention Act of 2014 (Pub. L. 113–295), added Internal Revenue Code (IRC) section 529A. IRC section 529A provides rules under which States or State agencies or instrumentalities may establish and maintain a new type of tax-favored savings program through which contributions may be made to the account of an eligible disabled individual to meet qualified disability expenses. These accounts also receive favorable treatment for purposes of certain means-tested Federal programs. Treasury Regulations section 1.529A–2 provides guidance about the requirements applicable to qualified ABLE programs and individuals seeking to establish ABLE accounts under such programs.

Current Actions: There is no change to the existing collection.

Type of Review: Extension of a currently approved collection.

Affected Public: States, and Individuals or households.

Estimated Number of Responses: 28,987.

Estimated Time per Respondent: 22 minutes.

Estimated Total Annual Burden Hours: 10,729.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information

displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 1, 2023.

Jon R. Callahan,

Senior Tax Analyst.

[FR Doc. 2023–19352 Filed 9–7–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–XXXX]

Agency Information Collection Activity Under OMB Review: Request for Retroactive Induction for a Period Previously Completed Under Chapter 33 (Chapter 31—Veteran Readiness and Employment)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits 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 by clicking on the following link *www.reginfo.gov/public/do/PRAMain, select* ''Currently under Review—Open for Public Comments'', then search the list for the information collection by Title or ''OMB Control No. 2900–XXXX.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–XXXX'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 3102, 3103, 3108, 5113.

Title: Request For Retroactive Induction For A Period Previously Completed Under Chapter 33 (Chapter 31—Veteran Readiness and Employment), VA form 28–10286.

OMB Control Number: 2900–XXXX.

Type of Review: Request for approval of a new collection.

Abstract: The Department of Veterans Affairs (VA) through its Veterans Benefits Administration (VBA) administers an integrated program of benefits and services, established by law, for Veterans, service personnel, and their dependents and/or beneficiaries. Title 38 U.S.C. 5101(a) provides that a specific claim in the form provided by the Secretary must be filed for benefits to be paid to any individual under the laws administered by the Secretary. Additionally, 38 U.S.C. 501(a) provides VA the authority to collect this information. VA Form (VAF) 28–10286, Request For Retroactive Induction for a Period Previously Completed Under Chapter 33, collects information that the Veteran Readiness and Employment (VR&E) program needs to verify if a Service member or Veteran meets the criteria for retroactive induction for a period previously completed under Chapter 33 (38 U.S.C. 3102, 3103, 3108, 5113).

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 insert citation date: 88 FRN 42818 on July 3, 2023, page 42818.

Affected Public: Individuals or Households.

Estimated Annual Burden: 33,000 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 99,000.

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. 2023–19394 Filed 9–7–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0011]

Agency Information Collection Activity Under OMB Review: Application for Reinstatement

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits 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,* select ''Currently under Review—Open for Public Comments'', then search the list for the information collection by Title or ''OMB Control No. 2900–0011.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0011'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: Application for Reinstatement—Insurance Lapsed More Than 6 Months (29–352 and 29–352R for VALife Insurance).

OMB Control Number: 2900–0011.

Type of Review: Extension of a previously approved collection.

Abstract: These forms are used by veterans who are requesting a reinstatement of their lapsed life insurance policies.

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 43012 on July 5, 2023.

Affected Public: Individuals or Households.

Estimated Annual Burden: 1,125 hours.

Estimated Average Burden per Respondent: 22.5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,000.

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. 2023–19368 Filed 9–7–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. Ch. 10, that the Advisory Committee on Disability Compensation (hereinafter the Committee) will hold meeting sessions on Tuesday, August 22, 2023, through Thursday, August 24, 2023, at various locations in Washington, DC and shown below.

The meeting sessions will begin and end as follows:

Date	Time	Location	Open session
August 22, 2023	10 a.m.–12 p.m. Eastern Standard Time (EST).	The Ritz-Carlton, Pentagon City, 1250 S Hayes St., Arlington, VA 22202.	Yes.
August 22, 2023	1–4 p.m. (EST)	MDEO Site Visit—Contract Examination Vendor Tour, The Ritz-Carlton, Pentagon City, 1250 S Hayes St., Arlington, VA 22202.	No.
August 23, 2023	9 a.m.–4 p.m. (EST)	The Ritz-Carlton, Pentagon City, 1250 S Hayes St., Arlington, VA 22202.	Yes.
August 24, 2023	9 a.m.–12 p.m. (EST)	Washington VA Medical Center, 50 Irving Street NW, Washington, DC 20422–0001.	No.
August 24, 2023	1–4 p.m. (EST)	Washington, D.C. Vet Center, 1296 Upshur Street NW, Washington, DC 20011.	No.

Sessions are open to the public, except when the Committee is conducting a tour of VA facilities. Tours of VA facilities are closed, to protect Veterans' privacy and personal information, by 5 U.S.C. 552b(c)(6).

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities (VASRD). The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising during service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation

On Tuesday, August 22, the Committee will convene an open session from 10 a.m. to 12 p.m. EST at The Ritz-Carlton, Pentagon City. The agenda includes Committee planning and May/June meeting debriefings, and hearing briefings from the Medical Disability Examination Office (MDEO). From 1 to 4 p.m. EST, the Committee will reconvene a closed session as it tours an MDEO Contract Examination Vendor. Tours of VA facilities are closed to protect Veterans' privacy and personal information, in accordance with 5 U.S.C Sec. 552b(c)(6).

On Wednesday, August 23, the Committee will convene an open session from 9 a.m. to 4 p.m. EST to hear briefings and updates on VASRD to include an overview of the regulation process, overview briefing(s) on the Suicide Prevention Program, Committee discussion/planning and the Committee's 2024 Biennial Report planning.

On Thursday, August 24, the Committee will convene from 9 a.m. to 12 p.m. EST for a closed session as it tours the VA Medical Center, Washington, DC from. From 1 to 4 p.m. EST, the Committee will reconvene a closed session as it tours the Washington, D.C. Vet Center. Tours of VA facilities are closed to protect Veterans' privacy and personal information, in accordance with 5 U.S.C Sec. 552b(c)(6).

The public is invited to address the Committee during the public comment period, which will be open for 30-minutes from 3:30 p.m. to 4 p.m. EST on Wednesday, August 23, 2023. The public can also submit one-page summaries of their written statements for the Committee's review. Public comments must be received no later than August 15, 2023, for inclusion in the official meeting record. Please send these comments to Jadine Piper of the Veterans Benefits Administration, Compensation Service, at *21C_ACDC.VBACO@va.gov.*

Additionally, any member of the public planning to attend or seeking additional information, or those who wish to obtain a copy of the agenda should contact Jadine Piper at *21C_ACDC.VBACO@va.gov,* and provide their name, email address and phone number. The call-in number (United States, Chicago) for those who would like to attend the meeting is: 872–701–0185; phone conference ID: 810 709 916#. Members of the public may also access the meeting by pasting the following URL into a web browser: *bit.ly/ACDCPublicAugustMeeting.*

Dated: September 1, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–19367 Filed 9–7–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 88 Friday,
No. 173 September 8, 2023

Part II

Department of Labor

Wage and Hour Division

29 CFR Part 541

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1235–AA39

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this proposal, the Department of Labor (Department) is updating and revising the regulations issued under the Fair Labor Standards Act implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. Significant proposed revisions include increasing the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South)—$1,059 per week ($55,068 annually for a full-year worker)—and increasing the highly compensated employee total annual compensation threshold to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally ($143,988). The Department is also proposing to add to the regulations an automatic updating mechanism that would allow for the timely and efficient updating of all the earnings thresholds.

DATES: Interested persons are invited to submit written comments on this notice of proposed rulemaking (NPRM) on or before November 7, 2023.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235–AA39, by either of the following methods:

- *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Address written submissions to: Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Commenters submitting file attachments on *https://www.regulations.gov* are advised that uploading text-recognized documents—*i.e.,* documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment, including any personal information provided, will become a matter of public record and will be posted without change to *https://www.regulations.gov.* The Department posts comments gathered and submitted by a third-party organization as a group under a single document ID number on *https://www.regulations.gov.* All comments must be received by 11:59 p.m. ET on November 7, 2023, for consideration in this rulemaking; comments received after the comment period closes will not be considered.

The Department strongly recommends that commenters submit their comments electronically via *https://www.regulations.gov* to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Please submit only one copy of your comments by only one method.

Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1–866–487–9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest Wage and Hour Division (WHD) district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at *https://www.dol.gov/agencies/whd/contact/local-offices* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Fair Labor Standards Act (FLSA or Act) requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the employee's regular rate of pay. Section 13(a)(1) of the FLSA, which was included in the original Act in 1938, exempts from the minimum wage and overtime pay requirements ''any employee employed in a bona fide executive, administrative, or professional capacity.'' [1] The exemption is commonly referred to as the ''white-collar'' or executive, administrative, or professional (EAP) exemption. The statute delegates to the Secretary of Labor (Secretary) the authority to define and delimit the terms of the exemption. Since 1940, the regulations implementing the EAP exemption have generally required that each of the following three tests must be met: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet a minimum specified amount (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test). The employer bears the burden of establishing the applicability of the exemption.[2] Job titles and job descriptions do not determine EAP exemption status, nor does merely paying an employee a salary.

Consistent with its broad authority under the statute, the Department is proposing compensation thresholds that will work effectively with the standard duties test and the highly compensated employee duties test to better identify who is employed in a bona fide EAP capacity. Specifically, the Department is proposing to set the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($1,059 per week or $55,068 annually for a full-year worker) [3] and the highly

[1] 29 U.S.C. 213(a)(1).

[2] *See, e.g., Idaho Sheet Metal Works, Inc.* v. *Wirtz,* 383 U.S. 190, 209 (1966); *Walling* v. *Gen. Indus. Co.,* 330 U.S. 545, 547–48 (1947).

[3] In determining earnings percentiles in its part 541 rulemakings since 2004, the Department has consistently looked at nonhourly earnings for full-time workers from the Current Population Survey (CPS) Merged Outgoing Rotation Group (MORG) data collected by the Bureau of Labor Statistics (BLS). As explained in section VII.B.5, the Department considers data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers, although for simplicity the Department

compensated employee total annual compensation threshold at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally ($143,988). These proposed compensation thresholds are firmly grounded in the authority that the FLSA grants to the Secretary to define and delimit the EAP exemption, a power the Secretary has exercised for over 80 years.

The proposed increase in the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region better fulfills the Department's obligation under the statute to define and delimit who is employed in a bona fide EAP capacity. Upon reflection, the Department has determined that its rulemakings over the past 20 years, since the Department simplified the test for the EAP exemption in 2004 by replacing the historic two-test system for determining exemption status with the single standard test, have vacillated between two distinct approaches: One used in rules in 2004 [4] and 2019,[5] that exempted lower-paid workers who historically had been entitled to overtime because they did not meet the more detailed duties requirements of the test that was in place from 1949 to 2004; and one used in a rule in 2016,[6] that restored overtime protection to lower-paid white-collar workers who performed significant amounts of nonexempt work but also removed from the exemption other lower-paid workers who historically were exempt under the prior test, an approach that received unfavorable treatment in litigation.[7] Having grappled with these different approaches to setting the standard salary level, this proposal retains the simplified standard test, the benefits of which were recognized in the Department's 2004, 2016 and 2019 rulemakings,[8] while updating the standard salary level to account for earnings growth since the 2019 rule and adjusting the salary level methodology based on the lessons learned in recent rulemakings.

The Department's proposed standard salary level will, in combination with the standard duties test, better define and delimit which employees are employed in a bona fide EAP capacity. By setting a salary level above what the methodology used in 2004 and 2019 would produce using current data, the proposal would ensure that, consistent with the Department's historical approach to the exemption, fewer lower-paid white-collar employees who perform significant amounts of nonexempt work are included in the exemption. At the same time, by setting the salary level below the methodology used in 2016, the proposal would allow employers to continue to use the exemption for many lower-paid white-collar employees who were made exempt under the 2004 standard duties test. The combined effect would be a more effective test for determining who is employed in a bona fide EAP capacity.

The Department is also proposing to increase the salary levels in the U.S territories, which have not been changed since 2004. Traditionally, the Department has set special salary levels only for territories that were not subject to the Federal minimum wage. In the 2004 rule, the Department ended the use of special salary levels for Puerto Rico and the U.S. Virgin Islands, as they had become subject to the Federal minimum wage since the Department last updated the part 541 salary levels, and set a special salary level only for American Samoa, which remained not subject to the Federal minimum wage.[9] In the 2019 rule, however, the Department elected to preserve the salary level set in 2004 ($455 per week) for employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI) instead of applying the new standard salary level of $684 per week that applied to employees in the 50 states and the District of Columbia.[10] In doing so, the Department for the first time set a special salary level for employees in territories that were subject to the Federal minimum wage. In accordance with the Department's traditional practice, and in the interest of applying the FLSA uniformly to areas subject to the Federal minimum wage, the Department is proposing to apply the standard salary level to employees in all territories that are subject to the Federal minimum wage and to maintain a special salary level only for employees in American Samoa, because that territory remains subject to special minimum wage rates. The Department is also proposing to update the special base rate for employees in the motion picture industry.

The Department is also proposing to update the earnings threshold for the highly compensated employee (HCE) exemption, which was added to the regulations in 2004 and applies to certain highly compensated employees and combines a much higher annual compensation requirement with a minimal duties test. The HCE test's primary purpose is to serve as a streamlined alternative for very highly compensated employees because a very high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed duties analysis.[11] In this rulemaking, the Department is proposing to increase the HCE total annual compensation threshold to the annualized weekly earnings amount of the 85th percentile of full-time salaried workers nationally ($143,988). The proposed HCE threshold is high enough to exclude employees who are not ''at the very top of [the] economic ladder'' [12] and would guard against the unintended exemption of workers who are not bona fide EAP employees, including those in high-income regions and industries.

In each of its part 541 rulemakings since 2004, the Department recognized the need to regularly update the earnings thresholds to ensure that they remain effective in helping differentiate between exempt and nonexempt employees. As the Department observed in these rulemakings, even a well-calibrated salary level that is not kept up to date becomes obsolete as wages for nonexempt workers increase over

uses the terms salaried and nonhourly interchangeably in this proposal. The Department relied on CPS MORG data for calendar year 2022 to develop this NPRM, including to determine the proposed salary level. In the final rule, the Department will use the most recent data available, which will change the dollar figures. For example, if after consideration of comments received, the final rule were to adopt the proposed salary level of the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region (currently the South), in the fourth quarter of 2023 the Department projects that the salary threshold could be $1,140 per week or $59,285 for a full-year worker. To calculate this, the Department applied the Congressional Budget Office projections of the employment cost index for wages and salaries of workers in private industry growing by 4.5 percent in 2023 to the 35th percentile of weekly earnings of full-time salaried workers in the South from the fourth quarter of 2022, which was $1,091 per week or $56,732 for a full-year worker. As an additional example, in the first quarter of 2024, the Department projects that the salary threshold could be $1,158 per week or $60,209 for a full-year worker; the Department applied the 4.5 percent growth rate to the 35th percentile of weekly earnings of full-time salaried workers in the South from the first quarter of 2023, which was $1,108 per week or $57,616 for a full-year worker.

[4] 69 FR 22121 (April 23, 2004).

[5] 84 FR 51230 (Sept. 27, 2019).

[6] 81 FR 32391 (May 23, 2016).

[7] The Department never enforced the 2016 rule because it was invalidated by the U.S. District Court for the Eastern District of Texas. *See Nevada* v. *U.S. Department of Labor,* 275 F.Supp.3d 795 (E.D. Tex. 2017).

[8] *See* 84 FR 51243–45; 81 FR 32414, 32444–45; 69 FR 22126–28.

[9] 69 FR 22172.

[10] 84 FR 51246.

[11] *See* 69 FR 22173–74.

[12] *Id.* at 22174.

time.[13] Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide EAP employees.

To address this problem, in the 2004 and 2019 rules the Department expressed its commitment to regularly updating the salary levels.[14] In the 2016 rule, it included a regulatory provision to automatically update the salary levels.[15] Based on its long experience with updating the salary levels, the Department has determined that adopting a regulatory provision for automatically updating the salary levels, with an exception for pausing future updates under certain conditions, is the most viable and efficient way to ensure the EAP exemption earnings thresholds keep pace with changes in employee pay and thus remain effective in helping determine exemption status. The proposed automatic updating mechanism would allow for the timely, predictable, and efficient updating of the earnings thresholds.

The Department estimates that in Year 1, 3.4 million currently exempt employees who earn at least the current salary level of $684 per week but less than the proposed standard salary level of $1,059 per week would, absent the employer paying them at or above the new salary level, gain overtime protection. For more than half of these employees, this proposal would restore overtime protections that the employees would have been entitled to under every rule prior to the 2019 rule. The Department also estimates that 248,900 employees who are currently exempt under the HCE test would be affected by the proposed increase in the HCE total annual compensation level. Absent the employer paying these employees at or above the new HCE level, the exemption status of these employees would turn on the standard duties test (which these employees do not meet) rather than the minimal duties test that applies to employees earning at or above the HCE threshold. The economic analysis of the proposed rule quantifies the direct costs resulting from the rule: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. The Department estimates that total annualized direct employer costs over the first 10 years would be $664 million with a 7 percent discount rate. This rulemaking will also give employees higher earnings in the form of transfers of income from employers to employees. The Department estimates annualized transfers would be $1.3 billion, with a 7 percent discount rate.

II. Background

A. The FLSA

The FLSA generally requires covered employers to pay employees at least the Federal minimum wage (currently $7.25 an hour) for all hours worked, and overtime premium pay of one and one-half times the regular rate of pay for all hours worked over 40 in a workweek.[16] However, section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), provides an exemption from both minimum wage and overtime pay for ''any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of [an] outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of [the Administrative Procedures Act] . . .).'' The FLSA does not define the terms ''executive,'' ''administrative,'' ''professional,'' or ''outside salesman,'' but rather delegates that task to the Secretary. Pursuant to Congress's grant of rulemaking authority, since 1938 the Department has issued regulations at 29 CFR part 541 to define and delimit the scope of the section 13(a)(1) exemption.[17] Because Congress explicitly delegated to the Secretary the authority to define and delimit the specific terms of the exemption, the regulations so issued have the binding effect of law.[18]

The exemption for executive, administrative, or professional employees (EAP exemption) was included in the original FLSA legislation passed in 1938.[19] It was modeled after similar provisions contained in the earlier National Industrial Recovery Act of 1933 (NIRA) and state law precedents.[20] As the Department has explained in prior rules, the EAP exemption is premised on two policy considerations. First, the type of work exempt employees perform is difficult to standardize to any time frame and cannot be easily spread to other workers after 40 hours in a week, making enforcement of the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.[21] Second, exempted workers typically earn salaries well above the minimum wage and are presumed to enjoy other privileges to compensate them for their long hours of work. These include, for example, above-average fringe benefits and better opportunities for advancement, setting them apart from nonexempt workers entitled to overtime pay.[22]

Although section 13(a)(1) exempts covered employees from both the FLSA's minimum wage and overtime requirements, its most significant impact is its removal of these employees from the Act's overtime protections. An employer may employ such employees for any number of hours in the workweek without paying the minimum hourly wage or an overtime premium. Some state laws have stricter exemption standards than those described above. The FLSA does not preempt any such stricter state standards. If a state establishes a higher standard than the provisions of the FLSA, the higher standard applies in that state.[23]

B. Regulatory History

The Department's part 541 regulations have consistently looked to the duties performed by the employee and the salary paid by the employer in determining whether an individual is employed in a bona fide executive, administrative, or professional capacity. Since 1940, the Department's implementing regulations have generally required each of three tests to be met for the exemption to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet a minimum specified amount (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test).

1. The Part 541 Regulations From 1938 to 2004

The Department issued the first version of the part 541 regulations in October 1938.[24] The Department's initial regulations included a $30 per

[13] 84 FR 51250–51; 81 FR 32430; *see also* 69 FR 22212, 22164.

[14] 69 FR 22171; 84 FR 51251–52.

[15] 81 FR 32430.

[16] *See* 29 U.S.C. 206(a), 207(a).

[17] *See Helix Energy Solutions, Group Inc.* v. *Hewitt,* 143 S.Ct. 677, 682 (2023) (''Under [section 13(a)(1)], the Secretary sets out a standard for determining when an employee is a bona fide executive.'').

[18] *See Betterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1977).

[19] *See* Fair Labor Standards Act of 1938, Public Law 75–718, 13(a)(1), 52 Stat. 1060, 1067 (June 25, 1938).

[20] *See* National Industrial Recovery Act, Public Law 73–67, ch. 90, title II, 206(2), 48 Stat 195, 204–5 (June 16, 1933).

[21] *See* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).

[22] *See id.*

[23] *See* 29 U.S.C. 218(a).

[24] 3 FR 2518 (Oct. 20, 1938).

week compensation requirement for executive and administrative employees, as well as a duties test that prohibited employers from using the exemption for executive, administrative, and professional employees who performed ''[a] substantial amount of work of the same nature as that performed by nonexempt employees of the employer.'' [25]

The Department issued the first update to its part 541 regulations in October 1940,[26] following extensive public hearings.[27] Among other changes, the 1940 update added the salary basis requirement to the tests for executive, administrative, and professional employees; newly applied the salary level requirement to professional employees; and introduced a 20 percent cap on nonexempt work for executive and professional employees, replacing language which prohibited the performance of a ''substantial amount'' of nonexempt work.[28]

The Department conducted further hearings on the part 541 regulations in 1947,[29] and issued revised regulations in December 1949.[30] The 1949 rulemaking updated the salary levels set in 1940 and introduced a second, less stringent duties test for higher paid executive, administrative, and professional employees.[31] Thus, beginning in 1949, the part 541 regulations contained two tests for the EAP exemption. These tests became known as the ''long'' test and the ''short'' test. The long test paired a lower earnings threshold with a more rigorous duties test that generally limited the performance of nonexempt work to no more than 20 percent of an employee's hours worked in a workweek. The short test paired a higher salary level and a less rigorous duties test, with no specified limit on the performance of nonexempt work. From 1958 until 2004, the regulations in place generally set the long test salary level to exclude from exemption approximately the lowest-paid 10 percent of salaried white-collar employees who performed EAP duties in lower wage areas and industries and set the short test salary level significantly higher. The salary and duties components of each test complemented each other, and the two tests worked in combination to determine whether an individual was employed in a bona fide EAP capacity. Lower-paid employees who met the long test salary level but did not meet the higher short test salary level were subject to the long duties test which ensured that employees were, in fact, employed in a bona fide EAP capacity by limiting the amount of time they could spend on nonexempt work. Employees who met the higher short test salary level were considered to be more likely to meet the requirements of the long duties test and thus were subject to a short-cut duties test for determining exemption status.

Additional changes to the regulations, including salary level updates, were made in 1954,[32] 1958,[33] 1961,[34] 1963,[35] 1967,[36] 1970,[37] 1973,[38] and 1975.[39] The Department revised the part 541 regulations twice in 1992 but did not update the salary threshold at that time.[40] None of these updates changed the basic structure of the long and short tests.

The Department described the salary levels adopted in the 1975 rule as ''interim rates,'' intended to ''be in effect for an interim period pending the completion of a study [of worker earnings] by the Bureau of Labor Statistics . . . in 1975.'' [41] However, those salary levels remained in effect until 2004. The utility of the salary levels in helping to define the EAP exemption decreased as wages rose during this period. In 1991, the Federal minimum wage rose to $4.25 per hour,[42] which for a 40-hour week exceeded the lower long test salary level of $155 per week for executive and administrative employees and equaled the long test salary level of $170 per week for professional employees. In 1997, the Federal minimum wage rose to $5.15 per hour,[43] which for a 40-hour week not only exceeded the long test salary levels, but also was close to the higher short test salary level of $250 per week.

2. Part 541 Regulations From 2004 to 2019

The Department issued a final rule in April 2004 (the 2004 rule) [44] that updated the part 541 salary levels for the first time since 1975 and made several significant changes to the regulations. Most significantly, the Department eliminated the separate long and short tests and replaced them with a single standard test. The Department set the standard salary level at $455 per week, which was equivalent to the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and in the retail industry nationally. The Department paired the new standard salary level test with a new standard duties test for executive, administrative, and professional employees, respectively, which was substantially equivalent to the short duties test used in the two-test system.[45]

In the 2004 rule, the Department acknowledged that the switch from a two-test system to a one-test system was a significant change in the regulatory structure,[46] and noted that the shift to setting the salary level based on ''the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent'' of EAP employees was made, in part, ''because of the proposed change from the 'short' and 'long' test structure.'' [47] The Department asserted that elimination of the long duties test was warranted because ''the relatively small number of employees currently earning from $155 to $250 per week, and thus tested for exemption under the 'long' duties test, will gain stronger protections under the increased minimum salary level which . . . guarantees overtime protection for all employees earning less than $455 per week.'' [48] The Department acknowledged, however, that the new standard salary level was comparable to the long test salary level used in the two-test system (*i.e.,* if the Department's long test salary level methodology had been applied to contemporaneous

[25] *Id.*

[26] 5 FR 4077 (Oct. 15, 1940).

[27] *See* ''Executive, Administrative, Professional . . . Outside Salesman'' Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer [Harold Stein] at Hearings Preliminary to Redefinition (Oct. 10, 1940) (Stein Report).

[28] 5 FR 4077.

[29] *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) (Weiss Report).

[30] *See* 14 FR 7705 (Dec. 24, 1949).

[31] *Id.* at 7706.

[32] 19 FR 4405 (July 17, 1954).

[33] 23 FR 8962 (Nov. 18, 1958).

[34] 26 FR 8635 (Sept. 15, 1961).

[35] 28 FR 9505 (Aug. 30, 1963).

[36] 32 FR 7823 (May 30, 1967).

[37] 35 FR 883 (Jan. 22, 1970).

[38] 38 FR 11390 (May 7, 1973).

[39] 40 FR 7091 (Feb. 19, 1975).

[40] The Department first created a limited exception from the salary basis test for public employees. 57 FR 37677 (Aug. 19, 1992). The Department also implemented a 1990 law requiring it to promulgate regulations permitting employees in certain computer-related occupations to qualify as exempt under section 13(a)(1) of the FLSA. 57 FR 46744 (Oct. 9, 1992); *see* Public Law 101–583, sec. 2, 104 Stat. 2871 (Nov. 15, 1990).

[41] 40 FR 7091.

[42] *See* Public Law 101–157, sec. 2, 103 Stat. 938 (Nov. 17, 1989).

[43] *See* Public Law 104–188, sec. 2104(b), 110 Stat 1755 (Aug. 20, 1996).

[44] 69 FR 22122.

[45] *See id.* at 22192–93 (acknowledging ''de minimis differences in the standard duties tests compared to the short duties tests'').

[46] *See id.* at 22126–28.

[47] *Id.* at 22167.

[48] *Id.* at 22126.

data).[49] Thus, employees who would have been subject to the more rigorous long duties test if the two-test system had been updated were subject to the equivalent of the short duties test under the new standard test. For example, under the 2004 rule's standard test, an employee who earned just over the rule's standard salary threshold of $455 in weekly salary, and who met the standard duties test, was exempt even if they would not have met the previous long duties test because they spent substantial amounts of time performing nonexempt work. If the Department had instead retained the two-test system and updated the long test salary level to $455, that same employee would have been nonexempt because they would have been subject to the more rigorous duties analysis due to their lower salary.

In the 2004 rule, the Department also created a new test for exemption for certain highly compensated employees.[50] The HCE test paired a minimal duties requirement—customarily and regularly performing at least one of the exempt duties or responsibilities of an EAP employee—with a high total annual compensation requirement of $100,000, a threshold that exceeded the annual earnings of approximately 93.7 percent of salaried workers nationwide.[51] The Department also ended the use of special salary levels for Puerto Rico and the U.S. Virgin Islands, as they had become subject to the Federal minimum wage since the Department last updated the part 541 salary levels in 1975, and set a special salary level only for American Samoa, which remained not subject to the Federal minimum wage.[52] The Department expressed its intent ''in the future to update the salary levels on a more regular basis, as it did prior to 1975.'' [53]

In May 2016, the Department issued a final rule (the 2016 rule) that retained the single test system and the standard duties test but increased the standard salary level and provided for regular updating. The 2016 rule (1) increased the standard salary level from the 2004 salary level of $455 to $913 per week, the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South); [54] (2) increased the HCE test total annual compensation amount from $100,000 to $134,004 per year; [55] (3) increased the special salary level for EAP workers in American Samoa; [56] (4) allowed employers, for the first time, to credit nondiscretionary bonuses, incentive payments, and commissions paid at least quarterly towards up to 10 percent of the standard salary level; [57] and (5) added a mechanism to automatically update the part 541 earnings thresholds every 3 years.[58] The standard salary level was set at the low end of the historical range of short test salary levels used in the pre-2004 two-test system.[59] The 2016 rule did not change any of the standard duties test criteria.[60] The 2016 rule was scheduled to take effect on December 1, 2016.

On November 22, 2016, the U.S. District Court for the Eastern District of Texas issued an order preliminarily enjoining the Department from implementing and enforcing the 2016 rule.[61] On August 31, 2017, the district court granted summary judgment to the plaintiff challengers, holding that the 2016 rule's salary level exceeded the Department's authority and invalidating the rule.[62] On October 30, 2017, the Department of Justice appealed to the U.S. Court of Appeals for the Fifth Circuit, which subsequently granted the Department's motion to hold that appeal in abeyance while the Department of Labor undertook further rulemaking. Following an NPRM published on March 22, 2019,[63] the Department published a final rule on September 27, 2019 (the 2019 rule),[64] which formally rescinded and replaced the 2016 rule.

The 2019 rule (1) raised the standard salary level from the 2004 salary level of $455 to $684 per week, the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and in the retail industry nationally; (2) increased the HCE total annual compensation threshold from $100,000 to $107,432; (3) allowed employers to credit nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10 percent of the standard salary level; and (4) established special salary levels for all U.S. territories.[65] The 2019 rule did not make changes to the standard duties test.[66] While utilizing the same methodology used in the 2004 rule to set the salary threshold, the Department did not assert that this methodology constituted the outer limit for defining and delimiting the salary threshold. Rather, the Department reasoned the 2004 methodology was well-established, reasonable, would minimize uncertainty and potential legal challenge, and would address the concerns of the district court that the 2016 rule over-emphasized the salary level.[67] The Department acknowledged that the new salary level was below the long test salary level used in the pre-2004 two-test system.[68] As in its 2004 rule, the Department ''reaffirm[ed] its intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice-and-comment rulemaking.'' [69] The Department noted that large gaps between rulemakings did not serve employer or employee interests and diminished the usefulness of the salary level test, and that regular increases promoted predictable and incremental change.[70] The 2019 rule took effect on January 1, 2020.[71]

C. Overview of Existing Regulatory Requirements

The part 541 regulations contain specific criteria that define each category of exemption provided for in section 13(a)(1) for bona fide executive, administrative, professional, and outside sales employees, as well as teachers and academic administrative personnel. The regulations also define exempt computer employees under

[49] *Id.* at 22169. The Department last set the long and short test salary levels in 1975. Throughout this proposal, when the Department refers to the relationship of salary levels set in 2004, 2016, and 2019 to equivalent long or short test salary levels, it is referring to salary levels based on current (at the relevant point in time) data that, in the case of the long test salary level, would exclude the lowest-paid 10 percent of exempt EAP employees in low-wage industries and areas and, in the case of the short test salary level, would be 149 percent of a contemporaneous long test salary level. The short test salary ratio of 149 percent is the simple average of the 15 historical ratios of the short test salary level to the long test salary level. *See* 81 FR 32467 & n.149.

[50] 69 FR 22169.

[51] *See id.* (Table 3).

[52] *Id.* at 22172.

[53] *Id.* at 22171.

[54] 81 FR 32550.

[55] *Id.*

[56] *Id.* at 32551.

[57] *See id.*

[58] *See id.* at 32550–51 (§ 541.602(a)(3)).

[59] *Id.* at 32405 (noting the historical range of short test salary levels was $889 to $1,231 based on an application of the short test methodology to contemporaneous data).

[60] *Id.* at 32444.

[61] *See Nevada* v. *U.S. Department of Labor,* 218 F. Supp. 3d 520 (E.D. Tex. 2016).

[62] *See Nevada,* 275 F.Supp.3d 795 (E.D. Tex. 2017).

[63] *See* 84 FR 10900 (Mar. 22, 2019).

[64] *See* 84 FR 51230.

[65] The Department established special salary levels of $455 per week for Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI (effectively continuing the 2004 salary level); it also maintained the 2004 rule's $380 per week special salary level for employees in American Samoa. 84 FR 51246.

[66] *See id.* at 51241–43.

[67] *See id.* at 51242.

[68] *Id.* at 51244.

[69] *Id.* at 51251.

[70] *See id.* at 51251–52.

[71] A lawsuit challenging the 2019 rule was filed in August 2022 and, at the time this proposal was drafted, remains pending in the U.S. District Court for the Western District of Texas. *Mayfield* v. *U.S. Department of Labor,* Case No. 1:22–cv–00792.

sections 13(a)(1) and 13(a)(17). The employer bears the burden of establishing the applicability of any exemption from the FLSA's pay requirements.[72] Job titles and job descriptions do not determine exemption status, nor does merely paying an employee a salary rather than an hourly rate.

To satisfy the EAP exemption, employees must meet certain tests regarding their job duties [73] and generally must be paid on a salary basis at least the amount specified in the regulations.[74] Some employees, such as doctors, lawyers, teachers, and outside sales employees, are not subject to salary tests.[75] Others, such as academic administrative personnel and computer employees, are subject to special, contingent earning thresholds.[76] The standard salary level for the EAP exemption is currently $684 per week (equivalent to $35,568 per year), and the total annual compensation level for highly compensated employees under the HCE test is currently $107,432.[77] A special salary level of $455 per week applies to employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI; [78] a special salary level of $380 per week applies to employees in American Samoa; [79] and employers can pay a special weekly ''base rate'' of $1,043 per week to employees in the motion picture producing industry.[80] Nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis may be used to satisfy up to 10 percent of the standard or special salary levels.[81]

Under the HCE test, employees who receive at least $107,432 in total annual compensation are exempt from the FLSA's overtime requirements if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in the standard tests for exemption.[82] The HCE test applies only to employees whose primary duty includes performing office or non-manual work.[83] Employees qualifying for exemption under the HCE test must receive at least the $684 per week standard salary portion of their pay on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments.[84]

III. Need for Rulemaking

The goal of this rulemaking is to set effective earnings thresholds to help define and delimit the FLSA's EAP exemption. To this end, the Department is proposing to make appropriate increases to the standard salary level and the HCE test's total annual compensation requirement, apply the standard salary level to territories subject to the Federal minimum wage, and update the special salary levels for American Samoa and the motion picture industry. The Department is also proposing to maintain the effectiveness of these earnings thresholds by adding a provision to automatically update the standard salary level and the HCE annual compensation threshold every 3 years with current wage data (which would also have the effect of updating the levels in American Samoa and for the motion picture industry). The updating mechanism would also temporarily delay a scheduled automatic update if, and while, the Department engages in notice-and-comment rulemaking to change the salary level methodology and/or the updating mechanism.

The part 541 regulations have always included salary requirements. From the beginning, there has been ''wide agreement'' that the amount paid to an employee is ''a valuable and easily applied index to the 'bona fide' character of the employment for which [the] exemption is claimed.'' [85] Because EAP employees ''are denied the protection of the Act,'' they are ''assumed [to] enjoy compensatory privileges'' which distinguish them from nonexempt employees, including substantially higher pay.[86] The Department has long recognized that the salary level test is a useful criterion for identifying bona fide EAP employees and providing a practical guide for employers and employees, thus tending to reduce litigation and ensuring nonexempt employees receive the overtime protection to which they are entitled.[87] The salary level test also facilitates application of the exemption by saving employees and employers from having to apply the more time-consuming duties analysis to a large group of employees who do not meet the duties test.[88] For these reasons, the salary level test has been a key part of how the Department defines and delimits the EAP exemption since the beginning of its rulemaking on the EAP exemption.[89] However, the Department has always recognized that any salary level will result in some employees who meet the duties test but do not earn enough to meet the salary level test, and thus are nonexempt and therefore eligible for overtime by virtue of their pay.[90] This is simply a feature of a salary level test; it does not undermine the efficacy of the salary level test but instead is taken into account in determining where the salary level is set.

The Department continues to believe that the amount paid to an employee is important evidence that they are employed in a bona fide EAP capacity, and that the salary level test ''is a vital element in the regulations.'' [91] The salary level test benefits employees and employers alike, which is why—despite disagreement over the appropriate magnitude of the part 541 earnings thresholds—an ''overwhelming majority'' of stakeholders have supported the retention of such thresholds in prior part 541 rulemakings.[92]

The Department's authority to set a salary level is not without limits, and the salary test's role in defining and delimiting the scope of the EAP exemption must allow for additional examination of employee duties for employees whose salary exceeds the

[72] *See, e.g., Idaho Sheet Metal,* 383 U.S. at 209; *Walling,* 330 U.S. at 547–48.

[73] For a description of the duties that are required to be performed under the EAP exemption, *see* §§ 541.100 (executive employees); 541.200 (administrative employees); 541.300, 541.303–.304 (teachers and professional employees); 541.400 (computer employees); 541.500 (outside sales employees).

[74] Alternatively, administrative and professional employees may be paid on a fee basis for a single job regardless of the time required for its completion as long as the hourly rate for work performed (*i.e.,* the fee payment divided by the number of hours worked) would total at least the weekly amount specified in the regulation if the employee worked 40 hours. *See* § 541.605.

[75] *See* §§ 541.303(d); 541.304(d); 541.500(c); 541.600(e). Such employees are also not subject to a fee basis test.

[76] *See* § 541.600(c) and (d).

[77] *See* §§ 541.600(a); 541.601(a)(1).

[78] *See* §§ 541.100; 541.200; 541.300.

[79] *See id.*

[80] *See* § 541.709.

[81] § 541.602(a)(3).

[82] § 541.601.

[83] § 541.601(d).

[84] *See* § 541.601(b)(1); *see also* 84 FR 51249.

[85] Stein Report at 19.

[86] *Id.; see also* Report of the Minimum Wage Study Commission, Volume IV, p. 236 (''Higher base pay, greater fringe benefits, improved promotion potential and greater job security have traditionally been considered as normal compensatory benefits received by EAP employees, which set them apart from non-EAP employees.'').

[87] *See* 84 FR 51237; Weiss Report at 8.

[88] Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Assistant Administrator, Office of Regulations and Research, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) (Kantor Report) at 2–3; 69 FR 22165; 84 FR 51280.

[89] *See* 84 FR 51237.

[90] *See, e.g.,* Kantor Report at 5.

[91] Weiss Report at 9.

[92] 84 FR 51235; *see also* Stein Report at 5, 19; Weiss Report at 9.

salary level.[93] Examination of duties for such employees is necessary in part because the salaries earned by employees who do and do not perform exempt job duties overlap. As explained in greater detail below, the proposed standard salary level set at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($1,059 per week, $55,068 annually) would, in combination with the standard duties test, better identify which employees are employed in a bona fide EAP capacity in a one-test system. By setting a salary level above what would currently be the equivalent of the long test salary level ($925 per week), the proposal would restore the right to overtime pay for salaried white-collar employees who prior to the 2019 rule were always considered nonexempt if they earned below the long test (or long test-equivalent) salary level and ensure that fewer white-collar employees who perform significant amounts of nonexempt work and earn between the long and short test salary levels are included in the exemption. At the same time, by setting the standard salary level well below what would currently be the equivalent of the short test salary level ($1,378 per week),[94] the proposal would address the concerns that have been raised about excluding from the EAP exemption too many white-collar employees solely based on their salary level. As discussed in section IV.A.4 below, the duties test would continue to determine exemption status for almost three-quarters of all salaried white-collar employees subject to the part 541 regulations, allowing employers to continue to use the exemption for 24.5 million salaried white-collar workers who earn at least the proposed salary level and meet the standard duties test.[95] The proposed salary level would also reasonably distribute between employees and their employers what the Department now understands to be the impact of the shift from a two-test to a one-test system on employees earning between the long and short test salary levels.

Since switching from a two-test to a one-test system for defining and delimiting the EAP exemption in 2004, the Department has followed different approaches to set the single standard salary level. In 2004, the Department set the new standard salary level roughly equivalent to the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail industry nationwide ($455 per week).[96] This approach produced a salary level amount that was equivalent to the lower long test salary level under the two-test system.[97] Because it was equivalent to the long test salary level, employees who historically earned less than the long test salary level continued to be entitled to overtime compensation because they earned below the new standard salary level. However, because the new standard duties test was substantially equivalent to the less rigorous short duties test,[98] employees who were paid the equivalent of the lower long test salary level and who met the less rigorous short duties test also now met the standard duties test and were not entitled to overtime compensation. This approach broadened the EAP exemption because all employees between the long and short test salary levels who historically had not been considered bona fide EAP employees because they did not meet the long duties test became exempt. The Department followed this same methodology to set the standard salary level in 2019, although applying the 2004 rule's methodology resulted in a salary level that was a lower amount than what would have been the equivalent of the long test salary level.[99] This broadened the EAP exemption even further by, for the first time, setting a salary level that exempted a group of white-collar employees earning below the equivalent of the long test salary level (based on contemporaneous data). Both the 2004 and 2019 rules thus effectively placed the impact of the shift from a two-test to a one-test system on lower-salaried white-collar employees—both those who earned below the short test salary level and were traditionally protected by the more rigorous long duties test (*i.e.,* because they performed substantial amounts of nonexempt work), and, in the case of the 2019 rule, those who had previously been protected by a salary level set at or equivalent to the long test salary.

To address the concern that the 2004 rule did not provide overtime compensation for lower-salaried white-collar employees performing large amounts of nonexempt work who historically were not considered bona fide EAP employees, in 2016 the Department set the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South), which produced a salary level that was at the low end of the historical range of short test salary levels.[100] This approach restored overtime protection to white-collar employees who perform substantial amounts of nonexempt work and earned between the equivalent of the long test salary level and the short test salary level. However, this approach also made nonexempt some employees who had previously met the long duties test—employees who earned between the long test salary level and the low end of the short test salary range and performed only a limited amount of nonexempt work. Until 2004 employers could use the long test to exempt these employees, and under the 2004 rule these employees remained exempt under the one-test system. Thus, the impact of the 2016 rule was that employers could not use the exemption for certain white-collar employees who earned between the long and short test salary levels and would have met the more rigorous long duties test.[101] In the challenge to the 2016 rule, the district court expressed concern that the 2016 rule conferred overtime eligibility based on salary level alone to a substantial number of employees who would otherwise be exempt.[102]

Having grappled with the different approaches that it has used to set the standard salary level since switching to a one-test system in 2004, the Department's goal in this rulemaking is not only to update the single standard salary level to account for earnings growth since the 2019 rule, but also to build on the lessons learned in its most recent rulemakings to more effectively define and delimit employees employed in a bona fide EAP capacity. Consistent with its broad authority under the statute, the Department is proposing a standard salary level test that would work effectively with the standard duties test to help achieve these objectives and would also reasonably distribute the impact of the switch to a one-test system across white-collar

[93] 84 FR 51238 (noting salary's ''useful, but limited, role'').

[94] During the period from 1949 to 2004, the ratio of the short test salary level to the long test salary levels ranged from approximately 130 percent to 180 percent. *See* 81 FR 32403. The simple average of the 15 historical ratios of the short test salary level to the long test salary level is 149 and the Department calculates the short test salary level as 149 percent of the long test salary level. *See id.* at 32467 & n.149.

[95] This number does not include the additional 8.1 million workers employed in occupations that are not subject to the salary level test, such as doctors, lawyers, and teachers. Such employees are unaffected by this rulemaking because their exemption status is always determined by the duties test.

[96] *See* 69 FR 22168.

[97] *See id.* at 22168–69.

[98] *Id.* at 22214.

[99] *See* 84 FR 51260 (Table 4) (showing that the salary level derived from the Department's long test methodology would have been $724 per week rather than the finalized $684 per week amount).

[100] 81 FR 32405.

[101] *See* 84 FR 10908; 84 FR 51242.

[102] *See Nevada,* 275 F.Supp.3d. at 806.

employees earning between the long and short test salary levels and their employers. In 2004 and 2019, setting the salary level equivalent to or below the lower long test salary level resulted in the exemption of lower-salaried employees who perform large amounts of nonexempt work, in effect significantly broadening the exemption compared to under the two-test system. This approach included in the exemption lower-salaried employees whom the Department had long considered not to be employed in a bona fide EAP capacity because they performed substantial amounts of nonexempt work. Under the 2016 approach, setting the salary level equivalent to the low end of the higher short test salary range would have restored overtime protections to those employees who perform substantial amounts of nonexempt work and earned between the long test salary level and the low end of the short test salary levels. However, it also would have resulted in denying employers the use of the exemption for many lower-salaried employees who traditionally were exempt under the long test, which raised concerns that the Department was in effect narrowing the exemption compared to the two-test system.[103] In this rulemaking, the Department proposes setting a standard salary level that would better define and delimit the EAP exemption by more effectively accounting for the switch from a two-test to a one-test system, and reasonably distribute the impact of the shift by ensuring overtime protection for some lower-salaried employees without excluding from exemption too many white-collar employees solely based on their salary level.[104]

In addition, consistent with its previously stated intent, the Department is undertaking this rulemaking to keep the earnings thresholds up to date. Four years have passed since the 2019 rule, during which time salaried workers in the U.S. economy have experienced a rapid growth in their nominal wages, which lessens the effectiveness of the current salary level threshold. Reapplying the same methodology that was used to set the standard salary level in 2019 to recent earnings data would result in a new threshold of $822 per week—a 20.2 percent increase over the current $684 per week standard salary level.[105] Applying the long test salary methodology to current data would result in a salary threshold of $925 per week—a 35.2 percent increase over the current salary level.

The Department is also proposing to increase the HCE total annual compensation threshold to the annualized weekly earnings amount of the 85th percentile of full-time salaried workers nationally ($143,988). Reapplying the 2019 methodology (annualized weekly earnings of the 80th percentile of full-time salaried workers nationally) to current earnings data results in a threshold of $125,268 per year—a 16.6 percent increase over the current threshold of $107,432. Other data further supports that the HCE test's current total annual compensation requirement has become outdated. When it was created in 2004, the HCE test featured a $100,000 threshold that exceeded the annual earnings of approximately 93.7 percent of salaried workers nationwide.[106] More recently in the 2019 rule, the Department set the HCE test threshold so it would be equivalent to the annual earnings of the 80th percentile of full-time salaried workers nationwide. Today, however, the $107,432 HCE threshold is approximately the 72nd percentile of annual earnings of full-time salaried workers nationwide. The Department's proposed increase from the 80th to the 85th percentile is high enough to exclude employees who are not ''at the very top of [the] economic ladder'' [107] and would ensure that this test for exemption continues to serve its intended function.

The salary levels applicable to the U.S. territories have not increased since 2004. In 2004, the Department ended the use of special salary levels in territories that had become subject to the Federal minimum wage since the salary levels were last set in 1975, and applied a special salary level of $380 per week only to employees in American Samoa, who were subject to special minimum wage rates below the Federal minimum wage.[108] In 2019, however, the Department established a special salary level of $455 per week for employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI, for the first time setting a special salary level in territories that were subject to the Federal minimum wage.[109] The Department also maintained the special salary level for American Samoa at $380 per week, the level set in 2004. There is thus a compelling need to increase the salary levels applicable to employees in U.S. territories, particularly employees in those territories that are subject to the Federal minimum wage.

Finally, the Department proposes to adopt a mechanism to automatically update the earnings thresholds in the part 541 regulations in future years. In its three most recent part 541 rulemakings, the Department has expressed its commitment to keeping the salary level tests up to date. In its 2004 rule, the Department conveyed its intent ''in the future to update the salary levels on a more regular basis.'' [110] In its 2016 rule, the Department adopted a mechanism to automatically update the salary level on a triennial basis. In 2019, after initially proposing to codify its commitment to updating the threshold every 4 years through rulemaking, the Department affirmed in its final rule that it ''intends to update these thresholds more regularly in the future.'' [111] As noted above, however, the history of the part 541 regulations shows multiple, significant gaps during which the salary levels were not updated and their effectiveness in helping to define the EAP exemption decreased as wages increased. While the Department increased its part 541 earnings thresholds every 5 to 9 years in the 37 years between 1938 and 1975, more recent decades have included long periods without raising the salary level, resulting in significant erosion of the real value of the threshold levels followed by unpredictable increases. As explained in greater detail in section IV.D, employees and employers alike would benefit from the certainty and stability of regularly scheduled updates.

IV. Discussion of Proposed Rule

Consistent with its statutory duty to define and delimit the EAP exemption, the Department is proposing increases to the earnings thresholds provided in the part 541 regulations. As explained in greater detail below, the Department proposes to increase the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). The Department also proposes to apply this updated standard salary level to the four U.S. territories that are subject to the Federal minimum wage—Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI—and to update the special salary levels for American Samoa and the motion picture industry in relation to the new standard salary level. The Department additionally proposes raising the HCE test's total annual compensation

[103] *See* 84 FR 51242.

[104] *See* section IV.A.3.

[105] *See* section VII.C.5 (applying CPS MORG data from calendar year 2022).

[106] *See* 69 FR 22169 (Table 3).

[107] *Id.* at 22174.

[108] *See id.* at 22172.

[109] *See* 84 FR 51246.

[110] 69 FR 22171.

[111] 84 FR 51251–52.

requirement to the annual equivalent of the 85th percentile of weekly earnings of full-time salaried workers nationally ($143,988). Finally, the Department proposes a new mechanism to automatically update the standard salary level and the HCE total annual compensation threshold every 3 years to ensure that they remain effective tests for exemption.

While the primary regulatory changes proposed are in §§ 541.600, 541.601, 541.709, and newly-added § 541.607, additional conforming changes are proposed to update references to the salary level throughout part 541. The Department is not proposing any changes to the salary basis or duties test requirements in this rulemaking. The Department welcomes comments on all aspects of this proposal.

A. Standard Salary Level

The salary level test is grounded in the text of section 13(a)(1). The Secretary's expressly-delegated authority to ''define[]'' and ''delimit[]'' the terms of the EAP exemption includes the authority to use a salary level test as one criterion for identifying employees who are employed in a ''bona fide executive, administrative, or professional capacity.'' The Department has used a salary level test since the first part 541 regulations in 1938. From the FLSA's earliest days, stakeholders have generally favored the use of a salary test,[112] and the Department's authority to use a salary test has been repeatedly upheld.[113]

Despite numerous amendments to the FLSA over the past 85 years, Congress has not restricted the Department's use of the salary level tests. Significant regulatory changes involving the salary requirements since 1938 include adding a separate salary level for professional employees in 1940, adopting a two-test system with separate short and long test salary levels in 1949, and creating a single standard salary level test and establishing a new HCE exemption test in 2004. These changes were all made through regulations issued pursuant to the Secretary's authority to define and delimit the exemption. Despite having amended the FLSA numerous times over the years, Congress has not amended section 13(a)(1) to alter these regulatory salary requirements.

The FLSA delegates to the Secretary the power to ''define[ ]'' and ''delimit[ ]'' the terms ''bona fide executive, administrative, or professional capacity'' through regulation. Congress thus ''provided that employees should be exempt who fell within certain general classifications''—those employed in a bona fide executive, administrative, or professional capacity—and authorized the Secretary ''to define and delimit those classifications by reasonable and rational specific criteria.'' [114] Therefore, the Department ''is responsible not only for determining which employees are entitled to the exemption, but also for drawing the line beyond which the exemption is not applicable.'' [115]

As the Department stated in its 2019 rule, an employee's salary level ''is a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees.'' [116] The amount an employee is paid is also a ''valuable and easily applied index to the 'bona fide' character of employment for which exemption is claimed,'' as well as the ''principal[ ]'' ''delimiting requirement'' ''prevent[ing] abuse'' of the exemption.[117] As the Department has explained, if an employee ''is of sufficient importance . . . to be classified as a bona fide'' executive employee, for example, and ''thereby exempt from the protection of the [A]ct, the best single test of the employer's good faith in attributing importance to the employee's services is the amount [it] pays for them.'' [118] Employee compensation is a relevant indicator of exemption status given that the EAP exemption is premised on the understanding that individuals who are employed in a bona fide executive, administrative, or professional capacity typically earn higher salaries and enjoy other privileges to compensate them for their long hours of work, setting them apart from nonexempt employees entitled to overtime pay.[119]

Consistent with the Department's longstanding approach, the proposed rule ensures that the salary level test and duties test continue to complement each other to define and delimit the EAP exemption and that the salary level does not play an outsized role in determining whether an individual is employed in a bona fide EAP capacity.[120] In part because of the overlap in the salaries earned by employees who do and do not perform exempt job duties, the salary level must allow for appropriate examination of duties. As discussed in section IV.A.4, under the Department's proposed standard salary level, the duties test will determine the exemption status for most white-collar employees.

The Department's proposed standard salary level will, in combination with the standard duties test, better define and delimit which employees are employed in a bona fide EAP capacity in a one-test system. By setting a salary level above the equivalent of the long test salary level, the proposal would (unlike the 2004 and 2019 rules) ensure that not all lower-paid white-collar employees who perform significant amounts of nonexempt work, and were historically considered by the Department not to be employed in a bona fide EAP capacity because they failed the long duties test, are included in the exemption. At the same time, by setting it well below the equivalent of the short test salary level, the proposal would address potential concerns that the salary level test should not be determinative of EAP exemption status for too many white-collar employees. The combined effect would be a more effective test for exemption. The proposed salary level would also reasonably distribute between employees and their employers what the Department now understands to be the impact of the 2004 shift from a two-test to a one-test system on employees earning between the long and short test salary levels.

1. History of the Salary Level

The first version of the part 541 regulations, issued in 1938, set a minimum compensation requirement of $30 per week for executive and administrative employees.[121] Since then, the Department has increased the

[112] *See* Stein Report at 5, 19.

[113] *See, e.g., Wirtz* v. *Miss. Publishers Corp.,* 364 F.2d 603, 608 (5th Cir. 1966); *Fanelli* v. *U.S. Gypsum Co.,* 141 F.2d 216, 218 (2d Cir. 1944); *Walling* v. *Yeakley,* 140 F.2d 830, 832–33 (10th Cir. 1944).

[114] *Walling,* 140 F.2d at 831–32; *see Ellis* v. *J.R.'s Country Stores, Inc.,* 779 F.3d 1184, 1199 (10th Cir. 2015) (approvingly quoting *Walling*); *see also Auer* v. *Robins,* 519 U.S. 452, 456 (1997) (''The FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees.'').

[115] Stein Report at 2.

[116] 84 FR 51239 (internal quotation marks omitted).

[117] Stein Report at 19, 24; *see also* 81 FR 32422.

[118] Stein Report at 19, 24; *see also id.* at 26 (''[A] salary criterion constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity.'').

[119] *See* Report of the Minimum Wage Study Commission, Vol. IV, at 236, 240; *see also, e.g.,* Stein Report at 19 (explaining that the ''term 'executive' implies a certain prestige, status, and importance'' denoted by pay ''substantially higher than'' the Federal minimum wage).

[120] The Department has consistently stated that salary alone cannot define who is a bona fide EAP employee. *See* 84 FR 51239; 81 FR 32429; 69 FR 22173.

[121] 3 FR 2518.

salary levels eight times—in 1940, 1949, 1958, 1963, 1970, 1975, 2004, and 2019.

In 1940, the Department maintained the $30 per week salary level for executive employees but established a higher $200 per month salary level test for administrative and professional employees. In selecting these thresholds, the Department used salary surveys from Federal and State Government agencies, experience gained under NIRA, and Federal Government salaries to determine the salary level that was a reasonable ''dividing line'' between employees performing exempt and nonexempt work.[122]

In 1949, recognizing that the ''increase in wage rates and salary levels'' since 1940 had ''gradually weakened the effectiveness of the present salary tests as a dividing line between exempt and nonexempt employees,'' the Department calculated the percentage increase in weekly earnings from 1940 to 1949, and then adopted new salary levels ''at a figure slightly lower than might be indicated by the data'' to protect small businesses.[123] In 1949, the Department also established a short test for exemption, which paired a higher salary level with a less rigorous duties test. The justification for this short test was that employees who met the higher salary level were more likely to meet all the requirements of the exemption (including the 20 percent limit on nonexempt work), and thus a ''short-cut test of exemption . . . would facilitate the administration of the regulations without defeating the purposes of section 13(a)(1).'' [124] Employees who met only the lower long test salary level, and not the higher short test salary level, were still required to satisfy the long duties test, which included a limit on the amount of nonexempt work that an exempt employee could perform. The two-test system remained part of the Department's regulations until 2004.

In 1958, the Department reiterated that salary is a ''mark of [the] status'' of an exempt employee and reinforced the importance of salary as an enforcement tool, adding that the Department had ''found no satisfactory substitute for the salary tests.'' [125] To set the salary levels, the Department considered data collected during 1955 WHD investigations on the ''actual salaries paid'' to employees who ''qualified for exemption'' (*i.e.,* met the applicable salary and duties tests in place at the time) and set the salary levels at $80 per week for executives and $95 per week for administrative and professional employees.[126] The Department set the long test salary levels so that only a limited number of employees performing EAP duties (about 10 percent) in the lowest-wage regions and industries would fail to meet the new salary level and therefore become entitled to overtime pay.[127] In laying out this methodology, often referred to as the ''Kantor'' methodology and generally referenced in this NPRM as the ''long test'' methodology, the Department echoed its prior comments stating that the salary tests ''simplify enforcement by providing a ready method of screening out the obviously nonexempt employees.'' [128]

The Department followed a similar methodology when determining the appropriate long test salary level in 1963, using data regarding salaries paid to exempt workers collected in a 1961 WHD survey.[129] The salary level for executive and administrative employees was increased to $100 per week, and the professional exemption salary level was increased to $115 per week.[130] The Department noted that these salary levels approximated the methodology used in 1958 to set the long test salary levels.[131]

The Department continued to use a similar methodology when it updated the salary levels in 1970. After examining data from 1968 WHD investigations, 1969 BLS wage data, and information provided in a report issued by the Department in 1969 that included salary data for executive, administrative, and professional employees,[132] the Department increased the long test salary level for executive and administrative employees to $125 per week and increased the long test salary level for professional employees to $140 per week.[133]

In 1975, instead of following the previous long test methodology, the Department set the long test salary levels ''slightly below'' the amount suggested by adjusting the 1970 salary levels for inflation based on increases in the Consumer Price Index (CPI).[134] The long test salary level for executive and administrative employees was set at $155, while the professional level was set at $170. The salary levels adopted were intended to be interim levels ''pending the completion and analysis of a study by [BLS] covering a six month period in 1975[,]'' and were not meant to set a precedent for future salary level increases.[135] The envisioned process was never completed, however, and the ''interim'' salary levels remained unchanged for the next 29 years.

The short test salary level increased in tandem with the long test level throughout the various rulemakings between 1949 and 2004. Because the short test was designed to capture only those white-collar employees whose salary was high enough to indicate a stronger likelihood of being employed in a bona fide EAP capacity and thus warrant a less stringent duties requirement, the short test salary level was always set significantly higher than the long test salary level.

When the Department updated the part 541 regulations in 2004, it opted to create a single standard test for exemption instead of retaining the two-test system from prior rulemakings. The Department set the new standard salary level at $455 per week and paired it with a duties test that was substantially equivalent to the less rigorous short duties test. In setting the new standard salary level, the Department looked at nonhourly earnings from the CPS MORG data collected by BLS.[136] The Department set a salary level that would exclude from exemption roughly the bottom 20 percent of full-time salaried employees in each of two subpopulations: (1) the South and (2) the retail industry nationally. In setting the salary level the Department looked to earnings data for all white-collar workers—exempt and nonexempt—and looked to a higher percentile than the long test methodology (10th percentile of exempt workers in low-wage industries and areas). The Department acknowledged, however, that the salary arrived at by this method was, at the time, equivalent to the salary derived from the long test method using current data.[137]

In the 2016 rule, the Department again used CPS MORG data but set the standard salary level equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South),

[122] *See* Stein Report at 20–21, 31–32.

[123] Weiss Report at 8, 14.

[124] *Id.* at 22–23.

[125] Kantor Report at 2–3.

[126] *Id.* at 6, 9.

[127] *Id.* at 6–7.

[128] *Id.* at 2–3; *see* Weiss Report at 8.

[129] 28 FR 7002 (July 9, 1963).

[130] *Id.* at 7004.

[131] *Id.*

[132] *See* 34 FR 9934, 9935 (June 24, 1969).

[133] 35 FR 885.

[134] 40 FR 7091.

[135] *Id.* at 7091–92.

[136] *See* 69 FR 22166–67.

[137] *Id.* at 22168. The 2004 methodology used the 20th percentile of a data set of all full-time salaried workers and the long test methodology looked to the lowest-paid 10 percent of exempt salaried workers. The two methodologies resulted in equivalent salary levels because exempt salaried workers generally have higher earnings than nonexempt salaried workers.

resulting in a standard salary level of $913 per week, which was at the low end of the historic range of short test salary levels. The Department explained that the increase in the standard salary level was needed because the 2004 rule exempted lower-salaried employees performing large amounts of nonexempt work who should be covered by the overtime compensation requirement.[138] Since the standard duties test was equivalent to the short duties test, the Department asserted that a salary level in the short test salary range was necessary to address this effect of the 2004 rule. As explained earlier, the U.S. District Court for the Eastern District of Texas held the 2016 rule invalid.

In updating the standard salary level in 2019, the Department reapplied the methodology from the 2004 rule, setting the salary level equal to the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail sector nationwide.[139] This methodology addressed concerns that had been raised that the 2016 methodology excluded too many employees from the exemption based on their salary alone. Unlike in 2004, however, where the 20th percentile of weekly earnings of full-time salaried workers in the South and retail nationally was essentially the same as the long test, this methodology now produced a salary level amount that was lower than the equivalent of the long test salary level using contemporaneous data. This methodology produced the current standard salary level of $684 per week (equivalent to $35,568 per year).[140]

2. Salary Level Test Function and Effects

Since 1940, the Department's regulations have consistently looked at both the duties performed by the employee and the salary paid by the employer in defining and delimiting who is a bona fide executive, administrative, or professional employee exempt from the FLSA's minimum wage and overtime protections. From 1949 to 2004, the Department determined EAP exemption status using a two-test system comprised of a long test (a lower salary level paired with a more rigorous duties test that limited performance of nonexempt work to no more than 20 percent for most employees) and a short test (a higher salary level paired with a less rigorous duties test that looked to the employee's primary duties and did not have a numerical limit on the amount of nonexempt work). The two-test system facilitated the determination of whether white-collar workers across the income spectrum were employed in a bona fide EAP capacity, and employees who met either test could be classified as EAP exempt.

In a two-test system, the long test salary level screens from the exemption the lowest-paid white-collar employees, thereby ensuring their right to overtime compensation. The Department has often referred to many of the employees who are screened from the exemption by virtue of their earning below the lower long test salary level as ''obviously nonexempt employees[.]'' [141] The long test salary level helped distinguish employees who were not employed in a bona fide EAP capacity because the Department found that employees who were screened from exemption by the long test salary level generally did not meet the other requirements for exemption.[142] Since 1958, the long test salary level was generally set to exclude from exemption approximately the lowest-paid 10 percent of salaried white-collar employees who performed EAP duties in the lowest-wage regions and industries.[143] The long test salary level also served as a line delimiting the population of white-collar employees for whom the duties test determined their exemption status. In the two-test system, this duties analysis included an examination of the amount of nonexempt work performed, which ensured that employees earning lower salary levels were, in fact, employed in a bona fide EAP capacity by limiting the amount of time they could spend on nonexempt work. Thus, the Department long recognized that lower salaried workers should be subject to a test that placed significant limits on the amount of nonexempt work they perform. The duties and salary level tests worked in tandem to properly define and delimit the exemption: lower-paid workers had to satisfy a more rigorous duties test with strict limits on nonexempt work; higher paid employees were subject to a less rigorous duties test because they were more likely to satisfy all the requirements of the exemption (including the limit on nonexempt work).[144]

Because employees who met the short test salary level were paid well above the long test salary level, the short test salary level did not perform the same function as the long salary level of screening obviously nonexempt employees. Instead, the short test salary level was used to determine whether the full duties test or the short-cut duties test would be applied to determine EAP exemption status. The exemption status of employees paid more than the long and less than the short test salary levels was determined by applying the more rigorous long duties test that ensured overtime protections for employees who performed substantial amounts of nonexempt work. The exemption status of employees paid at or above the higher short test salary level was determined by the less rigorous short duties test that looked to the employee's primary duty and did not cap the amount of nonexempt work an employee could perform. The short test thus provided a faster and more efficient duties test based on the Department's experience that employees paid at the higher short test salary level ''almost invariably'' met the more rigorous long duties test, including its 20 percent limit on nonexempt work, and therefore a shortened analysis of duties was a more efficient test for exemption status.[145]

In 2004, rather than update the two-test system, the Department chose to establish a new single-test system for determining exemption status. The new single standard test for exemption used a duties test that was substantially equivalent to the less rigorous short duties test in the two-test system.[146] Since the creation of the standard test, the Department has taken two different approaches to set the standard salary level that pairs with the standard duties test.

In 2004, as noted above, the Department set the new salary level roughly equivalent to the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail industry nationwide.[147] The Department acknowledged that the salary level ($455 per week) was, in fact, equivalent to the lower long test salary level amount under the two-test system using contemporaneous data.[148] Because it was equivalent to the long test salary level, the standard salary test continued to perform the same initial screening function as the long test salary level and employees who historically were entitled to overtime compensation

[138] 81 FR 32405.

[139] *See* 84 FR 51260 (Table 4).

[140] *Id.* at 51238.

[141] *See id.* at 51237 (quoting Kantor Report at 2–3).

[142] *See* Kantor Report at 2–3; Weiss Report at 8 (''In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations[.]'').

[143] *See* 84 FR 51236.

[144] Weiss Report at 22–23.

[145] *Id.*

[146] 69 FR 22214.

[147] *See id.* at 22168–69.

[148] *See id.*

because they earned below the long test salary level remained nonexempt under the new standard test. Without a higher salary short test, however, all employees who met the standard salary level were subject to the same duties test. The single standard duties test was equivalent to the short duties test, and so some employees who previously did not meet the long duties test met the standard duties test. As a result, the shift from a two-test to a one-test system significantly broadened the EAP exemption because employees who historically had not been considered bona fide EAP employees—in particular, those lower-paid employees who did not meet the long duties test because they performed substantial amounts of nonexempt work—were now defined as falling within the exemption and would not be eligible for overtime compensation.

This broadening specifically impacted lower-paid, salaried white-collar employees who earned between the long and short test salary levels and performed substantial amounts of nonexempt work. Under the two-test system, these employees had been entitled to overtime compensation if their nonexempt duties exceeded the long test's strict limit on such work. Under the 2004 standard test, these employees became exempt because they met both the low standard salary level and the less rigorous standard duties test. The Department's discussion of the elimination of the long duties test in 2004 focused primarily on the minimal role played by the long test at that time due to the erosion of the long salary level, and on the difficulties employers would face if they were again required to track time spent on nonexempt work when the dormancy of the long duties test meant that they had generally not been performing such tracking for many years.[149] While asserting that employees who were then subject to the long test would be better protected under the higher salary level of the new standard test, the Department did not compare the protection lower salaried employees would receive under the standard test with the protection they would have received under an updated long test with a salary level based on contemporary data and the existing long duties test.

To address the concern that lower-salaried employees performing large amounts of nonexempt work historically were not considered bona fide EAP employees and thus should be entitled to overtime compensation, in 2016 the Department set the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). This methodology produced a salary level ($913 per week) that was at the low end of the historical range of short test salary levels.[150] This approach restored overtime protection for employees performing substantial amounts of nonexempt work who earned between the long and short test salary levels, as they failed the new salary level test. However, this approach generated potential concerns that the salary level test should not be determinative of exemption status for too many individuals.

Due to the 2016 rule's narrowing of the exemption, employers were unable to use the exemption for employees who earned between the long test salary level and the low end of the short test salary range and would have met the more rigorous long duties test. Prior to 2004 employers could use the long test to exempt these employees, and under the 2004 rule these employees remained exempt under the one-test system. Thus, while the 2016 rule accounted for the absence of the long duties test by restoring overtime protections to employees earning between the long test salary level and the low end of the short test salary range who perform significant amounts of nonexempt work, it also made a group of employees who had been exempt under the two-test system newly nonexempt under the one-test system: employees earning between the long test level and the short test salary range who perform only limited nonexempt work.

In its 2019 rule, the Department determined that the 2016 rule had not sufficiently considered the impact of the increased standard salary level on employers' ability to use the exemption for this group of employees.[151] The Department emphasized that ''[f]or most . . . employees the exemption should turn on an analysis of their actual functions, not their salaries,'' and that the 2016 rule's effect of making nonexempt all lower-paid, white-collar employees who traditionally were exempt under the long test ''deviated from the Department's longstanding policy of setting a salary level that does not 'disqualify[ ] any substantial number of' bona fide executive, administrative, and professional employees from exemption.'' [152] To address these concerns, the Department simply returned to the 2004 rule's methodology for setting the salary threshold. In responding to comments that the proposed salary level did not account for the absence of the more rigorous long duties test, the 2019 rule reiterated the statements made in the 2004 rule and asserted that the 2016 rule did not adequately account for the absence of the lower long test salary level.[153] Applying the 2004 method to the earnings data available in 2019 produced a standard salary level of $684 per week, which was even below the equivalent of what the long test salary level would have been using contemporaneous data ($724 per week).[154]

The 2019 rule thus had the same impact as the 2004 rule of exempting all employees who earned between the long and short test salary levels and who performed too much nonexempt work to meet the long duties test, but passed the short duties test. The 2019 rule also for the first time permitted the exemption of a group of low-paid white-collar employees (those earning between $684 and $724 per week) who had always been protected by the salary level test's initial screening function—either under the long test, or under the 2004 rule salary level that was equivalent to the long test salary level. The Department stated that the standard salary level's ''fairly small difference'' from the long test level did not justify using the long test methodology to set the salary level, and emphasized that its approach preserved the salary level's principal function as a tool for screening from exemption obviously nonexempt employees.[155] In response to commenter concerns about the rule exempting employees who traditionally earned between the long and short test salary levels and received overtime compensation because they did not meet the long duties test, the Department cited the legal risks posed by the 2016 methodology (as evidenced by the district court's decisions) and explained that such employees were already exempt in the years leading up to 2004 because the Department's outdated salary levels had rendered the long test with its more rigorous duties requirement largely dormant.[156] As in the 2004 rule, the Department did not address the protection lower salaried employees would have received under the long test with an updated salary level based on contemporary data.

The Department's experience with a one-test system shows that it is less nuanced than the two-test system,

[149] *See* 69 FR 22126–27.

[150] 81 FR 32405.

[151] 84 FR 10908.

[152] *Id.* (quoting Kantor Report at 5).

[153] *See* 84 FR 51243.

[154] *Id.* at 51260.

[155] *Id.* at 51244.

[156] *Id.* at 51243.

which allowed for finer calibration in defining and delimiting the EAP exemption. In a two-test system, there are four variables (two salary levels and two duties tests) that can be adjusted to define and delimit the exemption. In a one-test system, there are only two variables (one salary level and one duties test) that can be adjusted, necessarily yielding less nuanced results. The loss in precision does not impact the lowest-paid white-collar employees, who were screened from exemption by the long test salary level, because they maintain their right to overtime pay so long as the standard salary level is set at least equivalent to the lower long test salary level—a condition that was met by the 2004 rule's salary level but not by the 2019 rule's salary level. Instead, the Department's experience shows that the shift from a two-test system to a one-test system impacts employees earning between the long and short test salary levels and, in turn, employers' ability to use the exemption for these employees.

In the two-test system, employees who earned between the long and short test salary levels and performed large amounts of nonexempt work were protected by the long duties test, while bona fide EAP employees who performed only limited amounts of nonexempt work in that earnings range were exempt. Meanwhile, the short test provided a time-saving short-cut test for higher-earning employees who would almost invariably pass the more rigorous, and thus more time consuming, long duties test. But the more rigorous long duties test, with its limitation on the amount of nonexempt work that could be performed, was always core to the two-test system, with the higher short test salary level and less rigorous short duties test serving as a time-saving mechanism for employees who would likely have met the more rigorous long duties test.

Upon reflection and based on its rulemakings over the past 20 years, the Department has determined that a one-test system that uses the standard duties test, without its limitations on the amount of nonexempt work, must use a salary level above the long test salary level in order to ensure that it is effectively identifying bona fide EAP employees. A single test system cannot fully replicate both the two-test system's heightened protection for employees performing substantial amounts of nonexempt work and its increased efficiency for determining exemption status for employees who are highly likely to perform EAP duties. One way in a one-test system to protect lower-salaried employees earning between the long and short test salary levels who were historically entitled to overtime compensation under the long test would be to reinstate the long duties test with its limitation on nonexempt work. A one-test system with a more rigorous duties test would appropriately emphasize the important role of duties in determining exemption status. However, for the reasons discussed in this section, the Department is not proposing in this rulemaking to replace the standard duties test with the long duties test or to return to a two-test system with the long duties test. The Department has not had a one-test system with a limit on nonexempt work other than from 1940 to 1949,[157] when the Department replaced this approach with its two-test system, and returning to it would eliminate the benefits of the current duties test, including having a single test with which employers and employees are familiar.

In light of these considerations, the Department's goal in this rulemaking is not only to update the single standard salary level to account for earnings growth since the 2019 rule, but also to build on the lessons learned in its most recent rulemakings to more effectively define and delimit employees working in a bona fide EAP capacity. Consistent with its broad authority under section 13(a)(1), the Department is proposing a single salary level test that will work effectively with the standard duties test to better define who is employed in a bona fide EAP capacity and will both perform the initial screening function that the salary level has always played and also adjust the salary level to account for the change to a single test system.

3. Salary Level Methodology

The Department's extensive regulatory history shows that the two-test system for defining the EAP exemption is an effective method of determining the exemption status of white-collar employees at both lower and higher salary levels. With this system, the salary and duties components of each test balance each other and the two tests work in combination to efficiently identify exempt employees while protecting employees who should receive overtime compensation. Although the two-test system's effectiveness diminished in its later years, this was a consequence of the Department's failure to update the salary level tests after 1975, not a flaw with the two-test structure itself. Not updating the salary levels in a two-test system is particularly problematic because the real value of the higher short test salary level will inevitably decrease, expanding the exemption to lower-paid white-collar employees who previously were not considered bona fide EAP employees because they did not meet the long duties test and earned below the short test salary level, and rendering the lower long test salary level, with its more rigorous duties requirements, less effective in differentiating between exempt and nonexempt employees.

The Department has considered returning to the two-test system as a way to define and delimit the EAP exemption without incurring the precision-related challenges inherent in a one-test system. However, the Department believes that a one-test system, with a single duties test, benefits both employers and employees in terms of the increased efficiency and simplicity in application. As the Department explained in 2004, a two-test system, with the more rigorous long duties test determining exemption status for many employees, would make exemption status determinations more complex and less efficient than retaining a single-test system with the existing duties test.[158] The Department also continues to be mindful of the post-1991 regulatory landscape, which remains highly relevant given that the two-test system effectively became a one-test system in 1991 when the Federal minimum wage equaled or surpassed the long test salary levels.[159]

The Department has also considered whether to propose changing the standard duties test in this rulemaking. A test requiring closer scrutiny of employee duties would be consistent with the statutory text, and a credible way to define the exemption.[160] Indeed, a more rigorous duties test, which limited the amount of nonexempt work—the long duties test—was traditionally the core of the EAP exemption in the two-test system. Experience under the two-test system shows that a more rigorous duties test helps to ensure that exempt employees are in fact performing EAP duties and

[157] *See* 5 FR 4077.

[158] *See* 69 FR 22126–27; *see also* 81 FR 32444–45 (discussing widespread employer and employee stakeholder opposition to reinstating a two-test system).

[159] 84 FR 51243.

[160] *See* 81 FR 32446 (''The Department continues to believe that, at some point, a disproportionate amount of time spent on nonexempt duties may call into question whether an employee is, in fact, a bona fide EAP employee.''); *see also* Stein Report at 17 (noting that ''it would be inconsistent with the purposes of the [FLSA]'' to exempt employees like working foremen). In the 2004 rule, the Department explained that eliminating the salary level test entirely would require significant changes to the duties test. *See* 69 FR 22172.

are therefore employed in a bona fide EAP capacity.[161] In this respect, the duties test allows for finer calibration than the salary level test when determining who is employed in a bona fide EAP capacity, with a rigorous duties test that limits the amount of nonexempt work that can be performed ensuring that employees are actually performing EAP work and not simply performing nonexempt work without receiving overtime compensation. Were the Department to lessen the salary level test's role by adopting a more rigorous duties test, the number of employees who are nonexempt based on their salary alone would decrease, helping alleviate concerns about the salary level ''supplanting an analysis of an employee's job duties'' in too many instances.[162] The Department could, for instance, return to a duties test that explicitly limited the amount of nonexempt work that could be performed. As discussed above, a limitation on nonexempt work was an integral part of the long duties test that was, for a long time, a critical component of the test for EAP exemption.

The Department has ultimately decided, however, not to propose any changes to the duties test, consistent with its decisions in the 2016 and 2019 rules. This decision was also informed by the Department's experience when it established the single-test system in 2004. In that rulemaking, the Department initially considered substantive changes to the duties test,[163] but ultimately declined to go through with most of the proposed changes, stating that the final standard duties test was substantially the same as the short duties test.[164] The Department also considered changing the duties test in both the 2016 and 2019 rulemakings, but ultimately chose not to propose any such changes.[165]

At this time, the Department favors keeping the current duties test and concludes that, paired with an appropriate salary level requirement, the test can appropriately distinguish bona fide EAP employees from nonexempt workers. While comments received in previous rulemakings and during listening sessions show that the standard duties test is not universally popular, it is well known to employers, employees, and the courts, making it easier and more efficient for employers to implement and for workers to understand. Substantive changes to the duties test are a possible way to revise the regulatory test but they would take more time for employers and employees to adjust to than an increase in the salary level, requiring employers to reassess their current exemption determinations.

i. Fully Restoring the Salary Level's Screening Function

To determine the appropriate salary level, the Department first considers whether the present methodology adequately performs the historical screening function of the long test salary level and next, the extent to which the salary level must be increased above the long test salary level to account for the switch to a one-test system in 2004.

The Department first focused on the salary level's historic function of screening obviously nonexempt employees from the exemption, a ''principle [that] has been at the heart of the Department's interpretation of the EAP exemption for over 75 years.'' [166] Under the two-test system, the lower long test salary level provided ''a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.'' [167] When the Department updated the long test in 1958, it reaffirmed the long test salary's function as a screening tool.[168]

When the Department moved to a one-test system, the standard salary test had to perform the initial screening function that the long test salary level performed in the two-test system. In the 2004 rule, the Department reaffirmed its historical statements emphasizing the salary level's critical screening function.[169] Most significantly, the Department used the long test methodology to validate its new salary level of $455 per week. Even though the 2004 rule made certain changes from that methodology (most significantly, setting the salary level equivalent to the ''lowest 20% of *all* salaried employees'' instead of the ''lowest 10% of *exempt* salaried employees''), the Department stressed that both ''approaches are capable of reaching exactly the same endpoint'' and demonstrated that the new method and the long test method produced equivalent salary levels at the time.[170] By setting a salary level equivalent to the long test level, the Department ensured that employees earning at levels whereby they were entitled to overtime compensation under the two-test system because they earned below the long test salary level remained screened from the exemption by the new standard salary test, regardless of whether they met the less rigorous standard duties test. In the 2004 rule, the Department rejected requests from commenters who supported a salary level that was $30 to $95 lower than the level the Department ultimately adopted,[171] thus maintaining the historic screening function by declining to set a salary level lower than the long test level.

In its 2019 rule, the Department reemphasized the salary level's screening function.[172] The Department distinguished the 2016 rule, which the Department explained was invalidated because it '' 'untethered the salary level test from its historical justification' of '[s]etting a dividing line between nonexempt and potentially exempt employees' by screening out only those employees who, based on their compensation level, are unlikely to be bona fide executive, administrative, or professional employees.'' [173] In contrast, the Department explained, reapplying the 2004 methodology to current data was likely to pass muster because the district court that invalidated the 2016 rule ''endorsed the Department's historical approach to setting the salary level'' and ''explained that setting 'the minimum salary level as a floor to screen[ ] out the obviously nonexempt

[161] The importance of a rigorous duties test was illustrated by the Department's *Burger King* litigation in the early 1980s, when the short and long tests were still actively in use. The Department brought two actions arguing that Burger King assistant managers were entitled to overtime protection. *Sec'y of Labor* v. *Burger King Corp.,* 675 F.2d 516 (2d Cir. 1982); *Sec'y of Labor* v. *Burger King Corp.,* 672 F.2d 221 (1st Cir. 1982). One group of assistant managers satisfied the higher short test salary level and was therefore subject to the less rigorous short duties test; the other group was paid less and was therefore subject to the long duties test with its limit on nonexempt work. Both appellate courts found that the higher paid employees were not overtime protected—even though they performed substantial amounts of nonexempt work—because they satisfied the short duties test. The lower-paid employees, however, were not exempt and therefore entitled to overtime compensation because they did not meet the more rigorous long duties test.

[162] 275 F. Supp. 3d at 806.

[163] *See* 68 FR 15564–68.

[164] 69 FR 22126, 22192–94.

[165] 84 FR 10904; 82 FR 34618 (July 26, 2017); 80 FR 38543 (July 6, 2015).

[166] *See* 84 FR 51241.

[167] Weiss Report at 8.

[168] Kantor Report at 2–3.

[169] 69 FR 22165.

[170] *See id.* at 22167–71 (showing that for all full-time salaried employees, $455 in weekly earnings corresponded to just over the 20th percentile in the South and the 20th percentile in retail, and that for employees performing EAP duties, $455 in weekly earnings corresponded to just over the 8th percentile in the South and the 10th percentile in retail).

[171] *See id.* at 22164.

[172] 84 FR 51237 (internal quotation marks omitted).

[173] *Id.* at 51231 (quoting 84 FR 10901).

employees' is 'consistent with Congress's intent.' '' [174]

The Department's position remains that a core function of the salary level test is to screen from the EAP exemption employees who, based on their low pay, should receive the FLSA's overtime protections. For decades under the Department's two-test system, the long test salary level performed this screening function. In the 2004 rule, the Department used a different approach—setting a single salary level test that was equivalent to, and thus set the same line of demarcation as, the long test salary level (although it combined that salary level with a duties test that was equivalent to the less rigorous short duties test). The Department deviated from this approach in 2019, setting a salary level that was $40 per week below the level produced using the long test methodology.[175] In doing so, the Department for the first time expanded the exemption to include employees who were paid below the long test salary level. As an initial step, the proposed salary level methodology must fully restore the salary level's screening function by ensuring that employees who were nonexempt because they earned less than the long test salary are also nonexempt under the standard test. Simply restoring the historic screening function would require a standard salary level amount that is at least equal to the long test level (which is $925 per week using current data). Such a salary level would not, however, account for the shift to a one-test system in 2004.

Increasing the standard salary level to at least the long test level would ensure that the salary level, at a minimum, performs the historical screening function it would have performed in a two-test system. From 1938 to 2019, all salaried white-collar employees paid below the long test salary level were entitled to the FLSA's protections, regardless of the duties they performed. This was true from 1938 to 1949 under the salary level test that became the long test,[176] from 1949 to 2004 under the long test, and from 2004 to 2019 under the standard salary level test that was set equivalent to the long test level. Setting the salary level below the long test level as was done in the 2019 rule—because the 2004 methodology no longer matched the long test salary level based on contemporaneous data—departed from this history by enlarging the exemption to newly include employees who earned less than the long test salary level.

In the 2019 rule, the Department expressly declined to use the long test methodology to set the salary level test.[177] Because the Department is not using the long test methodology to set the salary level in this proposal, but is instead using it to inform its selection of a new salary level methodology, the concerns expressed by the Department in 2019 do not apply. The Department was in part worried that the long test method is ''complex to model and thus is less accessible and transparent.'' [178] This concern does not arise here because the Department's proposed methodology uses a publicly available data set of all full-time nonhourly workers in the South to set the salary level, as opposed to the long test methodology data set (which only included exempt workers).[179] In 2019, the Department also expressed concern that the long test methodology presents a ''circularity problem'' because this approach ''would determine the population of exempt salaried employees, while being determined by the make-up of that population.'' [180] This concern is similarly not implicated here because, consistent with its practice since 2004, the Department is setting the salary level using a data set of all full-time nonhourly workers, not just exempt workers.

ii. Selecting the Proposed Salary Level Methodology

Section 13(a)(1)'s broad grant of statutory authority for the Department to define and delimit the EAP exemption provides the Department a degree of latitude in determining an appropriate salary level for identifying individuals who are employed in a bona fide EAP capacity. The Department believes that the long and short test salary levels provide useful parameters informed by its historical rulemaking for determining how to update the salary level test in this rulemaking. As previously discussed, the long and short test salary levels have served as the foundation for nearly all of the Department's prior rulemakings, either directly under the two-test system, or indirectly as a means of evaluating the Department's salary level methodology under a one-test system. Based on 2022 data, applying the long test methodology produces a salary level of $925 per week ($48,100 per year) and the short test methodology produces a salary level of $1,378 per week ($71,656 per year).

The long and short test salary levels reflected longstanding understandings of how an individual's salary level informs the question of whether an individual is employed in a bona fide EAP capacity. As noted above, the long test salary level helped distinguish employees who were not employed in a bona fide EAP capacity and the Department found that employees who were screened from exemption by the long test salary level generally did not meet the other requirements for exemption.[181] The justification for the short test, on the other hand, was that employees who met the higher salary level were more likely to meet all the requirements of the exemption (including the long test's 20 percent limit on nonexempt work).[182] Moreover, because the Department's rulemakings since 2004 have, to varying extents, used the long and short tests as guideposts for setting the salary level in a one-test system, maintaining the same orientation in this rulemaking would enable the Department to calibrate its methodology to better define and delimit bona fide EAP employees, and evaluate how it impacts employees who historically have been entitled to overtime compensation and the ability of employers to use the exemption to exclude from overtime protection employees who have historically been exempt.

In its almost 20 years of experience with the one-test system, the Department has never set a standard salary level that falls between the long test salary level and the short test range. As explained more fully above, the Department set the standard salary at (or below) the long test salary level in the 2004 and 2019 rules and set it at the low end of the historic range of short test salary levels in the 2016 rule. Setting the salary level at either the long test salary level or equivalent to a short test salary level in a one-test system with the standard duties test, however, results in either denying overtime protection to lower-paid employees who are performing large amounts of nonexempt work, and thus, were exempt under the Department's historical view of the EAP

[174] *Id.* at 51241 (quoting 275 F. Supp.3d at 806).

[175] *Id.* at 51244.

[176] During this period the Department used a one-test system that paired a lower salary level with a more rigorous duties test. *See, e.g.,* 5 FR 4077.

[177] 84 FR 51244, 51260.

[178] *Id.* at 51244.

[179] For the same reason, the Department's approach does not implicate concerns that applying the long test method ''requires 'uncertain assumptions' '' to compile a dataset set that represents exempt EAP employees. *Id.* (quoting 69 FR 22167). Moreover, while it is true that the Department must apply its probability codes to determine the group of salaried employees who pass the duties test, the Department has consistently applied these codes since the 2004 rule. *See generally* section VII.B.5 (discussing probability codes).

[180] 84 FR 51244 (quoting 69 FR 22167).

[181] *See* Kantor Report at 2–3.

[182] Weiss Report at 22–23.

exemption, or in raising concerns that the salary level is determining the status of too many employees. An appropriately calibrated salary level between the long and short test salary levels would better define and delimit which employees are employed in a bona fide EAP capacity, and thus better fulfill the Department's duty to define and delimit the EAP exemption.

Traditionally, the Department considered employees earning between the long and short test salary levels to be employed in a bona fide EAP capacity only if they were not performing substantial amounts of nonexempt work. With the adoption of a duties test based on the less rigorous short duties test, the shift to a single-test system eliminated the inquiry into the amount of nonexempt work employees performed. Following this shift, the Department has taken two approaches to setting the salary level to pair with the standard duties test. The approach taken in the 2004 rule permitted the exemption of all employees earning above the long test salary level who met the standard duties test—including many employees who performed substantial amounts of nonexempt work and were protected by the long duties test. The approach taken in the 2016 rule was challenged and criticized as making nonexempt employees earning between the long test salary level and the low end of the short test salary range—including some employees who may have performed very little nonexempt work and would have been exempt under the long test. Inevitably, any attempt to pair a single salary level with the current duties test will result in some employees who perform substantial amounts of nonexempt work being exempt, and some employees who perform almost exclusively exempt work being nonexempt.[183] But such a result is inherent in setting any salary level in a one test system—some employees will have EAP status turn on salary level. The proposed salary level would better identify which employees are employed in a bona fide EAP capacity—particularly by restoring overtime eligibility for individuals who perform substantial amounts of nonexempt work and historically would have been protected by the long duties test—while at the same time addressing potential concerns that the salary level test should not be determinative of exemption status for too many individuals.[184]

In setting the salary level, the Department continues to believe that it is important to use a methodology that is transparent and easily understood. As in its prior rulemakings, the Department proposes to set the salary level using a lower-salary regional data set (as opposed to nationwide data) to accommodate businesses for which salaries generally are lower due to geographic or industry-specific reasons.[185] Specifically, the Department proposes to set the salary level using the data set of full-time nonhourly [186] workers in the lowest-wage Census Region (the South). Like the Department's 2004, 2016, and 2019 rules, this approach would promote transparency because BLS routinely compiles this data. It would also promote regulatory simplification because the data set is not limited to exempt EAP employees and thus does not require the Department to model which employees pass the duties test.[187]

For similar reasons, the Department is not proposing to add nationwide earnings data from specific industries (such as retail) to the CPS earnings data from the lowest-wage Census Region. The Department's 2019 rule included such data to faithfully replicate the 2004 methodology which considered earnings of full-time nonhourly workers in the lowest-wage Census Region and the retail industry nationally.[188] The Department's approach nonetheless would yield a salary level that would be appropriate in low-wage industries because using earnings data from the lowest-wage Census Region would capture differences across regional labor markets without attempting to adjust to specific industry conditions.[189]

Based on 2022 data, applying the long test methodology produces a salary level of $925 per week ($48,100 per year), which equates to between the 26th and 27th percentiles of weekly earnings of full-time, nonhourly workers in the lowest-wage Census Region (the South).[190] This figure provides what the Department believes should be the lowest boundary of a salary level methodology because it would at least restore the historical screening function that had operated under a two-test system.

The Department is not proposing to set the salary level equivalent to the long test level in part because doing so would perpetuate the problem that has become evident under the 2004 and 2019 rules: that setting the single salary level no higher than the long test level enables employers to exempt employees who were traditionally not considered bona fide EAP employees because they performed substantial amounts of nonexempt work and did not meet the long duties test under the two-test system. Like these earlier rules, this approach would impact white-collar employees earning between the long and short test salary levels who perform substantial amounts of nonexempt work—and thus were entitled to overtime protection under the two-test system—but meet the less rigorous standard duties test.

As discussed above, the Department could address this issue by changing the duties test to reinstate the long test's limit on nonexempt work. Doing so would restore the relationship between the salary level and duties tests that existed under the two-test system whereby the Department paired a lower salary level with a more rigorous duties test. Paired with a long test-equivalent salary level, a stronger duties test would ensure that lower-paid employees who perform large amounts of nonexempt work receive overtime protection, while permitting employers to continue using the exemption for lower-paid employees performing EAP duties. However, for the reasons previously discussed, the Department proposes to restore the relationship between the salary level and duties test by keeping the duties test unchanged at this time and instead increasing the salary level moderately above the long test level. This increase in the salary level is necessary for the Department to effectively fulfill its role of defining and delimiting the EAP exemption because, without it, the employees who were not considered bona fide EAPs historically—those earnings between the long and short test

[183] *See* Stein Report at 6 (''In some instances the rate selected will inevitably deny exemption to a few employees who might not unreasonably be exempted, but, conversely, in other instances it will undoubtedly permit the exemption of some persons who should properly be entitled to benefits of the act.'').

[184] The Department has repeatedly recognized that increasing salary level tends to correlate with the performance of bona fide EAP duties. *See* section IV.A.2 (discussing role of long test and short test salary levels); section IV.C (discussing the role of the HCE total annual compensation threshold). Thus, increasing overtime protection specifically for workers earning at the lower end of the range between the long test salary level and short test salary level—but not those earning at the higher end of that range—is an especially appropriate approach to balancing these concerns.

[185] *See* 84 FR 51238; 81 FR 32404.

[186] Consistent with recent rulemakings, in determining earnings percentiles the Department looked at nonhourly earnings for full-time workers from the CPS MORG data collected by BLS.

[187] As discussed in the economic analysis, *see* section VII.B.5, this modeling is done using the Department's probability codes. *See* 84 FR 51244; 69 FR 22167.

[188] *See* 84 FR 51244 (citing 69 FR 22167).

[189] *See* 81 FR 32410.

[190] The 26th percentile in this data set corresponds to a salary level of $918 per week and the 27th percentile corresponds to a salary level of $933 per week.

salary levels who did not meet the historical long duties test—would remain exempt from overtime. In other words, the Department's proposed salary level methodology will better help limit the exemption of lower-paid employees who historically were not considered bona fide EAP employees because they perform substantial amounts of nonexempt work, but who are not receiving overtime protection under the one-test system.

Although the ''regulations cannot have the precision of a mathematical formula[,]'' [191] with only two variables to adjust in a one-test system, and with the Department deciding to leave one of those variables (the duties test) unchanged in this rulemaking, the Department wanted to look more precisely at methods for updating the salary level test. The Department has therefore looked to employee earnings ventiles rather than only deciles as it has historically done.[192] The earnings ventiles between the long test salary level (approximately the 26th or 27th percentile) and short test salary level (approximately the 53rd percentile) are the 30th, 35th, 40th, 45th, and 50th percentiles of weekly earnings of full-time salaried workers in the lowest-wage Census Region. The Department examined these earnings ventiles with the goal of more effectively defining and delimiting the exemption while maintaining the one-test system.

Setting the salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region would reduce the impact of a one-test system on lower-paid white-collar employees who perform significant amounts of nonexempt work. This percentile is midway between the 30th and 50th percentiles and would produce a salary level ($1,145 per week) that is roughly the midpoint between the long and short test salary levels. Of the approximately 10.3 million salaried white-collar employees who earn between the long and short test salary levels, approximately 47 percent earn between the long test salary level and $1,145 and would receive overtime protection by virtue of their salary, while approximately 53 percent earn between $1,145 and the short test salary level and would have their exemption status turn on whether they meet the duties test.

The Department remains concerned, however, that courts could find this approach makes the salary level test determinative of overtime eligibility for too many employees (*i.e.,* 47 percent of those earning between the long and short test levels). Setting the salary level equal to the 45th or 50th percentile of weekly earnings would further amplify this concern. In contrast, setting the salary level based on a lower percentile of earnings will (compared to such higher levels) increase the number of employees for whom duties is determinative of exemption status, and in turn the ability of employers to use the exemption for more lower-paid employees who meet the EAP duties requirements. This outcome is consistent with the important role of the duties test in identifying bona fide EAP employees and recognizes that the 2016 rule (which set the salary level equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region) was held invalid by the U.S. District Court for the Eastern District of Texas for making too many employees eligible for overtime based on salary alone.[193]

The Department is also responding to concerns that setting the salary level equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region would foreclose employers from exempting any white-collar employees who earn less than $1,145 per week and perform EAP duties, including those who were exempt under the long test and remained exempt when the Department established the one-test system in 2004 and set the salary level equivalent to the long test level.[194] Litigants challenging the 2016 rule also emphasized this consequence of setting a salary level above the long test in a one-test system, and those arguments have contributed to the Department more fully attempting to account for the impact of the shift from a two-test to a one-test system on the scope of the exemption. Although some stakeholders have urged the Department to follow the methodology from the 2016 rule or set an even higher threshold, the Department has chosen a salary level that is appreciably lower than the midpoint between the short and long test salary levels—an approach that it believes is an appropriate method for identifying bona fide EAP employees. This approach would also reasonably balance the goal of ensuring that employees earning above the long test salary level but performing substantial amounts of nonexempt work are not exempt with the goal of enabling employers to use the exemption for employees who do not perform substantial amounts of nonexempt work.

The Department also examined the 30th and 35th percentiles of weekly earnings of full-time salaried workers in the lowest-wage Census Region. The Department did not consider setting the salary level at the 25th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($901 per week or $46,852 per year) because it is lower than the long test salary level ($925 per week or $48,100 per year, which is approximately the 26th or 27th percentile). Setting the standard salary level at the 30th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region would result in a salary level of $975 per week ($50,700 per year). This salary level is roughly the midpoint between the 2004 methodology (the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region and in retail nationally, currently $822 per week or $42,744 per year), and the 2016 methodology (the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, currently $1,145 per week or $59,540 per year). While setting the salary level equal to the 30th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region would produce a salary level that is above the long test salary level, it is very close to the long test salary level, and the Department is concerned it would not sufficiently address the problem inherent in the 2004 methodology of including in the exemption employees who perform significant amounts of nonexempt work, including those earning salaries closer to the long test salary level, and historically were not considered bona fide EAP employees under the two-test system. Additionally, only 11 percent of white-collar employees who earn between the long and short test salary levels earn below the 30th percentile. As noted above, the Department believes that the standard salary must fulfill the historical screening function of the long test salary level and account for the shift to a one-test system, and the

[191] Weiss Report at 9.

[192] Historically, the Department set the long test salary level to exclude from exemption approximately the lowest-paid 10 percent of exempt salaried employees in the lowest-wage regions and industries. In 2004 and 2019, the Department set the standard salary level test equivalent to the 20th percentile of weekly earnings of full-time salaried workers in the South Census Region and in the retail industry nationally. In the 2016 rule, the Department set the salary level equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). *See* 84 FR 51236–37 (describing prior methodologies).

[193] *See Nevada,* 275 F.Supp.3d at 806–07.

[194] *See* 84 FR 51242.

Department is concerned that this salary level would not fulfill both objectives.

After careful consideration, the Department concludes that setting the salary level equal to the 35th percentile—which produces a salary level of $1,059 per week—will effectively define and delimit the scope of the EAP exemption. Consistent with the Department's responsibility to ''not only . . . determin[e] which employees are entitled to the exemption, but also [to] draw[ ] the line beyond which the exemption is not applicable[,]'' [195] the Department's proposed standard salary level will, in combination with the standard duties test, effectively calibrate the scope of the exemption to ensure the exemption of bona fide EAP employees, and do so in a way that distributes across the population of white-collar employees earning between the long and short test salary levels the impact of the shift to a one-test system.

The Department stated in the 2019 rule that the primary and modest purpose of the salary level is to identify potentially exempt employees by screening out obviously nonexempt employees.[196] While this initial screening function is the primary effect of the salary level, as noted above, each update to the salary level has also had a secondary effect: it defines the group of white-collar employees for whom the duties test is determinative of their exemption status. Setting the salary level equal to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region produces a salary level high enough above the long test level to ensure overtime protection for some lower-paid employees who were traditionally entitled to overtime compensation under the two-test system by virtue of their performing large amounts of nonexempt work. The salary level is also low enough, as compared with higher salary levels, to significantly shrink the group of employees performing EAP duties who are excluded from the exemption by virtue of their salary alone. Of the 10.3 million salaried white-collar employees earning between the equivalent of the long and short test salary levels, approximately 31 percent earn between $925 (the equivalent of the long test salary level) and $1,059 (the proposed salary level) and would receive overtime protection by virtue of their salary, while approximately 69 percent earn between $1,059 and $1,378 (the equivalent of the short test salary level) and would have their exemption status turn on whether they meet the duties test.

Comparing the impact of the new salary level on white-collar employees earning between the long and short test salary levels and their employers reinforces the reasonableness of the Department's proposed salary level. Whereas the 2004 and 2019 rules permitted the exemption of such employees even if they performed significant amounts of nonexempt work, and the 2016 rule prevented employers from using the exemption for such employees earnings below the short test salary range even if they performed EAP duties, the proposed methodology falls between these two methodologies and therefore reasonably balances the effect of the switch to a one-test system in a way that better differentiates between those who are and are not employed in a bona fide EAP capacity. Even though the Department's decision to select a salary level below the midpoint between the long and short tests means that the effect of the salary level on these employees and employers is not equal, a higher salary level could disrupt reliance interests of employers who (due in part to the Department's failure to update the salary level tests between 1975 and 2004), have been able to use a lower salary level and more lenient duties test to determine exemption status since 1991. However, a significantly lower salary level akin to the long test salary level would avoid disrupting such reliance interests only by continuing to place the burden of the move to a one-test system entirely on employees who historically were entitled to the FLSA's overtime protections because they perform substantial amounts of nonexempt work. The Department believes that employer reliance interests should inform where the salary level is set between the long and short test levels, and that its approach strikes a workable equilibrium that reasonably balances, between employees' right to receive overtime compensation and employers' ability to use the exemption, the impact of a one-test system.

Such reasonable balancing is fully in line with the Department's authority under the FLSA to ''mak[e] certain by specific definition and delimitation'' the ''general phrases'' ''bona fide executive, administrative, and professional employee.'' [197] This grant of authority confers discretion upon the Department to reasonably determine the boundaries of these general categories; any such line-drawing, as courts have recognized, will ''necessarily'' leave out some employees ''who might fall within'' these categories.[198]

The Department recognizes that it stated in its 2016 rule that the current duties test could not be effectively paired with a salary level below the short test salary range, and for this reason expressly rejected setting the salary level at the 35th percentile of weekly earnings of full-time salaried workers in the South.[199] But that rule, which would have prevented employers from using the EAP exemption for some employees who were considered exempt under the prior two-test system, was challenged in court, and a return to it would result in significant legal uncertainty for both workers and the regulated community. In the 2019 rule, the Department expressly rejected setting the salary level equal to the long test or higher.[200] However, as noted above, the Department did not fully address in that rule the implications of the switch from a two-test to a single-test system. Having now grappled with those implications, particularly in light of the Department's experience in the litigation challenging its 2016 rule, the Department has concluded that not only can it pair the current duties test with a salary between the long and short test salary levels, but that doing so appropriately recalibrates the salary level in a one-test system to ensure that it effectively identifies bona fide EAP employees.

The Department is not proposing any changes to how bonuses are counted toward the salary level requirement. Consistent with the current regulations, if the salary level is finalized as proposed, employers could satisfy up to 10 percent of the salary level ($105.90 per week under this proposed rule) through the payment of nondiscretionary bonuses and incentive pay (including commissions) paid annually or more frequently.[201]

4. Assessing the Impact of the Proposed Salary Level

As stated above, the Department believes that the salary level test should fulfill a ''useful, but limited, role'' in defining and delimiting the EAP exemption.[202] In proposing to update the standard salary level, the Department seeks to: preserve the primary role of an analysis of employee duties in determining EAP exemption status, fully restore the initial screening function of the salary level, and more

[195] Stein Report at 2.

[196] 84 FR 51238.

[197] *Walling,* 140 F.2d at 831.

[198] *Id.*

[199] 81 FR 32410.

[200] *See* 84 FR 51244.

[201] § 541.602(a)(3).

[202] 84 FR 51238.

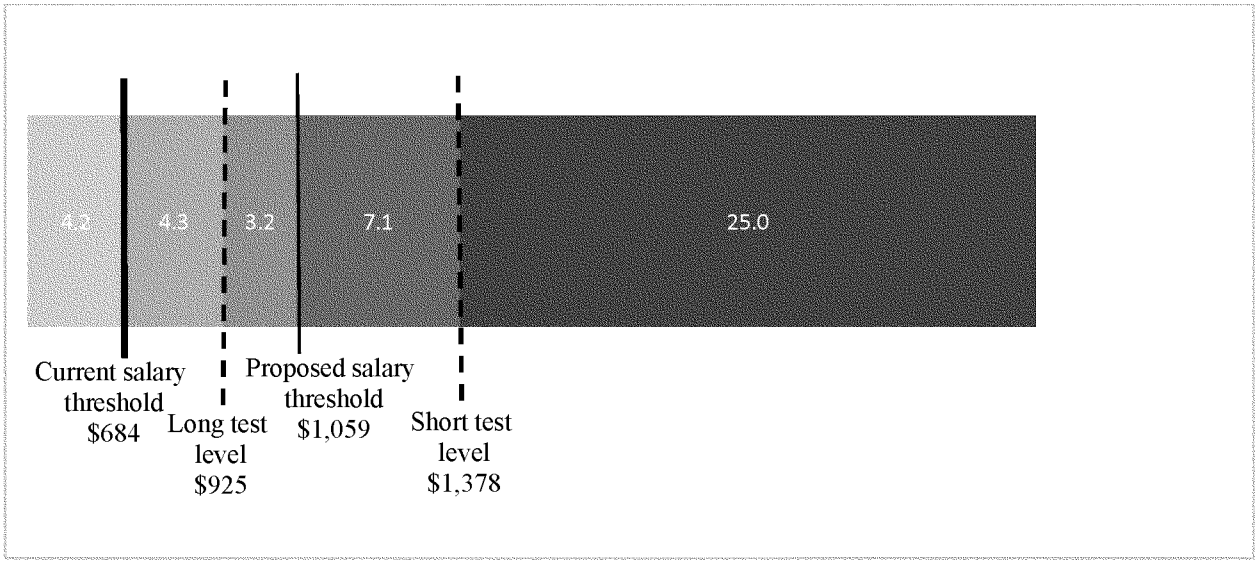
effectively identify in a one-test system who is employed in a bona fide EAP capacity in a manner that reasonably distributes among employees earning between the long and short test salary levels and their employers the impact of the Department's move from a two-test to a one-test system. A closer look at the expected impact of the proposed salary level shows that it meets these objectives.

The Department intentionally chose a salary level methodology that, if finalized, would ensure that the EAP exemption status of the great majority of white-collar employees would continue to depend on their duties. To evaluate whether the proposed methodology meets this objective, the Department first considered its effect on the population of all salaried white-collar employees—the universe of employees who could potentially be impacted by a change in the standard salary level. This analysis confirmed that the number of white-collar employees who would be excluded from the EAP exemption as a result of the Department's proposed standard salary level is greatly exceeded by the far-larger population of white-collar employees for whom duties would continue to determine their exemption status.

As illustrated in Figure A below, of the approximately 43.8 million salaried white-collar employees in the United States subject to the FLSA,[203] about 11.7 million earn below the Department's proposed standard salary level of $1,059 per week and about 32.1 million earn above the Department's proposed salary level.[204] Thus, approximately 27 percent of salaried white-collar employees (most of whom, as discussed below, do not perform EAP duties) earn below the proposed salary level, whereas approximately 73 percent of salaried white-collar employees earn above the salary level and would have their exemption status turn on their job duties.[205]

Scrutinizing these figures more closely reinforces the continued importance of the duties test under the Department's proposal. Of the approximately 11.7 million salaried white-collar employees who earn below the Department's proposed standard salary level of $1,059 per week, about 8.5 million earn below the long test salary level of $925 per week. As explained above, with the exception of the 2019 rule, when the Department set the salary level slightly lower, the Department has always set salary levels that screened from exemption employees earning below the long test salary level. The number of salaried white-collar employees for whom salary would be determinative of their nonexempt status and who earn at least the long test salary level—3.2 million—is nearly ten times smaller than the number of salaried white-collar employees for whom job duties would continue to be determinative of their exemption status because they earn at least the proposed standard salary level—32.1 million.[206]

Figure A: Distribution of Salaried White-Collar Employees by Weekly Earnings



Note: Numbers are in millions of employees.
Note: The long test level is the salary threshold that, based on current data, would exclude the lowest-paid 10 percent of exempt EAP employees in low-wage industries and areas. The short test level is equal to 149 percent of the long test level. The 149 percent ratio is the simple average of the fifteen historical ratios of the short test salary level to the long test salary level.

[203] Excluded from this number are workers in named occupations and those exempt under another non-EAP overtime exemption. The exemption status of these groups will not be impacted by a change in the standard salary level.

[204] As discussed further below, *see, e.g.,* section VII.B.5, the Department used data representing compensation paid to nonhourly white-collar workers to estimate compensation paid to salaried white-collar employees.

[205] Even this estimate is conservative, as it excludes 8.1 million white-collar employees employed as teachers, attorneys, and physicians, for whom there is no salary level requirement under the part 541 regulations and whose exemption status is therefore always determined by their duties. If these employees in ''named occupations'' are included, the percentage of white-collar employees for whom exemption status would depend on duties, rather than salary, increases to 77 percent. *See* §§ 541.303–304.

[206] As noted above, *see supra* note 205, these figures do not include the additional 8.1 million white-collar employees in occupations for which there is no salary level requirement and so duties is always determinative of exemption status.

In analyzing how the Department's proposed salary level would impact all salaried white-collar employees, the Department also considered the extent to which salaried white-collar employees across the income distribution perform EAP duties. As noted above, the salary level has historically served as ''a helpful indicator of the capacity in which an employee is employed, especially among lower-paid employees;'' [207] however, it should not eclipse the duties test.[208] The Department's proposed standard salary level meets this standard because, according to probability codes the Department has used in all of its recent part 541 rules,[209] most salaried white-collar employees paid less than the proposed standard salary level do not meet the duties test, whereas a substantial majority of salaried white-collar employees earning above the proposed standard salary level meet the duties test.

As illustrated in Figure B, of the 11.7 million salaried white-collar employees who earn less than the proposed standard salary level of $1,059 per week, the Department estimates that only 36 percent—about 4.2 million employees—meet the standard duties test. In contrast, of the 32.1 million salaried white-collar employees who earn at least $1,059 per week, 76 percent—about 24.5 million employees—meet the standard duties test.[210] The number of salaried white-collar workers who meet the standard duties test and earn below the proposed standard salary level is thus nearly six times smaller than the number of salaried white-collar workers who meet the standard duties test and earn at least the proposed standard salary amount. And 85 percent of all salaried white-collar workers who meet the standard duties test—24.5 million out of a total of approximately 28.7 million—earn at least the Department's proposed standard salary level.[211]

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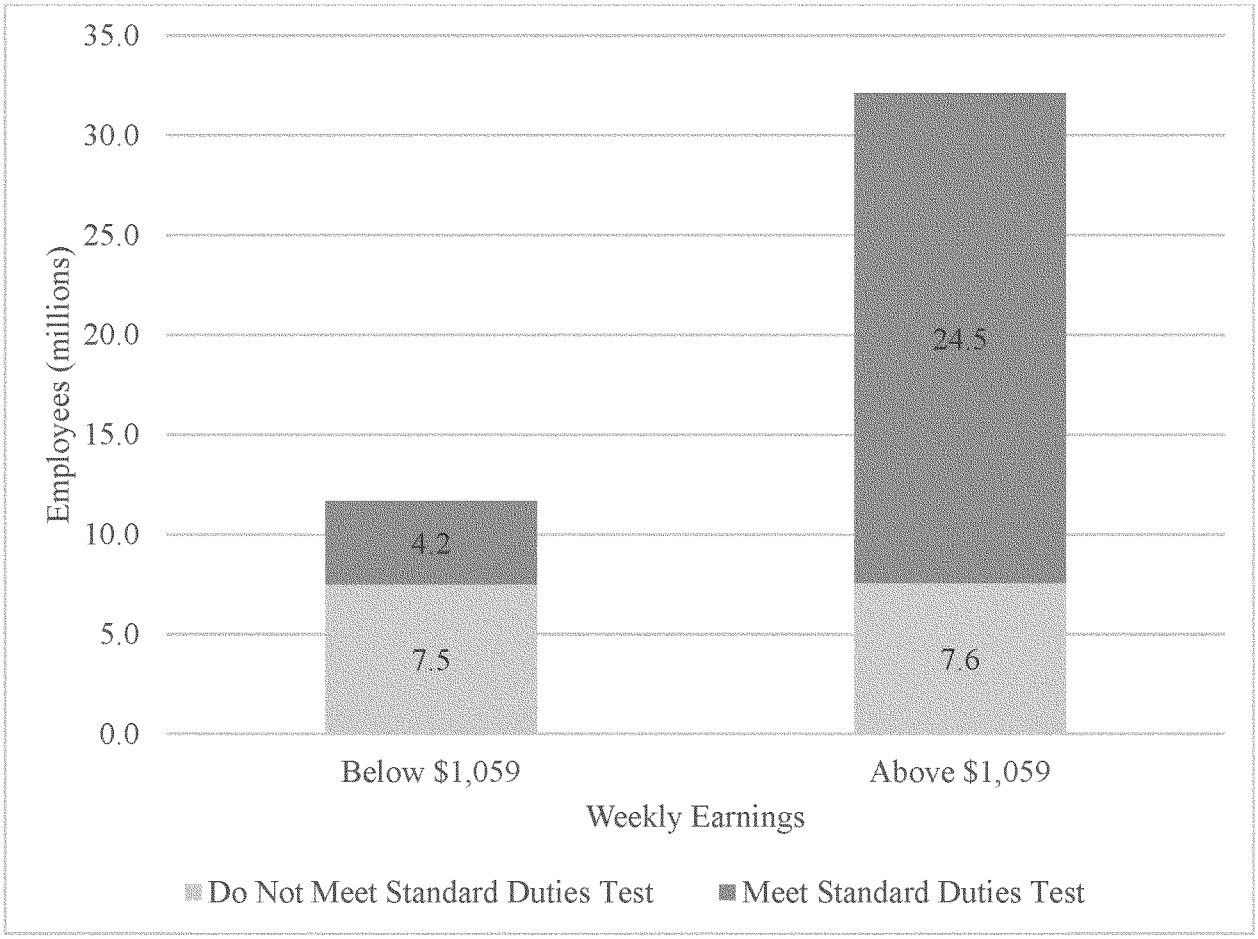
Figure B: Salaried White-Collar Employees Earnings Above and Below the Proposed Standard Salary Level Who Meet or Do Not Meet the Standard Duties Test



The Department next evaluated its proposed salary level methodology by looking at salaried white-collar employees who earn between the long and short test salary levels. As discussed in section IV.A.3.ii, the long

[207] 84 FR 51239 (quoting 84 FR 10907).

[208] *See id.* at 51245.

[209] *See* section VII.B.5.

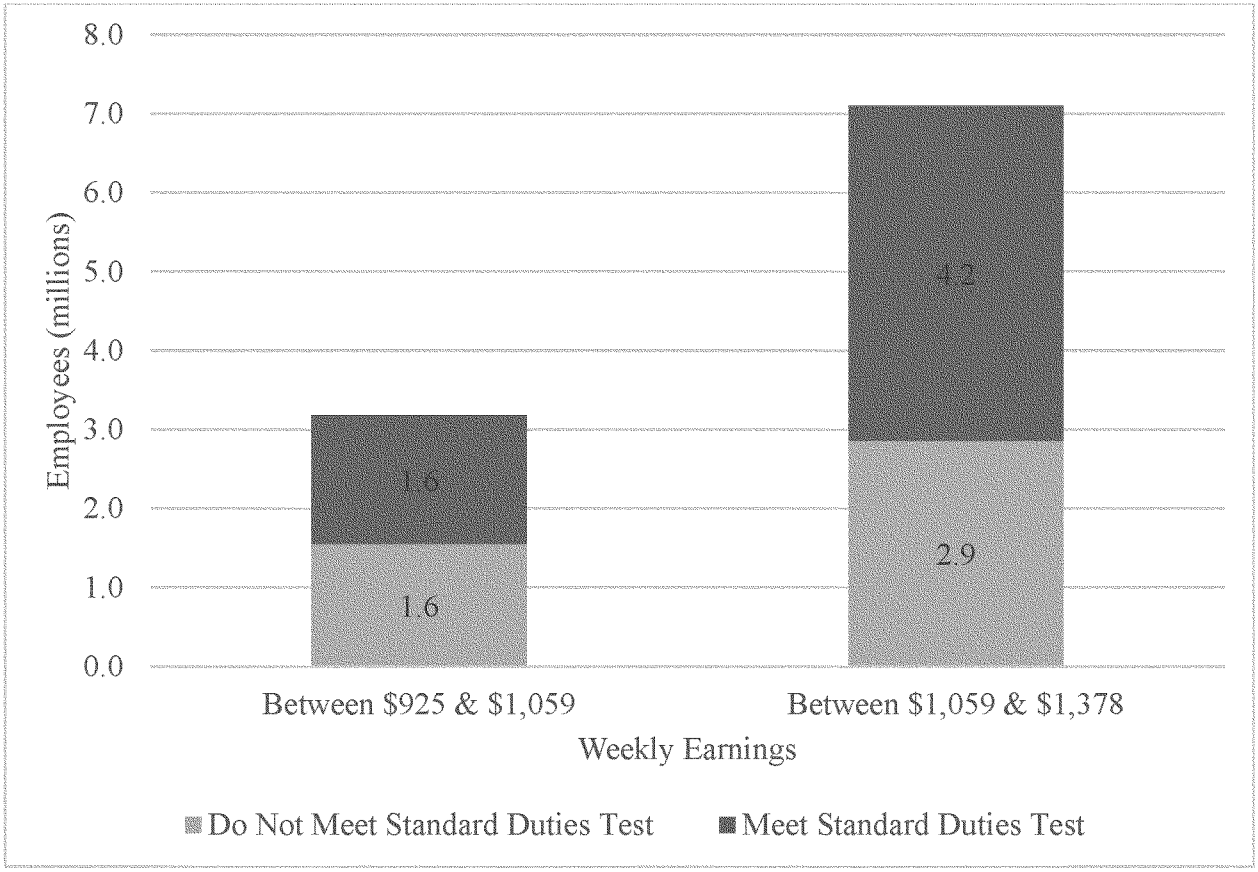
[210] As noted above, *see supra* note 205, these figures exclude salaried white-collar workers who are not subject to the part 541 salary criteria.

[211] Note that these numbers refer only to salaried white-collar employees at all salary levels who meet the standard duties test, including employees who are nonexempt because they earn below the current standard salary level.

and short test salary levels provide appropriate parameters for determining how to update the salary level test. Under the Department's proposal, duties would continue to be determinative of exemption status for a significant majority of white-collar employees earning between these thresholds.

As illustrated in Figure C, of the approximately 10.3 million salaried white-collar employees who earn between the long test salary level of $925 per week and the short test salary level of $1,378 per week, about 31 percent (3.2 million) earn below the Department's proposed standard salary level, and about 69 percent (7.1 million) earn at or above the Department's proposed standard salary level. Moreover, of the 3.2 million employees earning between the long test and the proposed standard salary level, approximately half do not meet the standard duties test.[212]

Figure C: Salaried White-Collar Employees Between Long and Short Test Salary Levels Who Meet or Do Not Meet the Standard Duties Test



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Finally, the Department also looked at the impact of the proposed salary level on currently exempt EAP employees—those salaried white-collar employees who meet the standard duties test and earn at least $684 per week. As with every prior rulemaking to increase the part 541 salary levels, a relatively small percentage of currently exempt employees would become nonexempt if this proposal were finalized. Of the approximately 43.8 million salaried white-collar employees in the United States, approximately 27.9 million currently qualify for the EAP exemption.[213] Of these 27.9 million presently-exempt employees, just 3.4 million earn at or above the current $684 per week standard salary level but less than $1,059 per week and would, without some intervening action by their employers, become entitled to overtime protection as a result of the Department increasing the standard salary level to $1,059 per week. A test for exemption that includes a salary level component will necessarily result in a number of employees who earned at or above the prior salary level and pass the duties test becoming nonexempt when the salary level is updated. This is a feature, and not a flaw, of a salary level test, and as the

[212] As discussed further below, about 1.6 million of the approximately 3.2 million salaried white-collar employees who earn between the long test salary threshold and the Department's proposed salary level (about 49 percent of these employees) do not meet the standard duties test. Thus, in effect, only 16 percent of salaried white-collar employees who earn between the long and short test salary levels—1.6 million out of a total of 10.3 million—have their exemption status determined solely by the proposed standard salary level.

[213] Note that the 27.9 million employee figure only refers to employees who meet the standard EAP exemption and thus differs from the population of currently exempt EAP workers identified in the economic analysis (28.4 million), which includes workers who qualify only for the HCE exemption. As noted above, this is a conservative estimate because there are also 8.1 million employees in the ''named occupations'' who, under the Department's regulations, are exempt based on their duties alone.

Department has consistently found since 1938, salary is an important indicator of whether an individual is employed in a bona fide EAP capacity and therefore a key element in defining the exemption.

The Department's proposed standard salary level would impact the exemption status of two distinct and important, but relatively small, groups of lower-paid EAP employees. First, the Department's proposal would restore overtime protections to 1.8 million currently exempt employees who meet the standard duties test but earn less than the equivalent of the long test salary level ($925). As previously explained, such employees were always excluded from the EAP exemption prior to 2019, either by the long test salary level itself, or under the 2004 rule salary level, which was equivalent to the long test salary level. Fully restoring the salary level's initial screening function requires a salary level that would ensure all employees who earn below the long test level would be excluded from the exemption.

Second, the proposed standard salary level would result in overtime protections for an additional 1.6 million currently exempt employees who meet the standard duties test and earn between the long test salary level ($925 per week) and the Department's proposed standard salary level. As explained earlier, the Department believes it is necessary to set the standard salary level above the long test level to reasonably distribute the impact of the switch from a two-test system to a one-test system. The Department's proposal would limit the number of affected employees by setting a standard salary level towards the lower end of the range between the long and short test salary levels and by using earnings data from the lowest-wage Census region (the South).

Even among the 3.4 million affected employees, the fact that a majority of these employees earn below the long test level underscores the modest role of the Department's proposed standard salary level. Beyond these 1.8 million employees earning less than the long test salary level—to whom this proposal would simply restore overtime protections that they had under every rule prior to 2019—the Department's proposed increase in the standard salary level would only affect the exemption status of 1.6 million employees. This group makes up less than six percent of all currently exempt, salaried white-collar employees and less than four percent of all salaried white-collar employees.[214] That this group is so small reinforces the conclusion that the Department's proposed salary level methodology would maintain the ''useful, but limited, role'' of the salary level in defining and delimiting the EAP exemption.[215]

5. Salary Level Alternatives

In determining which methodology to use to update standard salary level, the Department considered several alternatives to its proposed methodology of the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. As discussed, the Department believes that the long and short test salary levels provide appropriate boundaries for assessing potential salary levels,[216] though it also considered the methodology used in the 2019 rule, which set the standard salary level below the long test level.[217] The Department also looked at earnings ventiles for full-time salaried workers falling between the long and short test salary levels. The Department analyzed four alternative salary levels—two methodologies that would produce a higher salary level than the proposed methodology, and two that would produce a lower salary level.[218]

The Department first considered setting the standard salary level at the historical average short test salary level ($1,378 per week or $71,656 per year).[219] This would ensure that all employees who earn between the long and short test salary levels and perform substantial amounts of nonexempt work would be entitled to overtime compensation. However, by making exemption status for all employees who earn between the long and short test levels depend entirely on the salary paid by the employer, this approach would also prevent employers from being able to use the EAP exemption for employees earning between these salary levels who do not perform substantial amounts of nonexempt work and thus were historically exempt under the long test. For this reason, among others, the Department has chosen not to propose the salary level generated by this methodology.

The Department also considered setting the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($1,145 per week or $59,540 per year). This salary level is roughly the midpoint between the long and short test salary level alternatives ($925 per week and $1,378 per week, respectively). However, as discussed above, the Department is concerned that this approach could be seen by courts as making salary determinative of exemption status for too large a portion of employees, as this salary level would make the salary paid by the employer determinative of exemption status for roughly half (47 percent) of white-collar employees who earn between the long and short test salary levels.[220] The Department is also concerned that this approach would generate the same concerns that led to the district court decision invalidating the 2016 rule (which adopted the same methodology).[221]

The Department also considered using the 2004 methodology (the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region and in retail nationally), which is currently $822 per week ($42,744 per year). This is also the methodology that the Department used in the 2019 rule.[222] However, the salary level produced by the 2004 methodology is below the equivalent of the long test salary level ($925 per week). As discussed, the Department considers the long test to be the lower boundary for an appropriate salary level since, except for the 2019 rule, employees who earn below the long test salary level have consistently been excluded from the EAP exemption by the initial screening function of the salary level.[223] Accordingly, the Department believes that a standard salary level produced using the 2004 methodology would be too low to fully effectuate the salary level's role in defining the EAP exemption.

The Department also considered setting the standard salary level at the long test level ($925 per week or $48,100 per year). Doing so would ensure the initial screening function of the salary level by restoring overtime protections to those employees who were consistently excluded from the EAP exemption prior to 2019, either by the long test salary level itself, or under the 2004 rule salary level, which was set equivalent to the long test salary

[214] The 3.4 million employees affected by the Department's proposed standard salary level represent only 12 percent of the 27.9 million salaried white-collar employees who currently qualify for the standard EAP exemption.

[215] 84 FR 51238.

[216] *See* section IV.A.3.ii.

[217] *See* 84 FR 51260.

[218] The potential impact of these four alternatives is discussed in greater detail below. *See* section VII.C.8.

[219] *See* section IV.A.3.ii.

[220] *See id.*

[221] *See id.*

[222] 84 FR 51260.

[223] *See* section IV.A.2; section IV.A.4.

level.[224] However, as explained above, setting the standard salary level at the long test level would perpetuate the problem that has become evident under the 2004 and 2019 rules. Specifically, this approach would unduly deny overtime protections to all employees whose entitlement to overtime compensation was protected by the more rigorous long duties test.[225] As noted above, however, the Department believes that in a one-test system with the current duties test it must set the salary level above the long test salary level in order to better define and delimit which employees are employed in a bona fide EAP capacity.

While, for the reasons discussed herein, none of these alternatives were used as a method to establish the proposed salary test level, they confirm that the proposed salary level of the 35th percentile of weekly earnings of all full-time salaried employees in the lowest-wage Census Region (the South) is an appropriate salary level. The Department's proposed salary level appropriately would account for the shift from a two-test to a one-test system for determining exemption status, protecting lower-paid white-collar employees who traditionally have been entitled to overtime protection, while allowing employers to use the exemption for EAP employees earning less than the short test salary level.

The Department welcomes comments on its proposed increase to the standard salary level. The Department also invites comments on alternate salary methodologies and specifically how such alternative methodologies would better define and delimit bona fide EAP employees than the Department's proposed methodology.

B. Special Salary Levels—U.S. Territories and Motion Picture Industry

1. United States Territories

The FLSA's overtime requirements and the EAP exemption apply to employees in U.S. territories.[226] Historically, the Department generally applied special, lower salary levels to employees in U.S. territories that were not subject to the Federal minimum wage in section 6(a)(1) of the FLSA. Consistent with this principle, as the Department explained in the 2004 rule, the Department applied lower salary levels to employees in Puerto Rico, the U.S. Virgin Islands, and American Samoa because, until 1989, the FLSA permitted the establishment of special minimum wage rates below the Federal minimum wage in these territories.[227] The Department did not set a special salary level for employees in Guam, where the Federal minimum wage has applied since at least 1957,[228] or the CNMI.[229]

In 1989, Congress amended the FLSA to apply the Federal minimum wage to the U.S. Virgin Islands beginning that same year and to Puerto Rico beginning in 1996, while maintaining special minimum wage rates for American Samoa.[230] When the Department next updated the salary level tests in 2004, it applied the same salary level to employees in Puerto Rico and the U.S. Virgin Islands that it applied to employees in the 50 states and the District of Columbia ($455 per week), explaining that because these territories were ''now subject to the same minimum wage as the U.S. mainland, there was no longer a basis for a special salary level test[.]'' [231] The Department maintained a special salary level for employees in American Samoa equal to approximately 84 percent of the standard level ($380 per week), since American Samoa was not subject to the Federal minimum wage. This was roughly the same ratio to the U.S. mainland salary level that existed prior to 2004.[232] The Department also continued to apply the same salary level to employees in Guam and the CNMI that it applied to employees in the U.S. mainland.

The Department followed the same approach in the 2016 rule. Like the 2004 rule, the 2016 rule would have continued to apply the standard salary level to employees in all the U.S. territories except for American Samoa.[233] It also would have maintained a special salary level for employees in American Samoa, keeping it at 84 percent of the standard salary level, since American Samoa was still subject to special minimum wage rates below the Federal minimum wage.

In the 2019 rule, the Department elected to preserve the 2004 standard salary level for employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI ($455 per week) instead of applying the $684 per week salary level that applied to employees in the 50 states and the District of Columbia; [234] in effect, establishing a special salary level for employees in territories that were subject to the Federal minimum wage for the first time. In support of this approach, the Department pointed to the economic climate in Puerto Rico; stated that Guam, the U.S. Virgin Islands, and the CNMI, as U.S. territories, also faced their own economic challenges; and expressed a desire to promote salary level consistency across the U.S. territories.[235] The Department also maintained the 2004 special salary level for employees in American Samoa ($380 per week).[236] The Department determined that a special salary level lower than the other four territories was warranted for American Samoa because, like in 2004 and 2016, the territory was subject to special minimum wage rates below the Federal minimum wage.[237]

In § 541.600, the Department proposes to return to its longstanding pre-2019 approach of only setting special salary levels for employees in those U.S. territories that are not subject to the Federal minimum wage. Accordingly, the Department proposes to apply the

[224] *See* section IV.A.1.

[225] *See* section IV.A.2.

[226] 29 U.S.C. 213(f).

[227] 69 FR 22172.

[228] *See* Sarah A. Donovan, Cong. Rsch. Serv., R42713, The Fair Labor Standards Act (FLSA): An Overview, 6 (Mar. 8, 2023). In 1957, Congress amended section 13 of the FLSA to clarify that the Act's minimum wage and overtime requirements apply to Guam. Public Law 85–231, 71 Stat. 514 (Aug. 30, 1957) (codified at 29 U.S.C. 213(f)).

[229] The CNMI was exempted from the FLSA's minimum wage requirements, but not its overtime requirements, under the 1976 Covenant of Association with the United States, which established the CNMI as a Commonwealth. Public Law 94–241, sec. 503(c), 90 Stat. 263, 268 (Mar. 24, 1976). Congress applied the FLSA's minimum wage requirements to the CNMI for the first time in the Fair Minimum Wage Act of 2007, which was subsequently amended in 2015; pursuant to this legislation, the minimum wage in the CNMI gradually increased until it reached the full section 6(a)(1) minimum wage in 2018. *See* Public Law 110–28, sec. 8103, 121 Stat. 112, 188 (May 25, 2007); Public Law 114–61, sec. 1, 129 Stat. 545 (Oct. 7, 2015); Minimum Wage in the Northern Mariana Islands, WHD, available at: *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/cnmi.pdf.*

[230] *See* Public Law 101–157, sec. 4, 103 Stat. 938, 939–941 (Nov. 17, 1989).

[231] 69 FR 22172.

[232] *Id.*

[233] *See* 81 FR 32444. After the Department published the 2016 rule, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Public Law 114–187, which prevented the rule from taking effect in Puerto Rico until the Comptroller General of the United States produced a report on the impact of applying the rule to Puerto Rico and the Secretary of Labor determined, based on the report, that applying the rule to Puerto Rico would not have a negative impact on its economy. The Comptroller General published its report in June 2018. *See* U.S. Gov't Accountability Off., GAO–18–483, Puerto Rico: Limited Federal Data Hinder Analysis of Economic Condition and DOL's 2016 Overtime Rule (June 29, 2018). The 2016 rule was invalidated and so the Department did not have occasion to further address this issue.

[234] 84 FR 51246.

[235] *Id.* In the 2019 rule, the Department explained that while PROMESA did not apply to rulemakings other than the 2016 rule, the considerations that motivated PROMESA's adoption supported setting a special salary level in Puerto Rico. *See id.* As in 2019, the Department continues to believe that PROMESA does not constrain the Department's authority to set a salary level for Puerto Rico in this rulemaking.

[236] *Id.*

[237] *Id.*

standard salary level ($1,059 per week) to employees in Puerto Rico, where the Federal minimum wage has applied since 1996; Guam, where the Federal minimum wage has applied since at least 1957; the U.S. Virgin Islands, where the Federal minimum wage has applied since 1989; and the CNMI, where the Federal minimum wage has applied since 2018. The Department proposes to set a special salary level for employees in American Samoa equal to 84 percent of the standard salary level ($890 per week, based on a proposed standard salary level of $1,059 per month), since American Samoa remains subject to special minimum wage rates below the Federal minimum wage.[238] This is the same ratio to the standard salary level that the Department used in the 2004 and 2016 rules, as well as the same ratio to the salary level in the other four U.S. territories that the Department used in the 2019 rule.[239]

Pursuant to the Fair Minimum Wage Act of 2007, as amended, industry-specific special minimum wage rates in American Samoa are scheduled to be gradually eliminated. Under this legislation, barring further Congressional action, special wage rates in American Samoa will increase by $0.40 on September 30, 2024 and every 3 years thereafter until they equal the Federal minimum wage.[240] As such, the Department also proposes that 90 days after the highest industry minimum wage for American Samoa equals the Federal minimum wage, the full standard salary level will apply for all EAP employees in all industries in American Samoa.

The Department recognizes that the salary levels for the U.S. territories have not changed since 2004, and it understands that U.S. territories face their own economic challenges. However, the FLSA's EAP exemption should apply equally to employees subject to the Federal minimum wage in section 6(a)(1) of the FLSA—including in the U.S. territories, to which this provision explicitly applies—absent a special minimum wage for the territory, which the Department has interpreted as an indication of Congressional intent to treat employees in the territory differently. As noted above, except for the 2019 rule, the Department has taken the position that a special, lower salary level should only be set for employees in those U.S. territories that are not subject to the Federal minimum wage, a group which is currently limited to employees in American Samoa.[241] This approach provides a clear and objective standard by which to determine whether to apply the standard salary level or a special, lower salary level. Thus, in accordance with the Department's longstanding practice, and in the interest of applying the FLSA uniformly to all employees subject to the Federal minimum wage, the Department proposes to apply the standard salary level to employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI, and to maintain a special salary level for employees in American Samoa equal to 84 percent of the standard salary level until the highest industry minimum wage rate applicable in the territory equals the Federal minimum wage.[242]

The Department seeks comments on the proposed salary levels for the U.S. territories.

2. Motion Picture Producing Industry

The Department permits employers to classify as exempt employees in the motion picture producing industry who are paid a specified base rate per week (or a proportionate amount based on the number of days worked), so long as they meet the duties tests for the EAP exemption.[243] This exception from the salary basis requirement was created in 1953 to address the ''peculiar employment conditions existing in the [motion picture producing] industry,'' and applies, for example, when a motion picture producing industry employee works less than a full workweek and is paid a daily base rate that would yield the weekly base rate if 6 days were worked.[244] Consistent with its practice since the 2004 rule, the Department proposes in § 541.709 to increase the required base rate in proportion to the Department's proposed increase in the standard salary level test, resulting in a proposed base rate of $1,617 per week (or a proportionate amount based on the number of days worked).[245]

The Department seeks comments on the proposed base rate for the motion picture industry.

C. Highly Compensated Employees

In the 2004 rule, the Department created the HCE test for certain highly compensated employees. Combining a much higher compensation requirement with a minimal duties test, the HCE test is based on the rationale that employees who earn at least a certain amount annually—an amount substantially higher than the annual equivalent of the weekly standard salary level—will almost invariably pass the standard duties test.[246] The HCE test's primary purpose is thus to serve as a streamlined alternative for very highly compensated employees because a very high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed duties analysis.[247]

As outlined in § 541.601, to be exempt under the HCE test, an employee must

[238] Special wage rates by industry in American Samoa currently range from $5.38 per hour to $6.79 per hour. *See* Federal Minimum Wage in American Samoa, available at: *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/ASminwage Poster.pdf.*

[239] As noted above, the Department set the special salary level for American Samoa in the 2004 rule at $380 per week, which is approximately 84 percent of the standard salary level of $455 per week. 69 FR 22172. The 2016 rule would have set the special salary level for American Samoa at $767 per week, which is 84 percent of the standard salary level of $913 per week. 81 FR 32444. The 2019 rule preserved the 2004 salary level of $455 per week for employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI, as well as the 2004 salary level of $380 per week (approximately 84 percent of $455) for employees in American Samoa. 84 FR 51246.

[240] *See* Public Law 114–61, sec. 1, 129 Stat. 545 (Oct. 7, 2015).

[241] Three U.S. territories have a local minimum wage higher than the Federal minimum wage. The local minimum wage in Puerto Rico is currently $9.50 per hour; the local minimum wage in Guam is currently $9.25 per hour; and the local minimum wage in the U.S. Virgin Islands is currently $10.50 per hour. *See* State Minimum Wage Laws, WHD, available at: *https://www.dol.gov/agencies/whd/minimum-wage/state.*

[242] It is the Department's intent that the proposal to apply the standard salary level to employees in territories that are subject to the Federal minimum wage is severable from the proposal to raise the standard salary level from the current amount ($684 per week) to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($1,059 per week using current data). The Department also intends that the proposal to set the special salary level for employees in American Samoa equal to 84 percent of the standard salary level, and to eliminate the special salary level for American Samoa when the highest industry minimum wage equals the Federal minimum wage, be severable from the proposal to raise the standard salary level. The Department has an interest in the uniform application of the EAP exemption to all employees subject to the Federal minimum wage and in adopting a clear and objective standard by which to determine whether to apply a special salary level to any U.S. territory. Accordingly, the Department's intent is to apply the standard salary level to employees in those territories that are subject to the Federal minimum wage and set a special salary for American Samoa equal to 84 percent of the standard salary level until the highest minimum wage in the territory reaches the Federal minimum wage even if the standard salary level amount proposed in this rule does not take effect.

[243] § 541.709.

[244] 18 FR 2881 (May 19, 1953).

[245] The Department calculated this figure by dividing the proposed standard salary level ($1,059 per week) by the current standard salary level ($684 per week), and then multiplying this result (rounded to the nearest hundredth) by the base rate set in the 2019 rule ($1,043 per week). This produces a new base rate of $1,617 (per week), when rounded to the nearest whole dollar.

[246] 84 FR 51249; *see also* § 541.601(c) (''A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties.'').

[247] *See* 69 FR 22173–74.

earn at least the amount specified in the regulations in total annual compensation, of which at least the standard salary amount per week must be paid on a salary or fee basis,[248] and must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. The HCE test applies only to employees whose primary duty includes performing office or non-manual work. Employees qualifying for exemption under the HCE test must receive at least the standard salary level per week on a salary or fee basis, while the remainder of the employee's total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.[249] Total annual compensation does not include board, lodging, or other facilities, and does not include payments for medical insurance, life insurance, retirement plans, or other fringe benefits. An employer is permitted to make a final ''catch-up'' payment during the last pay period or within one month after the end of the 52-week period to bring an employee's compensation up to the required level.

The 2004 rule set the HCE total annual compensation amount at $100,000,[250] which exceeded the annual earnings of approximately 93.7 percent of salaried workers.[251] In the 2016 rule, the Department set the total annual compensation requirement for the HCE test at the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally, which was $134,004.[252] As previously noted, however, the 2016 rule was enjoined before its effective date and was subsequently invalidated in litigation.[253] In 2019, the Department set the HCE total annual compensation threshold at the 80th percentile of full-time salaried worker earnings nationwide, resulting in a HCE threshold of $107,432 per year.[254]

The Department continues to believe that the HCE test is a useful alternative to the standard salary level and duties tests for highly compensated employees. However, as with the standard salary level, the HCE total annual compensation level must be updated to ensure that it remains a meaningful and appropriate standard to pair with the minimal HCE duties test. To maintain the HCE test's role as a streamlined alternative for those employees most likely to qualify as EAPs, the HCE total annual compensation level must be high enough to exclude all but those employees ''at the very top of [the] economic ladder.'' [255]

Accordingly, the Department proposes to update the HCE test by setting the total compensation amount equal to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationwide. Consistent with its prior rules, the Department is setting the HCE test level using nationwide data, rather than a regional data set. This approach results in a HCE threshold of $143,988, of which at least $1,059 per week (the proposed standard salary level) must be paid on a salary or fee basis.[256]

The Department considered updating the current HCE threshold (the 80th percentile) with current data (which would result in a compensation level of $125,268), but is concerned that repeating the 2019 rule's methodology now would not produce a threshold high enough to reserve the HCE test for employees at the top of today's economic ladder and could risk the unintended exemption of large numbers of employees in high-wage regions.[257] The Department also considered setting the HCE threshold at the 90th percentile, like in its 2016 rule. However, the Department is concerned that the resulting compensation level ($172,796) could unduly restrict the use of the HCE exemption for employers in lower-wage regions and industries.[258] In contrast, setting the HCE compensation level at the 85th percentile would be a reasonable increase, particularly in comparison to the HCE threshold initially adopted in 2004, which covered 93.7 percent of all full-time salaried workers.[259] The Department believes that setting the HCE threshold at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationwide would be sufficient to guard against the unintended exemption of workers who are not bona fide executive, administrative, or professional employees, including those in higher-income regions and industries.

Under the proposed rule, employers that are currently using the HCE test to exempt more highly paid employees would instead need to apply the standard salary and duties test for employees earning between the current HCE threshold ($107,432) and the annualized weekly earnings of the 85th percentile of full-time salaried workers nationwide. The Department estimates that there are approximately 248,900 salaried white-collar workers earning between $107,432 and the proposed HCE total annual compensation level ($143,988) who meet the HCE duties test but do not meet the standard duties test, and who therefore would become nonexempt without some intervening action by their employers.

As with other earning thresholds in the part 541 regulations, the Department is proposing to automatically update the HCE total compensation amount every 3 years to reflect current earnings data, as discussed in greater detail in section IV.D.4. Automatic updates to the HCE threshold would ensure that the threshold remains at an appropriate level in future years.

The Department welcomes comment on its proposed increase to the HCE threshold.

D. Automatic Updates to the Salary and Total Annual Compensation Levels

In each of its part 541 rulemakings since 2004, the Department recognized the need to regularly update the earnings thresholds to ensure that they remain effective in helping differentiate between exempt and nonexempt employees. As the Department observed in these rulemakings, even a well-calibrated salary level that is not kept up to date becomes obsolete as wages for nonexempt workers increase over time.[260] Long intervals between

[248] Although § 541.602(a)(3) allows employers to use nondiscretionary bonuses to satisfy up to 10 percent of the weekly standard salary level when applying the standard salary and duties tests, the Department's regulation at § 541.601(b)(1) does not permit employers to use nondiscretionary bonuses to satisfy the weekly standard salary level requirement for HCE workers. Employers may use commissions, nondiscretionary bonuses, and other nondiscretionary compensation to satisfy the remaining portion of the HCE total annual compensation amount. *See* 84 FR 51249.

[249] § 541.601(b)(1). The criteria for determining if an employee is paid on a ''salary basis'' are identical under the standard exemption criteria and the HCE test. *See Helix Energy Solutions,* 143 S.Ct. at 683.

[250] 69 FR 22269 *(§ 541.601(a)).*

[251] *See id.* at 22169 (Table 3).

[252] *See* 81 FR 32429.

[253] *See Nevada,* 275 F. Supp. 3d at 808. The district court's decision did not specifically discuss the HCE test; however, the decision invalidated the entire 2016 rule.

[254] *See* 84 FR 51307 (§ 541.601(a)(1)); *see also id.* at 51249–50.

[255] 69 FR 22174.

[256] It is the Department's intent that the increase in the HCE total annual compensation threshold is independent of, and severable from, the proposed increase in the standard salary level to the 35th percentile of weekly earnings of full-time salaried employees in the lowest-wage Census Region (the South).

[257] *See* 69 FR 22174 (explaining the need to avoid the unintended exemption of employees ''such as secretaries in New York City or Los Angeles . . . who clearly are outside the scope of the exemptions and are entitled to the FLSA's minimum wage and overtime pay protections.'').

[258] *See* 84 FR 51250.

[259] *See* 69 FR 22169–70 (Tables 3 and 4).

[260] 84 FR 51250–51; 81 FR 32430; *see also* 69 FR 22122, 22164.

rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide executive, administrative, and professional employees. This problem was clearly illustrated by the stagnant salary levels in the regulations from 1975 to 2004, during which period increases in the Federal minimum wage meant that earnings of a worker paid the Federal minimum wage exceeded the long test salary level for a 40-hour week and came close to equaling the short test salary level.[261]

To address this problem, in the 2004 and 2019 rules the Department expressed its commitment to regularly updating the salary levels, and in the 2016 rule it included a regulatory provision to automatically update the salary levels.[262] Based on the Department's experience with updating the salary levels, as well as additional considerations discussed below, the Department has concluded that adopting a regulatory provision for automatically updating the standard salary level and the HCE total annual compensation requirement to reflect current wage data, with the ability to pause future updates under certain conditions, would be the most viable and efficient way to ensure the EAP exemption salary levels remain up to date.

1. Background

The Department introduced a regulatory provision for automatically updating the salary level tests in its 2016 rulemaking. Prior to the 2016 rule, the Department addressed the subject of automatic updating twice in response to comments by some stakeholders calling for its adoption. In its 1970 rulemaking, the Department stated that a comment ''propos[ing] to institute a provision calling for an annual review and adjustment of the salary tests . . . appears to have some merit, particularly since past practice has indicated that approximately 7 years elapse between amendment of the salary level requirements.'' [263] Despite recognizing the potential value of this approach, the Department ultimately determined that ''such a proposal will require further study.'' [264] Later, in its 2004 rule, the Department declined to adopt commenter requests for automatic increases to the salary level, reasoning in part that ''the salary levels should be adjusted when wage survey data and other policy concerns support such a change'' and that ''the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases.'' [265] In remarking on the lack of historical guidance related to the automatic updating of salary levels, the Department did not otherwise discuss its authority to promulgate such an approach through notice-and-comment rulemaking. Instead, the Department expressed its intent ''in the future to update the salary levels on a more regular basis, as it did prior to 1975.'' [266] Despite its best intentions, the Department's next rulemaking to update the salary levels did not occur for over a decade. The difficulty in achieving its goal of regularly updating the salary levels caused the Department to examine in greater detail in its 2016 rulemaking the possibility of automatically updating the salary levels.

In the 2016 rule, the Department introduced a new regulatory provision establishing a mechanism for automatically updating the standard salary test, the total annual compensation requirement for highly compensated employees, and the special salary levels for American Samoa and the motion picture industry.[267] Under this provision, future automatic updates would have occurred triennially, using the same methodologies that were used to initially set these earnings thresholds in the 2016 rule. The Department explained that the adopted automatic updating mechanism would ''ensure that the salary level test is based on the best available data (and thus would remain a meaningful, bright-line test), produce more predictable and incremental changes in the salary required for the EAP exemption, and therefore provide certainty to employers and promote government efficiency.'' [268] The district court decision invalidating the 2016 rule did not separately examine the merits of the automatic updating provision or the Department's authority to automatically update the salary levels. Rather, the court stated, ''Having determined the [2016] Final Rule is unlawful . . ., the Court similarly determines the automatic updating mechanism is unlawful.'' [269]

In its 2019 rulemaking, the Department reaffirmed that ''the need to update the part 541 earnings thresholds on a regular basis is clear.'' [270] The Department elaborated that ''[a]s employees' earnings rise over time, they begin surpassing the earnings thresholds set in the past'' and make the thresholds ''a less useful measure of employees' relative earnings, and a less useful method for identifying exempt employees.'' [271] Rather than adopt an automatic updating mechanism, the Department initially proposed to keep the earnings thresholds up to date by publishing an NPRM in the **Federal Register** every 4 years seeking comment on whether to update the earnings thresholds using the existing methodology, with the understanding that the Department could forestall issuing such a proposal due to economic or other factors.[272] However, the Department declined to codify this approach in its final rule [273] or implement a mechanism for automatically updating the salary levels as suggested by some commenters, stating that doing so could deprive the Department of flexibility to adapt to unanticipated circumstances.[274] Instead, the Department reaffirmed its intention to update the salary levels more regularly through notice-and-comment rulemaking.[275]

2. The Department's Authority To Automatically Update the Salary Level Tests

The Department's authority to automatically update the salary level tests for the EAP exemption is grounded in section 13(a)(1), which expressly gives the Secretary broad authority to define and delimit the scope of the exemption. During the 2016 and 2019 rulemakings, some stakeholders questioned the Department's authority to automatically update the salary levels, asserting, among other points, that unlike other statutes that expressly provide for indexing, section 13(a)(1)'s silence indicates that Congress did not intend the salary level to be automatically updated, and that an automatic updating mechanism would

[261] The Federal minimum wage was increased to $4.25 on April 1, 1991, equaling $170 for a 40-hour week, the same amount as the higher long test salary level for professional employees. On September 1, 1997, the Federal minimum wage was increased to $5.15, equaling $206 for a 40-hour week, which was close to the $250 short test salary level. *See* History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938–2009, WHD, available at: *https://www.dol.gov/agencies/whd/minimum-wage/history/chart;* 40 FR 7091–92.

[262] 69 FR 22171; 84 FR 51251–*52;* 81 FR 32430.

[263] 35 FR 884.

[264] *Id.*

[265] 69 FR 22171.

[266] *Id.*

[267] 81 FR 32430*, 32443.*

[268] *Id.* at 32430.

[269] *Nevada,* 275 F. Supp.3d at 808.

[270] 84 FR 10914.

[271] *Id.*

[272] *Id.* at 10914–15.

[273] *See id.* at 10915 n.140 (explaining how the Department could codify its proposed approach).

[274] 84 FR 51252.

[275] *Id.*

circumvent the Administrative Procedure Act (APA).[276]

As the Department has previously explained, Congress did not specifically set forth precise criteria for defining the EAP exemption, but instead authorized the Secretary to define and delimit the terms of the exemption.[277] Using this broad authority, the Department established the first salary level tests by regulation in 1938. Despite numerous amendments to the FLSA over the past 85 years, Congress has not restricted the Department's use of the salary level tests. Significant changes involving the salary requirements made through regulations issued pursuant to the Secretary's authority to define and delimit the exemption include adding a separate salary level for professional employees in 1940, adopting the two-test system in 1949, and switching to the single standard test and adding the new HCE test in 2004.[278] Despite having amended the FLSA numerous times over the years, Congress has not amended section 13(a)(1) to alter these regulatory salary requirements.

Other than directing the Department in 1990 to include in the EAP regulations certain computer employees paid at least six-and-a-half times the Federal minimum wage on an hourly basis,[279] Congress has never amended the FLSA in a manner that limits the use of the salary level tests.[280] Just as the Department has authority under section 13(a)(1) to establish and update the salary level tests, it likewise has authority to adopt a regulatory mechanism for automatically updating the salary levels to ensure that the tests remain effective. This interpretation is consistent with the well-settled principle that agencies have authority to '''fill any gap left, implicitly or explicitly, by Congress.''' [281] Further, the Department has determined that an automatic updating mechanism would better fulfill its statutory duty to define and delimit the EAP exemption because it will maintain the effectiveness of the salary levels, which have previously become eroded during large gaps between regulatory updates.

The Department's decision not to institute an automatic updating mechanism in its 2004 and 2019 rulemakings in no way suggests that it lacks authority to do so. In its 2004 rule, the Department stated that it found nothing in the legislative or regulatory history that would support indexing or automatic increases.[282] As the Department elaborated in its 2016 rulemaking, there was likewise no such authority disfavoring automatic updating.[283] The 2004 rule did not discuss the Department's authority to promulgate an automatic updating mechanism through notice-and-comment rulemaking or explore in detail whether automatic updates to the salary levels posed a viable solution to problems created by lapses between rulemakings. Similarly, the Department declined to adopt automatic updating in the 2019 rule because it ''believe[d] that it is important to preserve the Department's flexibility to adapt to different types of circumstances,'' [284] and not because it lacked authority to do so. While the Department decided not to institute an automatic updating mechanism in its 2019 rule, the Department did not assert that it lacked the legal authority for such a mechanism. And, as noted above, in its 2019 rule the Department reaffirmed its intention to update the salary levels more regularly. Consistent with this stated objective, and upon further consideration, the Department has concluded that the best method to ensure the standard salary level and HCE total compensation threshold remain up to date is an automatic updating mechanism that maintains the Department's flexibility to adapt to different circumstances and change course as necessary.

3. Rationale for Automatically Updating the Salary Level Tests

A regulatory mechanism for automatically updating the part 541 earnings thresholds would ensure that the levels keep pace with changes in employee earnings and thus remain effective in helping determine exemption status. As the Department's long experience has shown, earnings thresholds are only a strong measure of exempt status if they are kept up to date, and if left unchanged, such thresholds become substantially less effective in identifying exempt EAP employees as wages for workers increase over time. The Department's regulatory history, marked in many instances by lengthy gaps between rulemakings, underscores the difficulty with updating the earnings thresholds as quickly and regularly as necessary to keep pace with changing employee earnings and to maintain the full effectiveness of the test. Through the proposed automatic updating mechanism, the Department can timely and efficiently update the standard salary level and the HCE total annual compensation requirement by using the same methodologies as initially proposed and adopted through notice-and-comment rulemaking to set these thresholds, while a change to those methodologies would be effectuated through new notice-and-comment rulemaking. The proposed automatic updating mechanism would allow for regular and more predictable updates to the earnings thresholds, which would benefit both employers and employees and better fulfill the Department's statutory duty to define and delimit the EAP exemption by preventing the erosion of those levels over time.

As the Department explained in the 2016 rule, automatically updating the part 541 earnings thresholds would also prevent the more drastic and unpredictable threshold increases associated with less frequent updates. For example, between 1940 and 2019, the time between salary level updates ranged from 5 to 29 years. In part as a result of these breaks, long test salary level increases between 1940 and 1975 ranged from roughly 5 to 50 percent, the 2004 standard salary level test represented a 180 percent increase from the 1975 long test salary levels, and the 2019 standard salary level test represented an approximately 50 percent increase from the 2004 standard salary level. Automatically updating the part 541 earnings thresholds at a predetermined frequency using the same methodology would ensure that future salary level increases occur at a

[276] *See* 81 FR 32430, 32432; 84 FR 51251.

[277] 29 U.S.C. 213(a)(1).

[278] *See* section II.B.1–2.

[279] *See* Public Law 101–583, sec. 2, 104 Stat. 2871 (Nov. 15, 1990) (directing the Secretary to promulgate regulations that permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in the regulations to qualify as EAP exempt employees under section 13(a)(1), including those paid on an hourly basis if paid at least 6-and-a-half times the Federal minimum wage).

[280] Despite what some commenters asserted in the 2016 rulemaking, the Department's automatic updating mechanism does not conflict with section 13(a)(1)'s ''time to time'' language. *See* 81 FR 32431. Adopting a mechanism to ensure that the part 541 earnings thresholds continue screening out the same percentage of salaried workers over time would in no way preclude the Department from revisiting this methodology from ''time to time'' should cumulative changes in job duties, compensation practices, and other relevant working conditions indicate that changes to the proposed earnings thresholds are warranted.

[281] *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 165 (2007) (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984)).

[282] 69 FR 22171.

[283] *See* 81 FR 32432–33 (noting that ''instituting an automatic updating mechanism . . . is an appropriate modernization and within the Department's authority.'').

[284] 84 FR 51252.

known interval and in more gradual increments.

The Department is proposing for automatic updates to occur triennially (*i.e.,* every 3 years). The Department realizes that because employee earnings are constantly changing, annual or biennial automatic updates would keep the salary level more up to date and thereby may better serve the purpose of using earnings thresholds to help identify exempt employees. However, the Department is concerned about the potential burden that possible changes to the tests for exemption on an annual or biennial basis would impose on employers and believes that triennial updates are frequent enough to ensure that the part 541 earnings thresholds fulfill their purpose. This frequency is also consistent with the interval chosen in the 2016 rule following extensive public comment on this issue.[285]

In proposing to automatically update the earnings thresholds, the Department is mindful of previous statements from stakeholders, and the Department's own prior statements, about the need to preserve flexibility to adapt to unanticipated circumstances and prevailing economic conditions when setting the salary level.[286] Events since the Department's 2019 rule, including the COVID pandemic and its widespread impact on workplaces, have served to further validate these concerns. To address these concerns, the Department proposes to include in the regulatory provision the ability for the Department to temporarily delay a scheduled automatic update where unforeseen economic or other conditions warrant. This feature, which is a refinement of the automatic updating mechanism in the 2016 rule, would afford the Department added flexibility to adapt to unforeseen circumstances without sacrificing the benefits provided by automatic updating.

4. Proposal for Automatically Updating the Salary Level Tests

The Department proposes to add a new § 541.607 that would establish a mechanism for automatically updating the standard salary level and the HCE total annual compensation requirement. Specifically, the Department proposes to automatically update the standard salary level and the total annual compensation requirement for highly compensated employees every 3 years to reflect current earnings data.

Under this proposal, the Department would automatically update the standard salary level by adjusting it to remain at the 35th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (currently the South), as set out in section IV.A.3. The HCE test's total annual compensation requirement would be reset triennially at the annualized weekly earnings of the 85th percentile of full-time nonhourly workers nationally, as discussed in section IV.C. This approach, as opposed to other methods such as indexing these thresholds for inflation, would eliminate the risk that future levels will deviate from the underlying salary setting methodology established through rulemaking.[287] The Department proposes to update both thresholds using the most recent available four quarters of data, as published by BLS, preceding the publication of the Department's notice to automatically update the thresholds. Although the 2016 rule called for automatic updates based on a quarter of data,[288] relying on a full year of data would be consistent with the approach used to set the salary level in this proposal. Furthermore, relying on a year of data, rather than a quarter, would balance the Department's goal of accounting for current economic conditions with avoiding variations based on short-term fluctuations.

Under the proposed regulation, automatic updates would occur every 3 years, computed from the last day of the month in which this rulemaking take effect. Because under proposed §§ 541.600 and 541.709 both the special salary level for American Samoa and the base rate for the motion picture industry are set in relation to the standard salary level, those earnings thresholds would also reset at the time the standard salary level is updated. At least 150 days before the date of the update of the standard salary level and the HCE total annual compensation requirement, the Department would publish in the **Federal Register** and on WHD's website a notice with the new earnings levels described above. Consistent with the 2016 rule, the Department is proposing this interval to provide employers ample notice and sufficient time to make any necessary adjustments. A period substantially longer than 150 days could hinder the Department's ability to ensure that the thresholds that take effect are based on the most up to date data.

Finally, the Department's proposal includes a provision delaying a scheduled automatic update while the Department engages in notice-and-comment rulemaking to change the earnings requirements and/or updating mechanism, where economic or other conditions merit. The delay occurs only if the Department publishes an NPRM proposing to change the salary level methodology (for example, changing the earnings percentile) and/or modify the automatic updating mechanism (for example, changing the updating frequency) before the date on which it publishes the notice of the revised salary and compensation levels under the regulations. The notice must state, in addition to the updated levels, that the automatic update will be paused for 120 days from the day the update was set to occur while the Department engages in rulemaking, and that the pause will be lifted on the 121st day unless by that time the Department finalizes a rule changing the salary level methodology and/or automatic updating mechanism. Accordingly, this proposal provides for 270 days—150 days before, and 120 days after, the effective date for the scheduled automatic update—to complete this process. The Department chose this interval to provide time for a public comment period and to issue a final rule. If the Department does not issue a final rule by the prescribed deadline, the pause on the scheduled automatic update would be lifted and the new salary levels would take effect on the 121st day after they were originally scheduled to take effect. So as not to disrupt the automatic updating schedule and given the relative shortness of the delay, the 120-day pause would not affect the date for the next scheduled automatic update. The next automatic update, therefore, would occur 3 years from the date the delayed automatic update would have been originally effective.

As discussed in section V below, the Department intends for the proposed automatic updating mechanism to be severable from the increases to the earnings thresholds proposed in this

[285] *See* 81 FR 32438.

[286] *See, e.g.,* 84 FR 51251–52.

[287] During the 2016 rulemaking, the Department extensively considered whether to update the thresholds based on changes in the Consumer Price Index for All Urban Consumers (CPI–U)—a commonly used economic indicator for measuring inflation. *See* 81 FR 32438–41. The Department chose to update the thresholds using the same methodology used to initially set them in that rulemaking (*i.e.,* a fixed percentile of weekly earnings of full-time salaried workers), observing that the objectives that justify setting the salary level using a fixed percentile methodology also supported updating the thresholds using the same methodology. *See id.* at 32440. For this and other reasons discussed in detail in the 2016 rule, the Department concludes that updating the earnings thresholds by applying the same methodology used to set the initial levels instead of indexing them for inflation best ensures that the earnings thresholds continue to fulfill their objective of effectively differentiating between bona fide EAP employees and those who are entitled to overtime pay, and work appropriately with the duties test.

[288] *Id.* at 32551.

rulemaking. Regardless of the methodology used to set the standard salary level and HCE total compensation requirement, the utility of these thresholds as a means of distinguishing exempt from nonexempt employees necessarily erodes over time unless they are regularly updated. Automatically updating the standard salary level and HCE total compensation requirement based on current earnings data and on a set schedule would ensure that the thresholds remain effective into the future and thus better fulfill the Department's statutory duty to define and delimit the EAP exemption. Therefore, even if the increases to the standard salary level and the HCE total annual compensation threshold in this proposal are determined to be invalid, the Department intends for the automatic updating mechanism to apply to the existing compensation thresholds. For example, it is the Department's intent that if the proposed increase to the standard salary level to the 35th percentile of weekly earnings of salaried white collar workers in the lowest-wage Census region is invalidated, the automatic update to the standard salary level would occur using the same methodology that is in effect on the date the Department publishes the required notice of the revised salary and compensation levels—which, as noted above, must be no less than 150 days before the scheduled update.

The Department welcomes comments on all aspects of the proposed automatic updating mechanism.

E. Effective Date

The Department is proposing that all aspects of this proposed rule would become effective 60 days after publication of a final rule. This proposed effective date is consistent with the 60 days mandated for a ''major rule'' under the Congressional Review Act and exceeds the 30-day minimum required under the APA.[289] The Department recognizes that the 60-day proposed effective date is shorter than the effective dates for the 2004, 2016, and 2019 rules, which were between approximately 90 and 180 days. The Department believes that a 60-day effective date is appropriate, however, in part because employers and employees are familiar with the procedures in the current regulations from the 2019 rulemaking and changed economic circumstances have caused a strong need to update the standard salary level. The Department seeks comments on the proposed effective date. It also seeks comments on whether to apply different effective dates to different provisions of the proposed rule.

As discussed in detail below in sections VII.B–C, the Department's proposal to increase the HCE total annual compensation threshold to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationwide would result in employers applying the standard duties test to some employees who are currently subject to the streamlined HCE duties test. However, employers are familiar with the standard duties test and only approximately 248,900 employees who earn between the current and proposed HCE compensation thresholds would not meet the standard duties test and be affected by this change. Accordingly, the Department believes the proposed 60-day effective date for the proposed increase to the HCE total compensation threshold would provide sufficient time for stakeholders to adjust. The Department seeks comments on the proposed effective date for the HCE compensation threshold increase.

As discussed below in sections VII.B.C, the Department's proposed standard salary level—the 35th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region—would affect 3.4 million employees who earn between the current salary threshold of $684 per week and the proposed threshold of $1,059 per week. As discussed above, the Department believes it is important to update the standard salary level, both to account for earnings growth since the Department last updated the salary level in the 2019 rule and to build on the lessons learned in the Department's most recent rulemakings to better define and delimit employees working in a bona fide EAP capacity. The Department has also deliberately selected a proposed standard salary level that would ensure that duties remain determinative of exemption status for a significant majority of salaried white-collar employees and that would affect the exemption status of a relatively small group of currently exempt employees, more than half of whom earn below the long test salary level using contemporary data. At the same time, the Department recognizes that it updated the regulations approximately 4 years ago, economic conditions have changed significantly since then, and its proposed standard salary level would be a meaningful increase from the current standard salary level.

The Department seeks comments on whether the effective date for the increase of the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region should be 60 days after publication as proposed or if the increase should be made effective at some later date, such as 6 months or a year after publication of a final rule. If the effective date were longer than 60 days, the Department seeks comments on whether it should initially adjust the salary level to reflect recent wage growth (for example, making an initial adjustment for wage growth 60 days after publication of a final rule and having the final rule standard salary level be effective 6 months or a year after publication). Additionally, the Department seeks comments on the methodology it could use for such an initial update, were it to follow such an approach. In particular, the Department invites comments on whether to implement an initial update to the standard salary level, effective 60 days after publication of a final rule, that uses the current salary level methodology (the 20th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census region and retail nationally) and applies it to the most recent data available ($822 per week based on current data).

The Department also seeks comments on whether its proposed application of the standard salary level to employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI, its proposed update to the special salary level for employees in American Samoa, and its proposed update to the special salary level for employees in the motion picture production industry, should also go into effect 60 days after a final rule as proposed, or if any of these changes should instead go into effect at a later date, such as 6 months or a year after publication. If the effective date for these provisions were longer than 60 days, the Department seeks comments on whether it should make an initial adjustment to these levels 60 days after publication of a final rule and, if so, what methodology should be used for the initial adjustment.

Finally, the Department is proposing that the first automatic update to the proposed compensation levels be effective 3 years after the proposed 60-day effective date. The Department seeks comments on whether the date for the first automatic update should be adjusted if it were to make an initial adjustment to any of these levels as discussed above.

V. Severability

The Department proposes to include a severability provision in part 541 so that if one or more of the provisions of part 541 is held invalid or stayed pending

[289] *See* 5 U.S.C. 801(a)(3)(A); 5 U.S.C. 553(d).

further agency action, the remaining provisions would remain effective and operative. The Department proposes to add this provision as § 541.5.

It is the Department's intent that any final rule following from this proposal apply to its greatest extent even if one or more provisions of such rule are invalidated or stayed. For example, as noted above, it is the Department's intent that the proposed automatic updating mechanism be effective even if the proposed increase in the standard salary level is invalidated. Similarly, it is the Department's intent that the increase in the HCE total annual compensation requirement be effective even if the increase in the standard salary level is invalidated. It is also the Department's intent that the standard salary level apply in territories subject to the Federal minimum wage even if the increase in the standard salary level in this rulemaking is invalidated. Additionally, it is the Department's intent that the earnings thresholds set in this rulemaking apply even if the mechanism for automatically updating them in the future is determined to be invalid. In all circumstances, whether or not specifically discussed, it is the Department's intent that the provisions of any final rule be construed to give the maximum effect to the provisions permitted by law, and that any invalidated provisions be considered severable from part 541 and not affect the remainder of a final rule.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

This rulemaking would revise the burdens for the existing information collection previously approved under OMB control number 1235–0018, Records to be kept by Employers—Fair Labor Standards Act and under OMB control number 1235–0021, Employment Information Form. The information collection approved under OMB control number 1235–0021 is currently encumbered by another rulemaking. As a result, the Department has created a duplicate information collection under OMB control number 1235–0NEW to allow the public to comment on the burden estimates associated with this collection. The Department anticipates that at the time of publication of any potential final rule associated with this NPRM, no encumbrance will exist. Should a final rule be published, the Department will revert to the collection currently approved under OMB control number 1235–0021. As required by the PRA, the Department has submitted information collections as revisions to existing collections to OMB for review to reflect changes to existing burdens that will result from the implementation of this rulemaking. The Department has incorporated the increased universe of employers and employees (from Figure 1 and Table 32 of this NPRM) since the last PRA submission as well as the number of affected workers from Table 4 into the PRA burden analysis found in the supporting statements referenced below.

Summary: FLSA section 11(c) requires all employers covered by the FLSA to make, keep, and preserve records of employees and of wages, hours, and conditions of employment. An FLSA-covered employer must maintain the records for such period of time as prescribed by regulations issued by the Secretary. The Department has promulgated regulations at 29 CFR part 516 establishing the basic FLSA recordkeeping requirements. This NPRM, if finalized, would not impose any new information collection requirements; rather burdens under existing requirements would change as more employees become entitled to minimum wage and overtime protections.

Purpose and use: This proposed rule, which would revise 29 CFR part 541, affects the following provisions that could be considered to entail collections of information: (1) disclosure and recordkeeping requirements for covered employers; and (2) the complaint process under which employees may file a complaint with the Department to investigate potential violations of the FLSA. The proposed rule could potentially affect the number of employees for whom employers may need to maintain records and could potentially affect the number of complaints the Department receives from employees.

WHD obtains PRA clearance under OMB control number 1235–0018 for an information collection with respect to recordkeeping. An Information Collection Request (ICR) has been submitted to revise the approval and adjust the burdens for this collection. WHD obtains PRA clearance under control number 1235–0021 for an information collection covering complaints alleging violations of various labor standards that the agency already administers and enforces. As noted, for the purpose of this NPRM, the Department has created a duplicate ICR (1235–0NEW) to allow the public to comment. An ICR has been submitted to revise the approval to revise the burdens applicable to complaints in this proposed rule.

Information and technology: There is no particular order or form of records prescribed in the current regulations or in the proposed rule. An employer may meet the requirements of this proposed rule using paper or electronic means. WHD, to reduce the burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process in which complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under Federal wage and hour laws and regulations to an agency that may be able to offer assistance. WHD uses employer records to determine compliance with various FLSA requirements. Employers use the records to document compliance with the FLSA, including demonstrating qualification for various exemptions. WHD uses the Employment Information Form (1235–0021) to document allegations of non-compliance with labor standards the agency administers. To allow the public to comment, the Department has created duplicate ICR 1235–0NEW.

Minimizing Small Entity Burden: Although the FLSA recordkeeping requirements involve small entities, including small state and local government agencies, the Department minimizes respondent burden by requiring no specific order or form of records in responding to this information collection. Burden is reduced on complainants by providing a template to guide answers.

Public comments: As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the PRA. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be

properly assessed. The Department seeks comments on its analysis (contained in the supporting statements referenced below) that this NPRM creates a slight increase in paperwork burden associated with ICR 1235–0021, Employment Information Form (reflected in duplicate ICR 1235–0NEW), and affects the recordkeeping requirements and burdens on the regulated community in ICR 1235–0018, Records to be kept by Employers—Fair Labor Standards Act. Commenters may send their views on the Department's PRA analysis in the same way they send comments in response to the NPRM as a whole (*e.g.,* through the *www.regulations.gov* website), including as part of a comment responding to the broader NPRM. Alternatively, commenters may submit a comment specific to this PRA analysis by sending an email to *WHDPRAComments@dol.gov.* While much of the information provided to OMB in support of the information collection request appears in the preamble, interested parties may obtain a copy of the supporting statements for the affected ICRs by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble. Alternatively, a copy of the ICR applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free of charge from the *RegInfo.gov* website. Similarly, the complaint process ICR is available by visiting *http://www.reginfo.gov/public/do/PRAMain.*

OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including 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.

- Total burden for the recordkeeping and complaint process information collections, including the burdens that will be affected by this proposed rule and any changes, are summarized below. For the complaint ICR, the Department used actual data from FY22 and added additional burden related to this rulemaking using the number of affected workers from Table 4 of the RIA and multiplying by .05%. This is an approximate estimate of potential new complaints should the rule become final (please see the draft supporting statements referenced above for an explanation of how these estimates were derived). With respect to the FLSA recordkeeping ICR, the Department first revised the overall burden for the collection as the baseline number of employers and employees within the U.S. economy has changed since the collection was last submitted to OMB. The Department then added the newly affected workers described in the NPRM (see Table 4 of the RIA) to account for additional burden employers could potentially be subject to when a final rule is published.

Type of review: New collection (duplicate ICR to allow for public comment revising a currently approved information collection).

Agency: Wage and Hour Division, Department of Labor.

Title: Employment Information Form.

OMB Control Number: 1235–0NEW.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 28,824 (1,824 from this rulemaking).

Estimated number of responses: 28,824 (1,824 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 9,608 (608 burden hours due to this NPRM).

Estimated annual burden costs (capital/startup): $0 ($0 from this rulemaking).

Estimated annual burden costs (operations/maintenance): $0 ($0 from this rulemaking).

Estimated annual burden costs: $0 ($0 from this rulemaking).

Type of Review: Revision to a currently approved information collection.

Title: Records to be kept by Employers—Fair Labor Standards Act.

OMB Control Number: 1235–0018.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 4,068,419.

Estimated number of responses: 41,160,4 07 (8,971,488 from this NPRM).

Frequency of response: Various.

Estimated annual burden hours: 1,105,833 (299,050 from this NPRM).

Estimated annual burden costs: $51,277,476.

VII. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review. As amended by Executive Order 14094, section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more; or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive Order. OIRA has determined that this proposed rule is a ''significant regulatory action'' within the scope of section 3(f)(1) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department of Labor (Department) anticipates may result from this proposed rule, if finalized, and was prepared pursuant to the above-mentioned executive orders.

A. Introduction

1. Background

The Fair Labor Standards Act (FLSA or Act) requires covered employers to: (1) pay employees who are covered and not exempt from the Act's requirements not less than the Federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of their employees and of the wages, hours, and other conditions and practices of employment.

The FLSA provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees. The exemption applies to employees employed in a bona fide executive, administrative, or professional capacity, as those terms are ''defined and delimited'' by the Department.[290] The Department's regulations implementing these ''white-collar'' exemptions are codified at 29 CFR part 541. Since 1940, the regulations implementing the exemption have generally required each of the following three tests to be met: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet a minimum specified amount (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test).

The Department has updated the salary level test many times since its implementation in 1938. Table 1 presents the weekly salary levels associated with the EAP exemptions since 1938, organized by exemption and long/short/standard duties tests. From 1949 to 2004, the Department determined exemption status using a two-test system comprised of a long test (a lower salary level paired with a more rigorous duties test that limited performance of nonexempt work to no more than 20 percent for most employees) and a short test (a higher salary level paired with a less rigorous primary duties requirement that did not have a numerical limit on the amount of nonexempt work). In 2004, rather than update the two-test system, the Department chose to establish a new single-test system for determining exemption status, setting the standard salary level test at $455 a week, which was equivalent to the long test salary level, and pairing it with a standard duties test that was substantially equivalent to the more lenient short duties test. Because the single standard duties test was equivalent to the short duties test, employees who met the long test salary level and previously passed either the more rigorous long, or less rigorous short, duties test passed the standard duties test. The Department also added a new highly compensated employee (HCE) test, which used a very minimal duties test and a very high total compensation test set at $100,000 per year (*see* section II.B.2. for further discussion). In 2016, to address the concern that the standard test exempted lower-paid salaried employees performing large amounts of nonexempt work who had previously been protected by the more rigorous long duties test, the Department published a final rule setting the standard salary level at $913 per week, which was equivalent to the low end of the historic range of short test salary levels, and the HCE annual compensation level at $134,004. This approach restored overtime protection for employees performing substantial amounts of nonexempt work who earned between the long test salary level and the low end of the short test salary range, as they failed the new standard salary level test. As previously discussed, the U.S. District Court for Eastern District of Texas held the 2016 rule invalid. In 2019, in part to address the concern raised in the litigation that the approach taken in the 2016 rulemaking would have prevented employers from using the exemption for employees who earned between the long test salary level and the low end of the short test salary range and met the more rigorous long duties test, the Department returned to the methodology used in the 2004 rule and set the salary level at the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail industry nationally. Applying this method to the earnings data available in 2019 produced a standard salary level that was below the long test salary level. The current earnings thresholds, as published in 2019, are $684 a week for the standard salary test and $107,432 per year for the HCE test.

TABLE 1—HISTORICAL SALARY LEVELS FOR THE EAP EXEMPTIONS

Date enacted	Long duties test			Short duties test
	Executive	Administrative	Professional	
1938	* $30	$30		
1940	30	$200 (per month)	$200 (per month)	
1949	55	$75	$75	$100
1958	80	$95	$95	125
1963	100	$100	$115	150
1970	125	$125	$140	200
1975	155	$155	$170	250
	Standard duties test			
2004	$455			
2019	$684			

* Unless otherwise specified, all figures are dollars per week.

[290] 29 U.S.C. 213(a)(1).

2. Need for Rulemaking

The goal of this rulemaking is not only to update the single standard salary level to account for earnings growth since the 2019 rule, but also to build on the lessons learned in the Department's most recent rulemakings to more effectively define and delimit employees working in a bona fide EAP capacity. Specifically, the Department is proposing to update the standard salary level by setting it equal to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), based on the most recent Current Population Survey (CPS) data.[291] Using 2022 CPS Merged Outgoing Rotation Group (MORG) [292] data, the salary level would be set at $1,059 per week.

The Department's proposed standard salary level will, in combination with the standard duties test, better define and delimit which employees are employed in a bona fide EAP capacity in a one-test system. As explained in greater detail in sections III and IV.A., above, setting the standard salary level at or below the long test salary level, as the 2004 and 2019 rules did, results in the exemption of lower-salaried employees who traditionally were entitled to overtime protection under the long test either because of their low salary or because they perform large amounts of nonexempt work, in effect significantly broadening the exemption compared to the two-test system. Setting the salary level at the low end of the historic range of short test salary levels, as the 2016 rule did, would have restored overtime protections to those employees who perform substantial amounts of nonexempt work and earned between the long test salary level and the low end of the short test salary range. However, it also would have resulted in denying employers the use of the exemption for lower-salaried employees who traditionally were not entitled to overtime compensation under the long test, which raised concerns that the Department was in effect narrowing the exemption. By setting a salary level above what would currently be the equivalent of the long test salary level, the proposal would restore the right to overtime pay for salaried white-collar employees who prior to the 2019 rule were always considered nonexempt if they earned below the long test (or long test-equivalent) salary level. And it would ensure that fewer lower paid white-collar employees who perform significant amounts of nonexempt work are included in the exemption. At the same time, by setting it well below what would currently be the equivalent of the short test salary level, the proposal would allow employers to continue to use the exemption for many lower paid white-collar employees who were made exempt under the 2004 standard duties test. The proposed salary level would also more reasonably distribute between employees and their employers what the Department now understands to be the impact of the shift from a two-test to a one-test system on employees earning between the long and short test salary levels.

As the Department has previously noted, the amount paid to an employee is ''a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed, as well as the ''principal[ ]'' ''delimiting requirement'' ''prevent[ing] abuse'' of the exemption.'' [293] Additionally, the salary level test facilitates application of the exemption by saving employees and employers from having to apply the more time-consuming duties analysis to a large group of employees who will not pass it. For these reasons, the salary level test has been a key part of how the Department defines and delimits the EAP exemption since the beginning of its rulemaking on the EAP exemption.[294] At the same time, the salary test's role in defining and delimiting the scope of the EAP exemption must allow for appropriate examination of employee duties.[295] Under the Department's proposal, duties would continue to determine the exemption status for most salaried white-collar employees, addressing the legal concerns that have been raised about excluding from the EAP exemption too many white-collar employees solely based on their salary level.

The Department also proposes to update the HCE total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally ($143,988 in 2022). Though not as high a percentile as the HCE threshold initially adopted in 2004, which covered 93.7 percent of all full-time salaried workers,[296] the Department's proposed increase to the HCE threshold would ensure it continues to serve its intended function, because the HCE total annual compensation level would be high enough to exclude all but those employees at the very top of the economic ladder.

In accordance with the Department's traditional practice, and in the interest of applying the FLSA uniformly to areas subject to the Federal minimum wage, the Department is also proposing to apply the standard salary level to all territories that are subject to the Federal minimum wage and to update the special salary levels for American Samoa and the motion picture industry in relation to the new standard salary level. Having not increased these levels since 2004, there is a need to increase the salary levels in U.S. territories, particularly for employees in those territories that are subject to the Federal minimum wage.

In its three most recent part 541 rulemakings, the Department has expressed its commitment to keeping the earnings thresholds up to date to ensure that they remain effective in helping differentiate between exempt and nonexempt employees. Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide EAP employees. This rulemaking is motivated in part by the need to keep the part 541 earnings thresholds up to date. Based on its long experience with updating the salary levels, the Department has determined that adopting a regulatory provision for automatically updating the salary levels, with an exception for pausing future updates under certain conditions, is the most viable and efficient way to ensure the EAP exemption earnings thresholds keep pace with changes in employee pay and thus remain effective in helping determine exemption status. Accordingly, the Department is including in this proposed rule a mechanism for automatically updating the salary and compensation levels every 3 years. As explained in greater detail in section IV.D., employees and employers alike would benefit from the

[291] The Department uses the terms *salaried* and *nonhourly* interchangeably in this rule because, consistent with its 2004, 2016, and 2019 rules, the Department considered data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers. The Department also notes that the terms *employee* and *worker* are used interchangeably throughout this analysis.

[292] MORG is a supplement to the CPS and is conducted on approximately one-fourth of the CPS sample monthly to obtain information on weekly hours worked and earnings. The Department relied on CPS MORG data for calendar year 2022 to develop this NPRM. The Department will update the data used in any final rule resulting from this proposal.

[293] Stein Report at 19, 24; *see also* 81 FR 32422.

[294] *See* 84 FR 51237.

[295] *See* 84 FR 51238.

[296] *See* 69 FR 22169 (Table 3).

certainty and stability of regularly scheduled updates.

3. Summary of Affected Workers, Costs, Benefits, and Transfers

The Department estimated the number of affected workers and quantified costs and transfer payments associated with this proposed rule using pooled CPS MORG data. *See* section VII.B.2. The Department estimates in the first year after implementation, there would be 3.6 million affected workers.[297] This includes 3.4 million workers who meet the standard duties test and earn at least $684 per week but less than $1,059 per week and would either become eligible for overtime or have their salary increased to at least $1,059 per week (Table 2).[298] An estimated 248,900 workers would be affected by the proposed increase in the HCE compensation test from $107,432 per year to $143,988 per year. In Year 10, with automatic updating, the Department estimates that 4.3 million workers would be affected by the proposed change in the standard salary level test and 768,700 workers would be affected by the proposed change in the HCE total annual compensation test.[299]

This analysis quantifies three direct costs to employers: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs (*see* section VII.C.3). Total annualized direct employer costs over the first 10 years were estimated to be $663.6 million, assuming a 7 percent discount rate.[300] This proposed rule would also transfer income from employers to employees in the form of increased wages. The Department estimated annualized transfers would be $1.3 billion. Most of these transfers would be attributable to wages paid under the FLSA's overtime provision; a smaller share would be attributable to the FLSA's minimum wage requirement. These transfers also account for employers who may choose to increase the salary of some affected workers to at least the new threshold so that they can continue to use the EAP exemption.

The Department also provides a qualitative discussion of the potential benefits of this proposed rule, including strengthened overtime protections for some workers, increased worker productivity, increased personal time for workers, and reduced reliance on social assistance programs. *See* section VII.C.5.

TABLE 2—SUMMARY OF REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

Impact	Year 1	Future years [a]		Annualized value	
		Year 2	Year 10	3% Real discount rate	7% Real discount rate
Affected Workers (1,000s)					
Standard	3,399	2,999	4,288	(b)	(b)
HCE	249	269	769	(b)	(b)
Total	3,648	3,268	5,057	(b)	(b)
Costs and Transfers (Millions in $2022) [c]					
Direct employer costs	$1,202.8	$508.3	$748.0	$656.4	$663.6
Transfers [d]	1,234.2	949.0	1,981.2	1,318.1	1,294.3

[a] These cost and transfer figures represent a range over the nine-year span.
[b] Not annualized.
[c] Costs and transfers for affected workers passing the standard and HCE tests are combined.
[d] This is the net transfer from employers to workers. There may also be transfers of hours and income from some workers to others.

B. Number of Affected EAP Workers

1. Overview

This section explains the methodology used to estimate the number of workers who would be affected by the proposed rule. Workers who are currently EAP exempt are potentially affected by the proposed rule. In this proposed rule, as in previous rules, the Department estimated the current number of EAP exempt workers because there is no data source that identifies workers as EAP exempt. Employers are not required to report EAP exempt workers to any central agency or as part of any employee or establishment survey. The methodology described here is consistent with the approach the Department used in the 2004, 2016, and 2019 final rules.[301] To estimate the number of workers who would be affected by the rule, the proposed standard salary level and proposed HCE total annual compensation threshold are applied to the earnings of current EAP exempt workers.

[297] The term ''affected workers'' refers to the population of potentially affected EAP workers who either pass the standard duties test and earn at least $684 but less than the new salary level of $1,059 per week, or pass only the HCE duties test and earn at least $107,432 but less than the new HCE compensation level of $143,988 per year.

[298] Here and elsewhere in this analysis, numbers are reported at varying levels of aggregation, and are generally rounded to a single decimal point. However, calculations are performed using exact numbers. Therefore, some numbers may not match the reported totals or the calculations shown due to rounding of components.

[299] In later years, earnings growth will cause some initially affected workers to no longer be affected because their earnings will exceed the new salary or compensation threshold. This is possible in both non-update and update years but is much more likely to occur in non-update years. Additionally, some workers will become newly affected because their earnings will reach at least $684 per week, and in the absence of this proposed rule they would have lost their overtime protections. To estimate the total number of affected workers over time, the Department accounts for both of these effects.

[300] Hereafter, unless otherwise specified, annualized values will be presented using the 7 percent real discount rate.

[301] *See* 69 FR 22196–209; 81 FR 32453–60; 84 FR 51255–60. Where the proposal follows the methodology used to determine affected workers in the 2004, 2016, and 2019 final rules, citations to these rules are not always included.

2. Data

All estimates of numbers of workers used in this analysis were based on data from the CPS MORG, which is sponsored jointly by the U.S. Census Bureau and Bureau of Labor Statistics (BLS).[302] The CPS is a large, nationally representative sample. Households are surveyed for 4 months, excluded from the survey for 8 months, surveyed for an additional 4 months, then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey.[303] This supplement contains the detailed information on earnings necessary to estimate a worker's exemption status. Responses are based on the reference week, which is always the week that includes the 12th day of the month.

Although the CPS MORG is a large-scale survey, administered to approximately 15,000 households monthly representing the entire nation, it is still possible to have relatively few observations when looking at subsets of employees, such as workers in a specific occupation employed in a specific industry, or workers in a specific geographic location. To increase the sample size, the Department pooled 3 years of CPS MORG data (2020–2022). Earnings for each observation from 2020 and 2021 were inflated to 2022 dollars using the Consumer Price Index for All Urban Consumers (CPI–U).[304] The weight of each observation was adjusted so that the total number of potentially affected EAP workers in the pooled sample remained the same as the number for the 2022 CPS MORG. Thus, the pooled CPS MORG sample uses roughly three times as many observations to represent the same total number of workers in 2022. The additional observations allow the Department to better characterize certain attributes of the potentially affected labor force. This pooled dataset is used to estimate all impacts of the proposed rulemaking.

Some assumptions and adjustments were necessary to use these data as the basis for the analysis. For example, the Department eliminated workers who reported that their weekly hours vary and who provided no additional information on hours worked. This was done because the Department cannot estimate effects for these workers since it is unknown whether they work overtime and therefore unknown whether there would be any need to pay for overtime if their status changed from exempt to nonexempt. The Department reweighted the rest of the sample to account for this change (*i.e.,* to keep the same total employment estimates).[305] This adjustment assumes that the distribution of hours worked by workers whose hours do not vary is representative of hours worked by workers whose hours vary. The Department believes that without more information this is an appropriate assumption.[306]

3. Number of Workers Subject to the FLSA and the Department's Part 541 Regulations

As a starting point for the analysis, based on the CPS MORG data, the Department estimates that there would be 166.2 million wage and salary workers in Year 1. Figure 1 illustrates how the Department analyzed the U.S. civilian workforce through successive stages to estimate the number of affected workers.

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[302] In 2015, RAND released results from a survey conducted to estimate EAP exempt workers. However, this survey does not have the variables or sample size necessary for the Department to base its regulatory impact analysis (RIA) on this analysis. Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

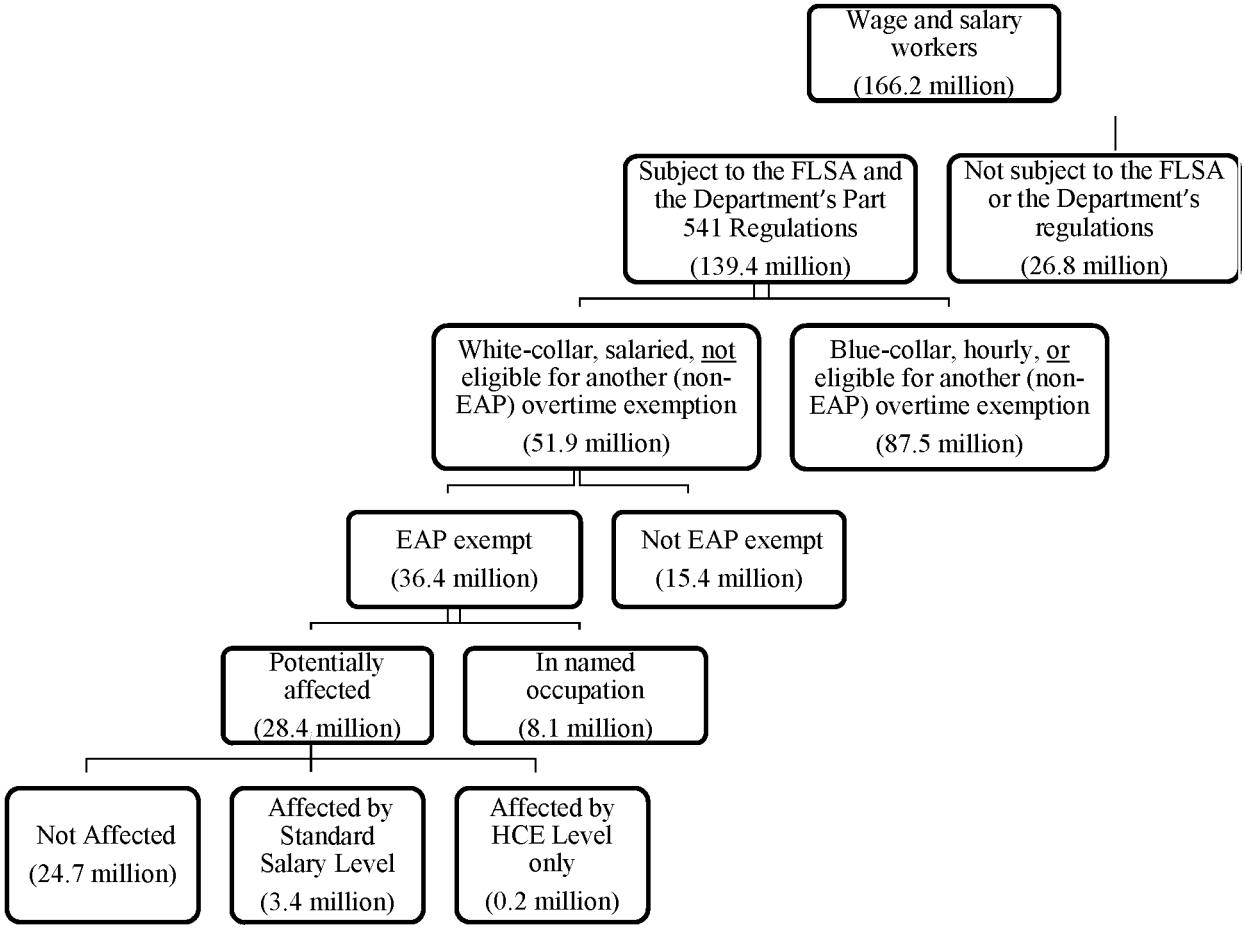
[303] This is the outgoing rotation group (ORG); however, this analysis uses the data merged over 12 months and thus it is referred to as MORG.

[304] Previous rulemakings also adjusted salaries in the pooled data using the CPI–U, but the Department recognizes that the relationship between wage growth and inflation between 2020 and 2022 may not be consistent. During the pandemic, large employment losses in low-wage industries resulted in stronger wage growth at the aggregate level. In the latter part of the 2020–2022 period, high inflation outpaced wage growth. Given these mixed effects, the Department decided to continue its prior practice of adjusting these observations using CPI–U.

[305] The Department also reweighted for workers reporting zero earnings. In addition, the Department eliminated, without reweighting, workers who reported both usually working zero hours and working zero hours in the past week.

[306] This is justifiable because demographic and employment characteristics are similar across these two populations (*e.g.,* age, gender, education, distribution across industries, share paid nonhourly). The share of all workers who stated that their hours vary (but provided no additional information) is 4.5 percent. To the extent these excluded workers are exempt, if they tend to work more overtime than other workers, then transfer payments and costs may be underestimated. Conversely, if they work fewer overtime hours, then transfer payments and costs may be overestimated.

Figure 1: Flow Chart of FLSA Exemptions and Estimated Number of Affected Workers



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The Department first excluded workers who are unemployed, not subject to its regulations, or not covered by the FLSA from the overall total number of wage and salary workers. Excluded workers include military personnel, unpaid volunteers, self-employed individuals, clergy and other religious workers, and Federal employees (with a few exceptions described below).

Many of these workers are excluded from the CPS MORG, including members of the military on active duty and unpaid volunteers. Self-employed and unpaid workers are included in the CPS MORG, but have no earnings data reported and thus are excluded from the analysis. The Department identified religious workers by their occupation codes: 'clergy' (Census occupational code 2040), 'directors, religious activities and education' (2050), and 'religious workers, all other' (2060). Most employees of the Federal Government are covered by the FLSA but not the Department's part 541 regulations because the Office of Personnel Management (OPM) regulates their entitlement to minimum wage and overtime pay.[307] Exceptions exist for U.S. Postal Service employees, Tennessee Valley Authority employees, and Library of Congress employees.[308] The analysis identified and included these covered Federal workers using occupation and/or industry codes and removed other Federal employees.[309]

The FLSA also does not cover employees of firms that have annual revenue of less than $500,000 and who are not engaged in interstate commerce. The Department does not exclude them from the analysis, however, because there is no data set that would adequately inform an estimate of the size of this worker population, although the Department believes it is a small percentage of workers. The 2004, 2016, and 2019 final rules similarly did not adjust for these workers.

Of the 166.2 million wage and salary workers in the United States, the Department estimates that 139.4 million are covered by the FLSA and subject to the Department's regulations (83.9 percent). The remaining 26.8 million workers are excluded from FLSA coverage for the reasons described above.

4. Number of Workers Who Are White-Collar, Salaried, Not Eligible for Another (Non-EAP) Overtime Exemption

After limiting the analysis to workers covered by the FLSA and subject to the Department's part 541 regulations,

[307] *See* 29 U.S.C. 204(f). Federal workers are identified in the CPS MORG with the class of worker variable PEIO1COW.

[308] *See id.*

[309] Postal Service employees were identified with the Census industry classification for postal service (6370). Tennessee Valley Authority employees were identified as Federal workers employed in the electric power generation, transmission, and distribution industry (570) and in Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, or Virginia. Library of Congress employees were identified as Federal workers under Census industry 'libraries and archives' (6770) and residing in Washington DC.

several other groups of workers were identified and excluded from further analysis since this proposed rule is unlikely to affect them. These include blue-collar workers,[310] workers paid on an hourly basis, and workers who are exempt under certain other (non-EAP) exemptions.

The Department excluded a total of 87.5 million workers from the analysis for one or more of these reasons, which often overlapped (*e.g.,* many blue-collar workers are also paid hourly). For example, the Department estimated that there are 47.5 million blue-collar workers. These workers were identified in the CPS MORG data following the methodology from the U.S. Government Accountability Office's (GAO) 1999 white-collar exemptions report [311] and the Department's 2004, 2016, and 2019 regulatory impact analyses.[312] Supervisors in traditionally blue-collar industries were classified as white-collar workers because their duties are generally managerial or administrative, and therefore they were not excluded as blue-collar workers. Using the CPS variable indicating a respondent's hourly wage status, the Department determined that 77.8 million workers were paid on an hourly basis in 2022.[313]

Also excluded from further analysis were workers who are exempt under certain other (non-EAP) exemptions. Although some of these workers may also be exempt under the EAP exemptions, they would independently remain exempt from the FLSA's minimum wage and/or overtime pay provisions based on the non-EAP exemptions. The Department excluded an estimated 3.8 million workers, including some agricultural and transportation workers, from further analysis because they are subject to another (non-EAP) overtime exemption. *See* Appendix A: Methodology for Estimating Exemption Status, contained in the rulemaking docket, for details on how this population was identified.

Agricultural and transportation workers are two of the largest groups of workers excluded from the population of potentially affected EAP workers in the current analysis, and with some exceptions, they were similarly excluded in other recent rulemakings. The 2004 rule excluded all workers in agricultural industries from the analysis,[314] while more recent analyses only excluded agricultural workers from specified occupational-industry combinations since not all workers in agricultural industries qualify for the agricultural overtime pay exemptions. This proposed rule followed the more recent analyses and only excluded agricultural workers in certain occupation-industry combinations. The exclusion of transportation workers matched the method for the 2004, 2016, and 2019 final rules. Transportation workers are defined as those who are subject to the following FLSA exemptions: section 13(b)(1), section 13(b)(2), section 13(b)(3), section 13(b)(6), or section 13(b)(10). The Department excluded 1.1 million agricultural workers and 2.0 million transportation workers from the analysis.

In addition, the Department excluded another 21,800 workers who qualify for one or more other FLSA minimum wage and overtime exemptions (and are not either blue-collar or hourly). The criteria for determining exemption status for these workers are detailed in Appendix A.

After excluding workers not subject to the Department's FLSA regulations and workers who are unlikely to be affected by this proposed rule (*i.e.,* blue-collar workers, workers paid hourly, workers who are subject to another (non-EAP) overtime exemption), the Department estimated there are 51.9 million salaried white-collar workers for whom employers might claim either the standard EAP exemption or the HCE exemption.

5. Number of Current EAP Exempt Workers

To determine the number of workers for whom employers might currently claim the EAP exemption, the standard EAP test and HCE test were applied. Both tests include earnings thresholds and duties tests. Aside from workers in named occupations (which are not subject to an earnings requirement and are discussed in the next subsection), to be exempt under the standard EAP test, the employee generally must:

- be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); [315]
- earn at least a designated salary amount (the standard salary level test, currently $684 per week); and
- primarily perform exempt work, as defined by the regulations (the standard duties test).

The HCE test allows certain highly paid employees to qualify for exemption if they customarily and regularly perform one or more exempt job duties (the HCE duties test). The current HCE annual compensation level is $107,432, including at least $684 per week paid on a salary or fee basis.

i. Salary Basis

The Department included only nonhourly workers in the analysis based on CPS data.[316] For this NPRM, the Department considered data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers. The Department notes that it made the same assumption regarding nonhourly workers in the 2004, 2016, and 2019 final rules.[317]

The CPS population of ''nonhourly'' workers includes salaried workers along with those who are paid on a piece-rate, a day-rate, or largely on bonuses or commissions. Data in the CPS are not available to distinguish between salaried workers and these other nonhourly workers. However, the Panel Study of Income Dynamics (PSID) provides additional information on how nonhourly workers are paid.[318] In the PSID, respondents are asked how they are paid on their main job and are also asked for more detail if their response is other than salaried or hourly. Possible responses include piecework, commission, self-employed/farmer/profits, and by the job/day/mile. The Department analyzed the PSID data and found that relatively few nonhourly workers were paid by methods other than salaried. The Department is not aware of any statistically robust source

[310] ''The section 13(a)(1) exemptions and the regulations in [Part 541] do not apply to manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy.'' § 541.3(a).

[311] GAO/HEHS. (1999). Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place. GAO/HEHS–99–164, 40–41, *https://www.gao.gov/assets/230/228036.pdf.*

[312] *See* 69 FR 22240–44.

[313] CPS MORG variable PEERNHRY.

[314] 69 FR 22197.

[315] Some computer employees may be exempt even if they are not paid on a salary basis. Hourly computer employees who earn at least $27.63 per hour and perform certain duties are exempt under section 13(a)(17) of the FLSA. These workers are considered part of the EAP exemptions but were excluded from the analysis because they are paid hourly and will not be affected by this proposed rule (these workers were similarly excluded in the 2004, 2016, and 2019 analyses). Salaried computer workers are exempt if they meet the salary and duties tests applicable to the EAP exemptions, and are included in the analysis since they will be impacted by this proposed rule. Additionally, administrative and professional employees may be paid on a fee basis, as opposed to a salary basis. § 541.605(a). Although the CPS MORG does not identify workers paid on a fee basis, they are considered nonhourly workers in the CPS and consequently are correctly classified as ''salaried'' (as was done in previous rules).

[316] The CPS variable PEERNHRY identifies workers as either hourly or nonhourly.

[317] *See* 69 FR 22197; 81 FR 32414; 84 FR 51258.

[318] University of Michigan, Institute for Social Research. 2019 PSID. Data available at: *https://simba.isr.umich.edu/data/data.aspx.*

that more closely reflects salary as defined in its regulations.

ii. Salary Level

Weekly earnings are available in the CPS MORG data, which allowed the Department to estimate how many nonhourly workers pass the compensation thresholds.[319] However, the CPS earnings variable does not perfectly reflect the Department's definition of earnings. First, the CPS includes all nondiscretionary bonuses and commissions if they are part of usual weekly earnings. However, the regulation allows nondiscretionary bonuses and commissions to satisfy up to 10 percent of the standard salary level. This discrepancy between the earnings variable used and the regulatory definition of salary may cause a slight overestimation or underestimation of the number of workers estimated to meet the standard salary level and HCE compensation tests.[320] Second, CPS earnings data include overtime pay. The Department notes that employers may factor into an employee's salary a premium for expected overtime hours worked. To the extent they do so, that premium would be reflected accurately in the data. Third, the earnings measure includes tips and discretionary commissions which do not qualify towards the required salary. The Department believes tips are an uncommon form of payment for these white-collar workers. Discretionary commissions tend to be paid irregularly and hence are unlikely to be counted as ''usual earning.'' Additionally, as noted above, most salaried workers do not receive commissions.

Lastly, the CPS annual earnings variable is topcoded at $150,000. Topcoding refers to how data sets handle observations at the top of the distribution. For the CPS annual earnings variable, workers earning above $2,884.61 ($150,000 ÷ 52 weeks) per week are reported as earning $2,884.61 per week. The Department imputed earnings for topcoded workers in the CPS data to adequately estimate impacts.[321]

iii. Duties

The CPS MORG data do not capture information about job duties. Therefore, the Department used probability estimates of passing the duties test by occupational title to estimate the number of workers passing the duties test. This is the same methodology used in recent part 541 rulemakings, and the Department believes it continues to be the best available methodology. The probabilities of passing the duties test are from an analysis performed by WHD in 1998 in response to a request from the GAO. Because WHD enforces the FLSA's overtime requirements and regularly assesses workers' exempt status, WHD was uniquely qualified to provide the analysis. The analysis was originally published in the GAO's 1999 white-collar exemptions report.[322]

WHD examined 499 occupational codes and determined that 251 occupational codes likely included EAP exempt workers.[323] For each, WHD assigned one of four probability codes reflecting the estimated likelihood, expressed as ranges, that a worker in that occupation would perform duties required to meet the EAP duties tests (Table 3). All occupations and their associated probability codes are listed in Appendix A. Just as in the 2004, 2016, and 2019 final rules, the Department has supplemented this analysis to account for the HCE exemption. The Department modified the four probability codes to reflect probabilities of passing the HCE duties test based on its analysis of the provisions of the highly compensated test relative to the standard duties test. To illustrate, WHD assigned exempt probability code 4 to the occupation ''first-line supervisors/managers of construction trades and extraction workers'' (Census code 6200), which indicates that a worker in this occupation has a 0 to 10 percent likelihood of meeting the standard EAP duties test. However, if that worker earned at least $100,000 annually (now $107,432 annually), they were assigned a 15 percent probability of passing the more lenient HCE duties test.[324]

TABLE 3—PROBABILITY WORKER IN CATEGORY PASSES THE DUTIES TESTS

Probability code	The standard EAP test		The HCE test	
	Lower bound (%)	Upper bound (%)	Lower bound (%)	Upper bound (%)
0	0	0	0	0
1	90	100	100	100
2	50	90	94	96
3	10	50	58.4	60
4	0	10	15	15

The occupations identified in GAO's 1999 report map to an earlier occupational classification scheme (the 1990 Census occupational codes).[325] For this proposed rule, the Department used occupational crosswalks to map the previous occupational codes to the 2018 Census occupational codes, which are used in the CPS MORG 2020 through 2022 data. If a new occupation comprises more than one previous occupation, then the new occupation's probability code is the weighted average of the previous occupations' probability

[319] The CPS MORG variable PRERNWA, which measures weekly earnings, is used to identify weekly salary.

[320] In some instances, this may include too much nondiscretionary bonuses and commissions (*i.e.,* when it is more than 10 percent of usual earnings). But in other instances, it may not include enough nondiscretionary bonuses and commissions (*i.e.,* when the respondent does not count them as usual earnings).

[321] The Department used the standard Pareto distribution approach to impute earnings above the topcoded value as described in Armour, P. and Burkhauser, R (2013). Using the Pareto Distribution to Improve Estimates of Topcoded Earnings. Center for Economic Studies (CES).

[322] Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place, *supra* note 311, at 40–41.

[323] WHD excluded nine that were not relevant to the analysis for various reasons. For example, one code was assigned to unemployed persons whose last job was in the Armed Forces, some codes were assigned to workers who are not FLSA covered, others had no observations.

[324] The HCE duties test is used in conjunction with the HCE total annual compensation requirement to determine eligibility for the HCE exemption. It is much less stringent than the standard and short duties tests to reflect that very highly paid employees are much more likely to be properly classified as exempt.

[325] Census occupation codes were also updated in 2002 and 2010. References to occupational codes in this analysis refer to the 2002 Census occupational codes. Crosswalks and methodology available at: *https://www.census.gov/topics/employment/industry-occupation/guidance/code-lists.html.*

codes, rounded to the closest probability code.

These codes provide information on the likelihood that an employee met the duties tests, but they do not identify the workers in the CPS MORG who passed the test. For example, for every ten public relations managers, between five and nine are assumed to pass the standard duties test (based on probability category 2). However, it is unknown which of these ten workers are exempt; therefore, for the purposes of producing an estimate, the Department must assign a status to these workers. Exemption status could be randomly assigned with equal probability, but this would ignore the earnings of the worker as a factor in determining the probability of exemption. The probability of qualifying for the exemption increases with earnings because higher paid workers are more likely to perform the required duties.[326]

The Department estimated the probability of qualifying for the standard exemption for each worker as a function of both earnings and the occupation's exempt probability category using a gamma distribution.[327] Based on these revised probabilities, each worker was assigned exempt or nonexempt status based on a random draw from a binomial distribution using the worker's revised probability as the probability of success. Thus, if this method is applied to ten workers who each have a 60 percent probability of being exempt, six workers would be expected to be designated as exempt.[328] For details, *see* Appendix A (in the rulemaking docket).

The Department acknowledges that the probability codes used to determine the share of workers in an occupation who are EAP exempt are 25 years old. However, the Department believes the probability codes continue to estimate exemption status accurately given the fact that the standard duties test is not substantively different from the former short duties tests reflected in the codes. For the 2016 rulemaking, the Department reviewed O*NET [329] to determine the extent to which the 1998 probability codes reflected current occupational duties. The Department's review of O*NET verified the continued appropriateness of the 1998 probability codes.[330]

The Department estimates that of the existing 51.9 million salaried white-collar workers considered in the analysis, 36.4 million currently qualify for the EAP exemption.

6. Potentially Affected Exempt EAP Workers

The Department excluded some of the current EAP exempt workers from further analysis because the proposed rule would not affect them. Specifically, the Department excluded workers in named occupations who are not required to pass the salary requirements (although they must still pass a duties test) and therefore whose exemption status does not depend on their earnings. These occupations include physicians (identified with Census occupation codes 3010, 3040, 3060, 3120), lawyers (2100), teachers (occupations 2200–2550 and industries 7860 or 7870), academic administrative personnel (school counselors (occupation 2000 and industries 7860 or 7870) and educational administrators (occupation 0230 and industries 7860 or 7870)), and outside sales workers (a subset of occupation 4950). Out of the 36.4 million workers who were EAP exempt, 8.1 million, or 22.1 percent, were expected to be in named occupations. Thus, the proposed changes to the standard salary level and HCE compensation tests would not affect these workers. The 28.4 million EAP exempt workers remaining in the analysis are referred to in this proposed rule as ''potentially affected'' (17.1 percent of all workers).

Based on analysis of the occupational codes and CPS earnings data (described above), the Department has concluded there are 28.4 million potentially affected EAP workers.[331]

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[326] For the standard exemption, the relationship between earnings and exemption status is not linear and is better represented with a gamma distribution. For the HCE exemption, the relationship between earnings and exemption can be well represented with a linear function because the relationship is linear at high salary levels (as determined by the Department in the 2004 rule). Therefore, the gamma model and the linear model would produce similar results for highly compensated workers. *See* 69 FR 22204–08, 22215–16.

[327] The gamma distribution was chosen because, during the 2004 revision, this non-linear distribution best fit the data compared to the other non-linear distributions considered (*i.e.,* normal and lognormal). A gamma distribution is a general type of statistical distribution that is based on two parameters that control the scale (alpha) and shape (in this context, called the rate parameter, beta).

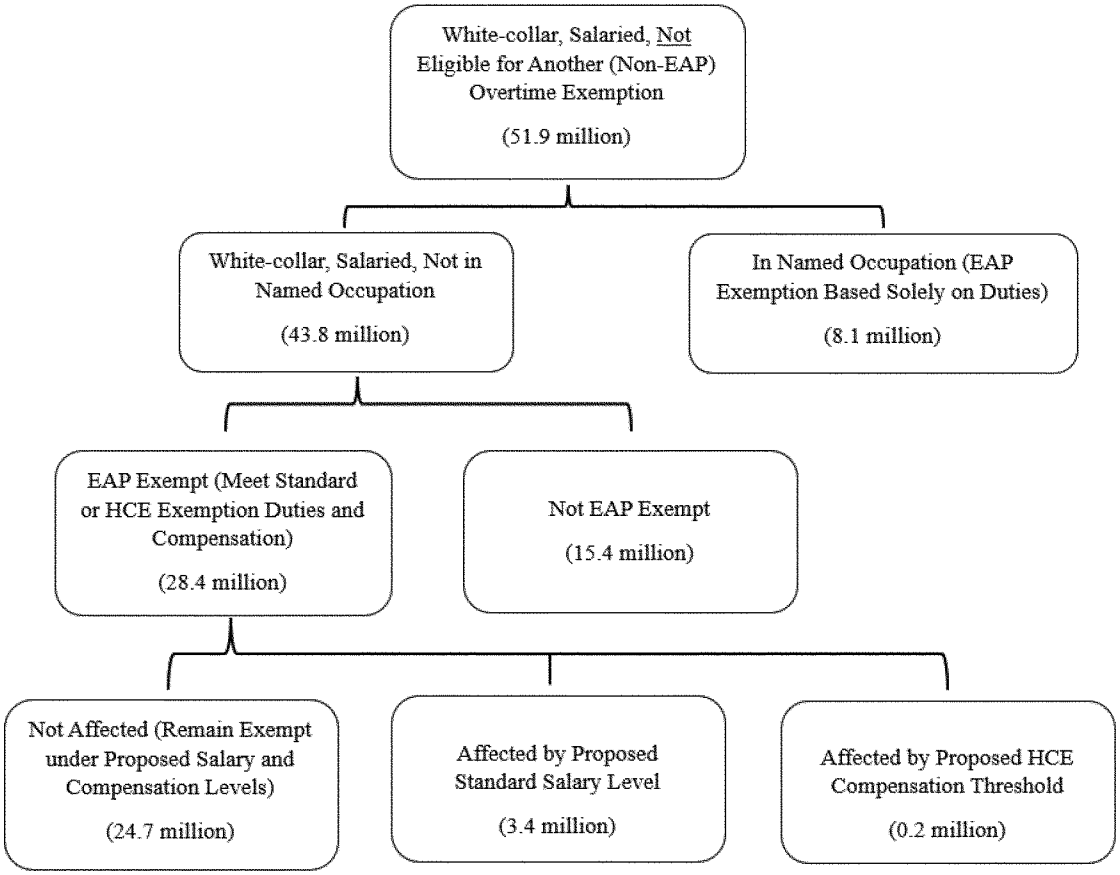
[328] A binominal distribution is frequently used for a dichotomous variable where there are two possible outcomes; for example, whether one owns a home (outcome of 1) or does not own a home (outcome of 0). Taking a random draw from a binomial distribution results in either a zero or a one based on a probability of ''success'' (outcome of 1). This methodology assigns exempt status to the appropriate share of workers without biasing the results with manual assignment.

[329] The O*NET database contains hundreds of standardized and occupation-specific descriptors. *See http://www.onetcenter.org.*

[330] 81 FR 32459.

[331] Of these workers, approximately 16.0 million pass only the standard test, 11.9 million pass both the standard and the HCE tests, and 420,000 pass only the HCE test.

Figure 2: Exemption Status and Number of Affected Workers



As shown in Figure 2 above, 8.1 million of the 51.9 million salaried white-collar workers are in named occupations and will not be affected by a change in the earnings requirements. The Department also estimates that of the remaining 43.8 million salaried white-collar workers, about 11.7 million earn below the Department's proposed standard salary level of $1,059 per week and about 32.1 million earn above the Department's proposed salary level. Thus, approximately 27 percent of salaried white-collar employees earn below the proposed salary level, whereas approximately 73 percent of salaried white-collar employees earn above the salary level and would have their exemption status turn on their job duties.

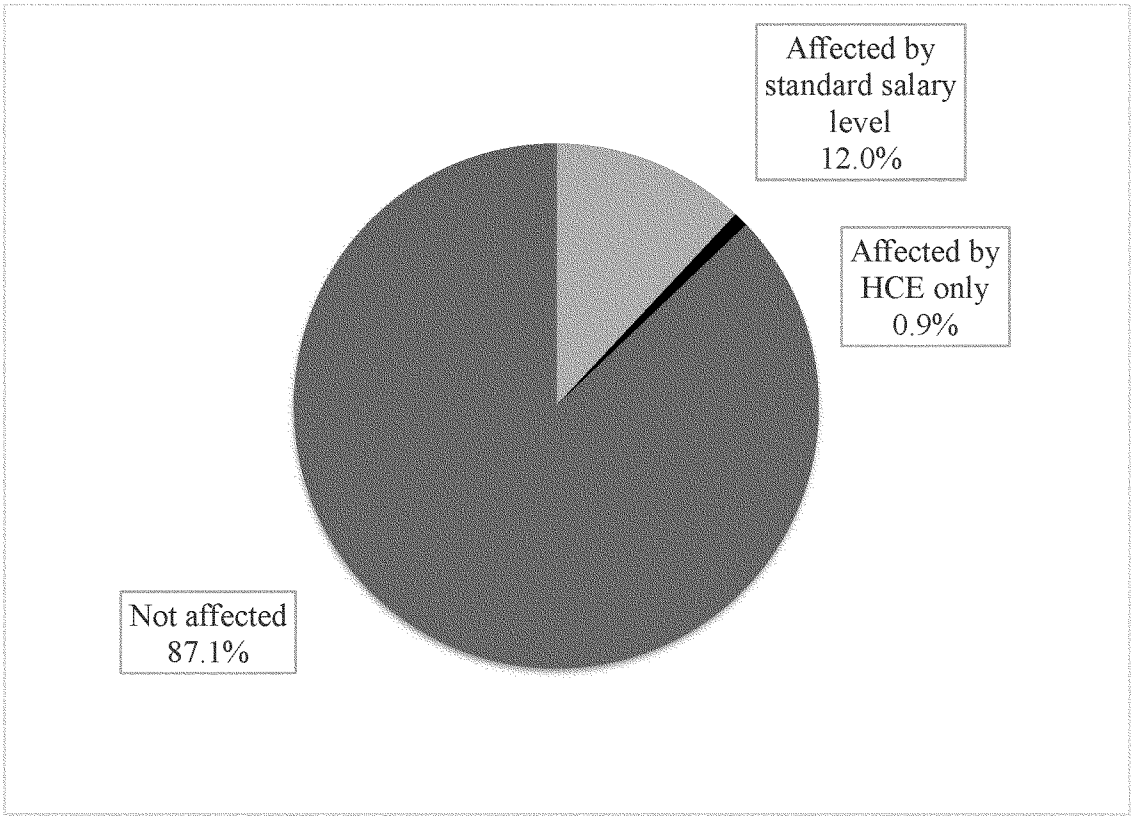
7. Number of Affected EAP Workers

The Department estimated that the proposed increase in the standard salary level from $684 per week to $1,059 per week would affect 3.4 million workers in Year 1 (of these 3.4 million affected employees, 1.8 million earn less than the long test salary level ($925)).[332] The Department estimated that the proposed increase in the HCE annual compensation level from $107,432 to $143,988 would impact 248,900 workers (Figure 3).[333] In total, the Department expects that 3.6 million workers out of the 28.4 million potentially affected workers would be affected in Year 1.

[332] *See* section VII.C.8 (Alternative 2). As discuss in section IV.A, such employees were always excluded from the EAP exemption prior to 2019, either by the long test salary level itself, or under the 2004 rule salary level, which was equivalent to the long test salary level. The remaining 1.6 million of these affected employees earn between the long test salary level and the Department's proposed standard salary level.

[333] This group includes workers who may currently be nonexempt under more protective state EAP laws and regulations, such as some workers in Alaska, California, Colorado, Maine, New York, Washington, and Wisconsin.

Figure 3: Pie Chart of Potentially Affected Employees and their Affected Status



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8. Supplemental Analysis on the Number of Affected Workers in the Territories

The Department is proposing to apply the standard salary level to all territories that are subject to the Federal minimum wage, including the Commonwealth of the Northern Mariana Islands (CNMI), Guam, Puerto Rico, and the U.S. Virgin Islands, and to update the special salary level for American Samoa in relation to the new standard salary level. In American Samoa, the salary level would be set at 84 percent of the new standard salary level, or $890 per week ($1,059 x 84 percent). In the other territories, the salary level would be set at the proposed standard salary level of the 35th percentile of weekly nonhourly earnings in the lowest wage Census region (currently the South), or $1,059 per week. The salary levels in the territories have not been updated since 2004, when the salary level for Puerto Rico, Guam, the U.S. Virgin Islands, and the CNMI was set to $455 per week and the salary level for American Samoa was set to $380 per week. Therefore, the increases in those salary levels will be more pronounced than in the 50 states and the District of Columbia. This may lead to larger impacts resulting from the increased standard salary level in the territories. Unfortunately, data are not available to conduct a full analysis of impacts in the territories. Therefore, the Department applied reasonable assumptions to the available data to estimate the number of affected workers in the territories.[334]

The CPS data used for the impact analysis does not include data for the territories, and no other data source provides individual level data on earnings, occupation, and pay basis (*i.e.,* hourly or salaried). The Department identified several data sources with pertinent information on the territories:

- BLS Occupational Employment and Wage Statistics (OEWS)
- The Puerto Rico Community Survey
- The Census of Island Areas
- The Economic Census
- County Business Patterns (CBP)

For Puerto Rico, Guam, and the U.S. Virgin Islands the Department used OEWS data.[335] The OEWS does not include American Samoa or the CNMI; the Department used CBP (discussed below) data on the number of workers for these territories. The Department believes OEWS is more appropriate for this analysis than CBP because it provides the number of white-collar workers and information about earnings, which CBP does not.[336] The Puerto Rico Community Survey provides individual-level earnings information for Puerto Rico that is not available in the OEWS.[337] However, the Department chose to use OEWS because it includes data on additional territories, and to limit the number of data sets used for consistency. The Department welcomes comments on the choice of data set for this analysis, and the overall methodology for estimating the impact on territories. The Department also welcomes recommendations for additional sources of data on workers in the territories.

The OEWS reports the number of workers by detailed occupation, to which the Department applied the

[334] The Department was unable to estimate transfer payments in the territories because of the additional assumptions that would be necessary.

[335] OEWS 2022. *https://www.bls.gov/oes/tables.htm.*

[336] CBP includes total quarterly payroll and the number of employees, but no information about the distribution of these earnings.

[337] The Government Accountability Office assessed the impacts of the 2016 rulemaking in Puerto Rico using the Puerto Rico Community Survey. GAO. (2018). Limited Federal Data Hinder Analysis of Economic Condition and DOL's 2016 Overtime Rule. *https://www.gao.gov/assets/700/693309.pdf.*

probability codes to estimate the number of white-collar workers who meet the duties test requirements for the EAP exemption. The OEWS does not have information on the share of employees in each occupation who are salaried. In order to estimate this share, the Department calculated the share of workers in the 50 states and DC who meet the duties requirement in the CPS data who are salaried, controlling for the distribution of workers across occupations in each of the three territories.[338] The Department then multiplied the share of workers who meet the duties requirement who are salaried in each occupation by the number of workers who meet the duties requirements in that territory.

The OEWS also reports select percentiles of the earnings distribution for each occupation (10th, 25th, 50th, 75th, and 90th). This allows the Department to estimate an earnings distribution for each occupation and approximate the number of workers who earn between the old and new salary levels.[339] These calculations are summarized in Table 4.

TABLE 4—ESTIMATED NUMBER OF AFFECTED WORKERS IN TERRITORIES USING OEWS

Population or parameter	Puerto Rico	Guam	U.S. Virgin Islands
Workers [a]	907,930	51,340	27,860
Workers who meet duties requirements	169,241	10,413	5,808
Share of workers meeting duties requirements who are salaried [b c]	54%	60%	57%
Salaried workers meeting duties requirements	91,919	6,285	3,333
Share between salary thresholds ($455–$1,059)	49%	38%	32%
Salaried workers meeting duties requirements between thresholds (*i.e.,* affected workers)	44,881	2,407	1,071

[a] Limited to wage and salary workers in nonfarm establishments.
[b] Also removes workers unlikely to be impacted by this rulemaking such as workers in named occupations and workers exempt under another non-EAP overtime exemption.
[c] Ratio calculated from CPS data for employees in the 50 states and the District of Columbia while controlling for occupation distribution.

There are several reasons why the estimated number of workers calculated from the OEWS may over or underestimate the true number of affected workers. The Department does not know the size of the biases and so does not know which dominate. First, the share of workers who are salaried in the territories may differ from in the 50 states and the District of Columbia. If the share is higher in the territories than the states, then the Department's approach will underestimate the number of affected workers but overestimate the number if the share is lower. Second, the OEWS is limited to wage and salary workers in nonfarm establishments which may lead to an undercount of affected workers.[340]

The Department used 2021 CBP data to estimate the number of affected workers in American Samoa and the CNMI. The methodology is largely the same as for the analysis using OEWS data. Table 5 shows estimates using CBP data for all five territories to facilitate a comparison of OEWS and CBP results for Puerto Rico, Guam, and the U.S. Virgin Islands.

CBP provides employment data for each territory. To estimate the number of workers who may be exempt, the Department calculated the share of workers in the OEWS analysis who meet the duties requirements and are salaried in each of the other three territories and applied that weighted average to American Samoa and the CNMI. The Department also calculated the share of exempt workers who earn between the current and proposed salary thresholds in the three territories covered by the OEWS data and applied them to American Samoa and the CNMI. The Department then multiplied the number of workers by these two shares to estimate the number of affected workers.[341]

TABLE 5—ESTIMATED NUMBER OF AFFECTED WORKERS IN TERRITORIES USING CBP

Population or parameter	Puerto Rico	Guam	U.S. Virgin Islands	American Samoa	CNMI
Workers	660,654	49,876	25,652	7,808	12,763
Share who are salaried and meet duties requirements [a]	10%	12%	12%	10%	10%
Salaried workers meeting duties requirements	66,885	6,106	3,069	803	1,313
Share between salary thresholds [b]	49%	38%	32%	48%	48%
Salaried workers meeting duties requirements between thresholds (*i.e.,* affected workers)	32,657	2,339	986	383	625

[a] Ratio calculated from OEWS data for Puerto Rico, Guam, and U.S. Virgin Islands. Average used for American Samoa and the CNMI. Excludes workers unlikely to be impacted by this rulemaking such as workers in named occupations and workers exempt under another non-EAP overtime exemption.
[b] "Excludes workers unlikely to be impacted by this rulemaking such as workers in named occupations and workers exempt under another non-EAP overtime exemption.

[338] The Department also excluded workers who are unlikely to be affected by this rulemaking, including workers in named occupations and workers exempt under another non-EAP overtime exemption.

[339] The Department interpolated values between the reported percentiles by assuming a uniform distribution for each segment (*e.g.,* between the 10th and the 25th percentiles the Department assumed the earnings distribution is linear). The Department assumed a minimum value of $100 and a maximum value of three times the 90th percentile.

[340] In particular, "The OEWS survey excludes the majority of the agricultural sector, with the exception of logging (NAICS 113310), support activities for crop production (NAICS 1151), and support activities for animal production (NAICS 1152). Private households (NAICS 814) also are excluded. OEWS Federal Government data include the U.S. Postal Service and the Federal executive branch only. All other industries, including state and local government, are covered by the survey." *See https://www.bls.gov/oes/current/oes_tec.htm.*

[341] American Samoa has lower current and proposed salary thresholds. However, earnings are also lower in American Samoa. Therefore, the Department believes to estimate American Samoa impacts, it is more appropriate to use the salary thresholds in the other territories when applied to wage data for those territories, rather than using the lower American Samoa thresholds combined with the higher earnings data for other territories.

In general, the same potential biases apply here as with the OEWS analysis. However, employment coverage differs slightly between the OEWS and CBP. The CBP excludes government workers (including state and local workers) and covered workers in a few select NAICS, resulting in a downward bias in the number of affected workers.[342] Additionally, the estimates for American Samoa and the CNMI assume the share of workers in these territories who meet the duties requirements and are salaried, and the share of these workers who earn between the current and proposed salary thresholds, are similar to those shares in Puerto Rico, Guam, and the U.S. Virgin Islands.

As a sensitivity analysis, the Department compared the results from the CBP analysis to the OEWS analysis for Puerto Rico, Guam, and the U.S. Virgin Islands. The two estimates of the number of affected workers are within 10 percent for both Guam and the U.S. Virgin Islands. The Puerto Rico estimates differ by a larger amount because the CBP number of workers in Puerto Rico is smaller than the OEWS number due to differences in the covered population.

Table 6 includes the estimated number of affected workers by area using the preferred data source for each (*i.e.,* OEWS for Puerto Rico, Guam, and U.S. Virgin Islands and CBP for American Samoa and the CNMI). The share of workers affected by the rule ranges from 3.8 to 4.9 percent for each territory, with an average of 4.9 percent over all territories, which is higher than the average of 2.2 percent estimated for the 50 states and the District of Columbia. The effect is larger in the territories than the states for two reasons. First, the increase in salary level will be larger since the salary level wasn't increased for these territories in the 2019 rulemaking. Second, earnings tend to be lower in the territories, and so more workers may fall within the impacted salary range.

TABLE 6—SUMMARY OF NUMBER OF AFFECTED WORKERS BY TERRITORY

Territory	All workers	Number of affected workers	Affected as share of all workers (%)
Puerto Rico	907,930	44,881	4.9
Guam	51,340	2,407	4.7
U.S. Virgin Islands	27,860	1,071	3.8
American Samoa	7,808	383	4.9
CNMI	12,763	625	4.9
Total	1,007,701	49,367	4.9

Although the share of affected workers to total workers in the territories is larger, these workers still comprise only a fraction of the workforce. As is true for the mainland U.S., the Department believes that many of these workers are unlikely to work regular overtime. The Department welcomes comments and data on the prevalence of overtime work in the territories.

The Department has not included this supplemental estimate of affected workers in the territories in the larger analysis of affected workers due to the limitations of the estimates and the inability to estimate transfers. Even if this supplemental estimate were to be included in the broader analysis, the total number of affected workers would be little changed, as the number of affected workers in the territories (49,367) is less than 1.5% of our affected workers estimate (3.6 million).

C. Effects of Revised Salary and Compensation Levels

1. Overview and Summary of Quantified Effects

The Department is proposing to set the standard salary level using the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census region (currently the South) and to set the HCE compensation level at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationwide. In both cases the Department used 2022 CPS data to calculate the levels.[343] The levels presented in this analysis are likely lower than the corresponding levels would be at the time a final rule is published, given that the Department would use the most recent data available. However, the economic impacts estimated here are an appropriate proxy for the effects likely to occur at the time of implementation if the proposal is finalized.

Both transfers from employers to employees and between employees, and direct employer costs, would depend on how employers respond to this rulemaking. Employer response is expected to vary by the characteristics of the affected EAP workers. Assumptions related to employer responses are discussed below.

Table 7 presents the estimated number of affected workers, costs, and transfers associated with increasing the standard salary and HCE compensation levels. The Department estimated that the direct employer costs of this proposed rule, if finalized, would total $1.2 billion in the first year, with 10-year annualized direct costs of $664 million per year using a 7 percent discount rate.

In addition to these direct costs, this proposed rule would transfer income from employers to employees. Estimated Year 1 transfers would equal $1.2 billion, with annualized transfers of $1.3 billion per year using both the 3 percent and 7 percent real discount rates. Potential employer costs due to reduced profits and additional hiring were not quantified but are discussed in section VII.C.3.v.

[342] In particular, ''CBP covers most NAICS industries excluding crop and animal production; rail transportation; Postal Service; pension, health, welfare, and vacation funds; trusts, estates, and agency accounts; office of notaries; private households; and public administration. CBP also excludes most establishments reporting government employees.'' *See https://www.census.gov/programs-surveys/cbp/about.html.*

[343] Full-time is defined as 35 or more hours per week.

TABLE 7—SUMMARY OF AFFECTED WORKERS AND REGULATORY COSTS AND TRANSFERS

Impact [a]	Year 1	Future years [b]		Annualized value	
		Year 2	Year 10	3% Real discount rate	7% Real discount rate
Affected Workers (1,000s)					
Standard	3,399	2,999	4,288	([c])	([c])
HCE	249	269	769	([c])	([c])
Total	3,648	3,268	5,057	([c])	([c])
Direct Employer Costs (Millions in $2022)					
Regulatory familiarization	$427.2	$0.0	$65.1	$67.9	$75.0
Adjustment [c]	$240.8	$8.1	$15.0	$35.7	$40.0
Managerial	$534.9	$500.2	$667.9	$552.8	$548.5
Total direct costs [d]	$1,202.8	$508.3	$748.0	$656.4	$663.6
Transfers from Employers to Workers (Millions in $2022) [e]					
Due to minimum wage	$48.6	$27.1	$17.2	$25.2	$25.9
Due to overtime pay	$1,185.6	$921.8	$1,963.9	$1,292.9	$1,268.5
Total transfers [f]	$1,234.2	$949.0	$1,981.2	$1,318.1	$1,294.3

[a] Additional costs and benefits of the rule that could not be quantified or monetized are discussed in the text.
[b] These costs/transfers represent a range over the nine-year span.
[c] Not annualized.
[d] Adjustment costs occur in all years when there are newly affected workers. Adjustment costs may occur in years without updated earnings thresholds because some workers' projected earnings are estimated using negative earnings growth.
[e] Components may not add to total due to rounding.
[f] This is the net transfer from employers to workers. There may also be transfers between workers.

2. Characteristics of Affected EAP Workers

Table 8 presents the number of affected EAP workers, the mean number of overtime hours they work per week, and their average weekly earnings. The Department considered two types of overtime workers in this analysis: regular overtime workers and occasional overtime workers.[344] Regular overtime workers typically worked more than 40 hours per week. Occasional overtime workers typically worked 40 hours or less per week, but they worked more than 40 hours in the week they were surveyed. The Department considered these two populations separately in the analysis because labor market responses to overtime pay requirements may differ for these two types of workers.

The 3.4 million workers affected by the increase in the standard salary level work on average 1.6 usual hours of overtime per week and earn on average $914 per week.[345] However, most of these workers (about 85 percent) usually do not work overtime. The 15 percent of affected workers who usually work overtime average 11.0 hours of overtime per week. In a representative week, roughly 121,000 (or 3.6%) of the 3.4 million affected workers occasionally work overtime; they averaged 8.7 hours of overtime in the weeks they worked overtime.[346] Finally, 8,000 (or 0.2%) of all workers affected by the increase in the salary level earn less than the minimum wage.

The 248,900 workers affected by the change in the HCE compensation level average 3.1 hours of overtime per week and earn an average of $2,355 per week ($122,460 per year). About 72 percent of these workers do not usually work overtime, while the 28 percent who usually work overtime average 11.1 hours of overtime per week. Among the 3.8% who occasionally work overtime, they averaged 12.7 hours in the weeks that they worked overtime.

Although most affected workers who typically do not work overtime would be unlikely to experience significant changes in their daily work routine, those who regularly work overtime may experience significant changes. Moreover, affected EAP workers who routinely work overtime and earn less than the minimum wage would be most likely to experience significant changes.[347]

Employers might respond by paying overtime premiums; reducing or eliminating overtime hours; reducing employees' regular wage rates to keep overall compensation consistent (provided that the reduced rates still exceed the minimum wage); increasing employees' salaries to the updated earnings threshold to preserve their exempt status); [348] or using some combination of these responses.

[344] Regular overtime workers were identified in the CPS MORG with variable PEHRUSL1. Occasional overtime workers were identified with variables PEHRUSL1 and PEHRACT1.

[345] CPS defines ''usual hours'' as hours worked 50 percent or more of the time.

[346] This group represents the number of workers with occasional overtime hours in the week the CPS MORG survey was conducted. Because the survey week is a representative week, the Department believes the prevalence of occasional overtime in the survey week and the characteristics of these workers are representative of other weeks (even though a different group of workers would be identified as occasional overtime workers in a different week).

[347] A small proportion (0.2 percent) of affected EAP workers earn implicit hourly wages that are less than the applicable minimum wage (the higher of the state or Federal minimum wage). The implicit hourly wage is calculated as total weekly earnings divided by total weekly hours worked. For example, workers earning the $684 per week standard salary level would earn less than the Federal minimum wage if they work 95 or more hours in a week ($684 ÷ 95 hours = $7.20 per hour).

[348] Increasing employees' salaries to the updated salary level would be less common for affected workers earning below the minimum wage and more generally would be inversely correlated with baseline salary and compensation.

TABLE 8—NUMBER OF AFFECTED EAP WORKERS, MEAN OVERTIME HOURS, AND MEAN WEEKLY EARNINGS, YEAR 1

Type of affected EAP worker	Affected EAP workers [a]		Mean overtime hours	Mean usual weekly earnings
	Number (1,000s)	% of total		
Standard Salary Level				
All affected EAP workers	3,399	100	1.6	$914
Earn less than the minimum wage [b]	8	0.2	33.2	809
Regularly work overtime	494	14.5	11.0	917
Occasionally work overtime [c]	121	3.6	8.7	914
HCE Compensation Level				
All affected EAP workers	249	100	3.1	2,355
Earn less than the minimum wage [b]	.....	.....	.....	.....
Regularly work overtime	70	28.3	11.1	2,332
Occasionally work overtime [c]	9	3.8	12.7	2,347

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).
[b] The applicable minimum wage is the higher of the Federal minimum wage and the state minimum wage. These workers all regularly work overtime and are also included in that row. HCE workers will not be affected by the minimum wage provision.
[c] Workers who do not usually work overtime but did in the CPS reference week. Mean overtime hours are actual overtime hours in the reference week. Other workers may occasionally work overtime in other weeks.

This section characterizes the population of affected workers by industry, occupation, employer type, location of residence, and demographics. The Department chose to provide as much detail as possible while maintaining adequate sample sizes.

Table 9 presents the distribution of affected EAP workers by industry and occupation, using Census industry and occupation codes. The industry with the most affected EAP workers is professional and business services (687,000), while the industry with the highest percentage of EAP workers affected is agriculture, forestry, fishing, and hunting (about 22 percent). The occupational category with the most affected EAP workers is management, business, and financial (1.6 million), while the occupation category with the highest percentage of EAP workers affected is services (about 31 percent).

Potentially affected workers in private-sector nonprofits are more likely to be affected than workers in private-sector for-profit firms (16.8 percent compared with 12.0 percent). However, as discussed in section VII.B.3, the estimates of workers subject to the FLSA include workers employed by enterprises that are not subject to the FLSA under the law's enterprise coverage requirements because there is no data set that would adequately inform an estimate of the size of this worker population in order to exclude them from these estimates. Although failing to exclude workers who work for non-covered enterprises would only affect a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for workers in nonprofits because when determining FLSA enterprise coverage only revenue derived from business operations, not charitable activities, is included.

TABLE 9—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND PROPOSED SALARY LEVELS, BY INDUSTRY AND OCCUPATION, YEAR 1

Industry/occupation/nonprofit	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (%)
Total	139.40	28.36	24.71	3.65	12.9
By Industry [d]					
Agriculture, forestry, fishing, & hunting	1.33	0.06	0.04	0.01	22.1
Mining	0.62	0.17	0.16	0.01	7.3
Construction	8.91	1.19	1.03	0.15	13.0
Manufacturing	15.13	3.90	3.58	0.32	8.1
Wholesale trade	3.23	0.85	0.75	0.10	12.2
Retail trade	15.38	1.85	1.54	0.31	16.7
Transportation & utilities	8.51	1.03	0.91	0.12	11.5
Information	2.56	0.96	0.84	0.12	12.3
Financial activities	9.85	4.25	3.77	0.48	11.3
Professional & business services	16.78	6.75	6.07	0.69	10.2
Education	14.02	1.12	0.92	0.202	18.0
Healthcare & social services	20.53	3.60	2.97	0.627	17.4
Leisure & hospitality	11.60	0.87	0.69	0.18	21.1
Other services	5.31	0.74	0.60	0.14	18.9

TABLE 9—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND PROPOSED SALARY LEVELS, BY INDUSTRY AND OCCUPATION, YEAR 1—Continued

Industry/occupation/nonprofit	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (%)
Public administration	5.63	1.01	0.83	0.18	18.0
By Occupation [d]					
Management, business, & financial	23.57	14.56	12.91	1.65	11.3
Professional & related	34.77	10.18	8.92	1.26	12.4
Services	21.84	0.13	0.09	0.04	31.0
Sales and related	12.63	2.36	1.95	0.41	17.5
Office & administrative support	15.81	0.93	0.67	0.26	28.1
Farming, fishing, & forestry	0.93	0.00	0.00	0.00	0.00
Construction & extraction	6.72	0.03	0.02	0.01	19.6
Installation, maintenance, & repair	4.53	0.04	0.04	0.00	6.4
Production	7.98	0.09	0.08	0.01	12.3
Transportation & material moving	10.60	0.04	0.04	0.01	13.5
By Nonprofit and Government Status					
Nonprofit, private	9.80	2.27	1.89	0.38	16.8
For profit, private	110.90	23.90	21.03	2.87	12.0
Government (state, local, and Federal)	18.70	2.20	1.80	0.40	18.1

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] Exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers earning below the new salary level do not have their weekly earnings increased to the new level).
[c] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).
[d] Census industry and occupation categories.

Table 10 presents the distribution of affected EAP workers based on Census Regions and Divisions, and metropolitan statistical area (MSA) status. The region with the most affected workers will be the South (1.5 million), but the South's percentage of potentially affected workers who are estimated to be affected is relatively small (15.2 percent). Although 90 percent of affected EAP workers will reside in MSAs (3.28 of 3.65 million), so do a corresponding 88 percent of all workers subject to the FLSA.[349]

Employers in low-wage industries, regions, and in non-metropolitan areas may be more affected because they typically pay lower wages and salaries. The Department believes the salary level included in this proposed rule is appropriate for these lower-wage sectors, in part because the proposed methodology uses earnings data from the lowest-wage census region. Moreover, the duties test would continue to determine exemption status for the vast majority of workers in low-wage regions and industries under the proposed rule. For example, as displayed in Table 10, 84.8 percent of potentially affected EAP workers in the South Census Region earn more than the proposed salary level and thus would not be affected by the proposed rule (8.39 ÷ 9.89). Effects by region and industry are considered in section VII.C.7.

TABLE 10—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND PROPOSED SALARY LEVELS, BY REGION, DIVISION, AND MSA STATUS,YEAR 1

Region/division/metropolitan status	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (%)
Total	139.40	28.36	24.71	3.65	12.9
By Region/Division					
Northeast	*24.75*	*5.74*	*5.10*	*0.64*	*11.1*
New England	6.83	1.71	1.54	0.17	9.9
Middle Atlantic	17.92	4.03	3.56	0.47	11.6
Midwest	*30.39*	*5.87*	*5.07*	*0.80*	*13.7*
East North Central	20.47	4.01	3.48	0.53	13.3
West North Central	9.92	1.86	1.59	0.27	14.6
South	*51.42*	*9.89*	*8.39*	*1.50*	*15.2*

[349] Identified with CPS MORG variable GTMETSTA.

TABLE 10—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND PROPOSED SALARY LEVELS, BY REGION, DIVISION, AND MSA STATUS,YEAR 1—Continued

Region/division/metropolitan status	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (%)
South Atlantic	26.76	5.50	4.68	0.81	14.8
East South Central	7.69	1.22	1.00	0.22	18.3
West South Central	16.97	3.18	2.71	0.47	14.7
West	*32.83*	*6.86*	*6.15*	*0.70*	*10.3*
Mountain	10.73	2.07	1.79	0.28	13.7
Pacific	22.10	4.78	4.36	0.42	8.8
By Metropolitan Status					
Metropolitan	122.92	26.61	23.33	3.28	12.3
Non-metropolitan	15.47	1.62	1.28	0.34	20.8
Not identified	1.01	0.13	0.10	0.03	22.1

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] Exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers earning below the new salary level do not have their weekly earnings increased to the new level).
[c] Estimated number of workers exempt under the EAP exemptions who will be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

Table 11 presents the distribution of affected EAP workers by demographics. Potentially affected women, Black workers, Hispanic workers, young workers, and workers with less education are all more likely to be affected than other worker types. This is because EAP exempt workers with these characteristics are more likely to earn within the affected standard salary range than EAP exempt workers without these characteristics. For example, of potentially affected workers, women tend to have lower salaries and are therefore more likely to be in the affected range. Median weekly earnings for potentially affected women are $1,649 compared to $2,074 for men.

Among potentially affected workers, certain demographic groups—women, Black workers, Hispanic workers, young workers, and workers with less education—have an increased likelihood of being affected by this rulemaking, even though workers in these demographic groups are less likely to be EAP exempt in the first place. Therefore, as a share of all workers, not just potentially affected workers, workers in these demographic groups may not be more likely to be affected. For example, when looking at potentially affected workers, 19.7 percent of potentially affected Black workers are affected, while only 12.7 percent of potentially affected white workers are affected. However, when looking at total workers, about the same shares of total Black and total white workers would be affected (2.5 percent of Black workers and 2.6 percent of white workers).

TABLE 11—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND PROPOSED SALARY LEVELS, BY DEMOGRAPHICS, YEAR 1

Demographic	Workers subject to FLSA (millions)	Potentially Affected EAP Workers (millions) [a]	Not-Affected (millions) [b]	Affected (millions) [c]	Affected as share of all workers (%)	Affected as share of potentially affected (%)
Total	139.40	28.36	24.71	3.65	2.6	12.9
By Sex						
Male	72.15	16.62	15.04	1.57	2.2	9.5
Female	67.25	11.74	9.67	2.08	3.1	17.7
By Race						
White only	107.29	22.05	19.25	2.80	2.6	12.7
Black only	17.66	2.26	1.82	0.44	2.5	19.7
All others	14.45	4.05	3.65	0.40	2.8	9.9
By Ethnicity						
Hispanic	25.66	2.57	2.15	0.42	1.6	16.3
Not Hispanic	113.74	25.79	22.56	3.23	2.8	12.5
By Age						
16–25	21.21	1.28	0.92	0.36	1.7	28.3
26–35	33.47	7.17	6.06	1.11	3.3	15.5

TABLE 11—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND PROPOSED SALARY LEVELS, BY DEMOGRAPHICS, YEAR 1—Continued

Demographic	Workers subject to FLSA (millions)	Potentially Affected EAP Workers (millions) [a]	Not-Affected (millions) [b]	Affected (millions) [c]	Affected as share of all workers (%)	Affected as share of potentially affected (%)
36–45	29.84	7.49	6.68	0.81	2.7	10.9
46–55	27.37	6.73	6.02	0.72	2.6	10.6
56+	27.50	5.69	5.04	0.65	2.4	11.4
By Education						
No degree	10.35	0.13	0.09	0.05	0.4	35.1
High school diploma	58.01	4.56	3.58	0.98	1.7	21.4
Associate's degree	14.70	1.91	1.54	0.37	2.5	19.6
Bachelor's degree	35.80	13.61	12.02	1.59	4.4	11.7
Master's degree	15.52	6.80	6.24	0.56	3.6	8.3
Professional degree	2.03	0.38	0.35	0.04	1.8	9.3
PhD	2.98	0.98	0.91	0.07	2.3	7.2

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] Exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Workers who continue to be exempt after the increases in the salary level (assuming affected workers' weekly earnings do not increase to the new salary level).
[c] Estimated number of workers exempt under the EAP exemptions who would be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary level).

3. Costs

i. Summary

The Department quantified three direct costs to employers in this analysis: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. These are the same costs quantified in the 2016 and 2019 rulemakings. The Department estimated that in Year 1, regulatory familiarization costs would be $427.2 million, adjustment costs would be $240.8 million, and managerial costs would be $534.9 million (Table 12). Total direct employer costs in Year 1 would be $1.2 billion. Recurring costs are projected in section VII.C.10. The Department discusses costs that are not quantified in section VII.C.3.v. The Department welcomes comments on its cost estimates.

TABLE 12—SUMMARY OF YEAR 1 DIRECT EMPLOYER COSTS

[millions]

Direct employer costs	Standard salary level	HCE compensation level	Total
Regulatory familiarization [a]	.....	.....	$427.2
Adjustment	$224.4	$16.4	240.8
Managerial	485.5	49.4	534.9
Total direct costs	709.8	65.9	1,202.8

[a] Regulatory familiarization costs are assessed jointly for the proposed change in the standard salary level and the HCE compensation level.

ii. Regulatory Familiarization Costs

This rulemaking would impose direct costs on firms by requiring them to review the regulation. To estimate these ''regulatory familiarization costs,'' three pieces of information must be estimated: (1) the number of affected establishments; (2) a wage level for the employees reviewing the rule; and (3) the amount of time spent reviewing the rule. The Department generally used the same methodology for calculating regulatory familiarization costs that it used in recent rulemakings.

Regulatory familiarization costs can be calculated at an establishment level or at a firm level. The Department assumed that regulatory familiarization occurs at a decentralized level and used the number of establishments in its cost estimate; this results in a higher estimate than would result from using the number of firms. The most recent data on private sector establishments and firms at the time this proposed rule was drafted are from the 2020 Statistics of U.S. Businesses (SUSB), which reports 8.00 million establishments with paid employees.[350] Additionally, there were an estimated 90,126 state and local governments in 2017, the most recent data available.[351] The Department thus estimated 8.09 million entities (the term entity is used to refer to the combination of establishments and governments).

The Department assumes that all entities would incur some regulatory familiarization costs, even if they do not employ exempt workers, because all entities would need to confirm whether this rulemaking affects their employees. Entities with more affected EAP workers would likely spend more time reviewing the regulation than entities with fewer or no affected EAP workers (since a more careful reading of the regulation will probably follow the initial decision that the entity is affected). However, the Department did not know the distribution of affected EAP workers across entities, so it used an average cost per entity.

The Department believes an average of one hour per entity is appropriate because the regulated community is

[350] Statistics of U.S. Businesses 2020, *https://www.census.gov/programs-surveys/susb.html.*

[351] 2017 Census of Governments. Table 1, *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

likely to be familiar with the content of this rulemaking. EAP exemptions have existed in one form or another since 1938, and a final rule was published as recently as 2019. Furthermore, employers who use the exemptions must apply them every time they hire an employee whom they seek to classify as exempt. Thus, employers should be familiar with the exemptions. The most significant changes in this proposed rulemaking are setting a new standard salary level and a new HCE compensation level for exempt workers and establishing a mechanism for keeping these thresholds up to date. The changed regulatory text is only a few pages, and the Department will provide summaries and other compliance assistance materials that will help inform employers that are implementing the final rule. The Department thus believes, consistent with its approach in the 2016 and 2019 rules, that one hour is an appropriate average estimate for the time each entity would spend reviewing the changes made by this rulemaking. Additionally, the estimated 1 hour for regulatory familiarization represents an assumption about the average for all entities in the U.S., even those without any affected or exempt workers, which are unlikely to spend much time reviewing the rulemaking. Some businesses, of course, would spend more than 1 hour, and some would spend less.

The Department's analysis assumes that compensation, benefits, and job analysis specialists (SOC 13–1141) with a median wage of $32.59 per hour would review the rulemaking.[352] [353] The Department also assumed that benefits are paid at a rate of 45 percent of the base wage [354] and overhead costs are paid at a rate of 17 percent of the base wage,[355] resulting in an hourly rate of $52.80. The Department thus estimates regulatory familiarization costs in Year 1 would be $427.2 million ($52.80 per hour × 1 hour × 8.09 million entities).

The Department also conducted a sensitivity analysis. First, as previously noted, the Department used the number of establishments rather than the number of firms, which results in a higher estimate of the regulatory familiarization cost. Using the number of firms, 6.2 million, would result in a reduced regulatory familiarization cost estimate of $329.0 million in Year 1.

iii. Adjustment Costs

This rulemaking would also impose direct costs on establishments by requiring them to evaluate the exemption status of employees, update and adapt overtime policies, notify employees of policy changes, and adjust their payroll systems. The Department believes the size of these ''adjustment costs'' would depend on the number of affected EAP workers and would occur in any year when exemption status is changed for any workers. To estimate adjustment costs, three pieces of information must be estimated: (1) a wage level for the employees making the adjustments; (2) the amount of time spent making the adjustments; and (3) the estimated number of newly affected EAP workers. The Department again estimated that the average wage with benefits and overhead costs for a mid-level human resource worker is $52.80 per hour (as explained above).

The Department estimated that it would take establishments an average of 75 minutes per affected worker to make the necessary adjustments. This is the same time estimate as used in the 2016 and 2019 rulemakings. Little applicable data were identified from which to estimate the amount of time required to make these adjustments. The estimated number of affected EAP workers in Year 1 is 3.6 million (as discussed in section VII.B.7). Therefore, total estimated Year 1 adjustment costs would be $240.8 million ($52.80 × 1.25 hours × 3.6 million workers).

The Department notes that the 75-minute-per-worker average time estimate is an assumption about the average across all workers. This estimate assumes that the time is focused on analyzing more complicated situations. For example, employers are likely to incur relatively low adjustment costs for some workers, such as those who work no overtime (described below as Type 1 workers). This leaves more time for employers to spend on adjustment costs for workers who work overtime either occasionally or regularly. To demonstrate, if the aggregate time spent on adjustments (75 min × 3.6 million workers) was spread out over only workers who regularly work overtime, then the time estimate is 4.4 hours per worker.

The Department used a time estimate per affected worker, rather than per establishment, because the distribution of affected workers across establishments is unknown. However, it may be helpful to present the total time estimate per establishment based on a range of affected workers. If an establishment has five affected workers, the time estimate for adjustment costs is 6.25 hours. If an establishment has 25 affected workers, the time estimate for adjustment costs is 31.25 hours. And if an establishment has 50 affected workers, the time estimate for adjustment costs is 62.5 hours.

A reduction in the cost to employers of determining employees' exemption status may partially offset adjustment costs. Currently, to determine whether an employee is exempt, employers must apply the duties test to salaried workers who earn $684 or more per week. However, when the rule takes effect, firms would no longer be required to apply the duties test to employees earning less than the new standard salary level. While this would be a clear cost savings to employers for these employees, the Department did not estimate the potential size of this cost savings.

iv. Managerial Costs

If an employee becomes nonexempt due to the changes in the salary levels, then firms may incur ongoing managerial costs because the employer may spend more time developing work schedules and closely monitoring an employee's hours to minimize or avoid paying that employee overtime. For example, the manager of a newly nonexempt worker may have to assess whether the marginal benefit of scheduling the worker for more than 40 hours exceeds the marginal cost of paying the overtime premium. Additionally, the manager may have to spend more time monitoring the employee's work and productivity since the marginal cost of employing the worker per hour has increased. Unlike regulatory familiarization and adjustment costs, which occur primarily in Year 1, managerial costs are incurred more uniformly every year.

The Department applied managerial costs to workers who (1) become nonexempt, overtime-protected and (2) either regularly work overtime or occasionally work overtime, but on a predictable basis—an estimated 738,000 workers (*see* Table 16 and accompanying explanation). Consistent with its approach in its 2019 rule, the Department assumed that management

[352] OEWS 2022. Available at: *https://www.bls.gov/oes/current/oes131141.htm.*

[353] Previous related rulemakings used the CPS to estimate wage rates. The Department is using OEWS data now to conform with standard practice for the Department's economic analyses.

[354] The benefits-earnings ratio is derived from BLS's Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D. This fringe benefit rate includes some fixed costs such as health insurance.

[355] The Department believes that the overhead costs associated with this rulemaking are small because existing systems maintained by employers to track currently hourly employees can be used for newly overtime-eligible workers. However, acknowledging that there might be additional overhead costs, the Department has included an overhead rate of 17 percent.

would spend an additional ten minutes per week scheduling and monitoring each affected worker expected to become nonexempt, overtime-eligible as a result of this rule, and whose hours would be adjusted.

There was little precedent or data to aid in evaluating managerial costs. Prior to the 2016 rulemaking, earlier part 541 rulemakings did not estimate managerial costs. The Department likewise found no estimates of managerial costs after reviewing the literature. Thus, the Department used the same methodology as the 2019 rule.

The Department believes these additional managerial costs would not be prohibitive. Currently, EAP exempt employees account for about 22 percent of the U.S. labor force; as such, the Department expects that most employers of EAP exempt workers also employ nonexempt workers. Those employers already have in place recordkeeping systems and standard operating procedures for ensuring employees only work overtime under employer-prescribed circumstances. Thus, such systems generally do not need to be invented for managing formerly exempt EAP employees. The Department also notes that under the FLSA recordkeeping regulations in part 516, employers determine how to make and keep an accurate record of hours worked by employees. For example, employers may tell their workers to write their own time records and any timekeeping plan is acceptable if it is complete and accurate. Additionally, if the nonexempt employee works a fixed schedule, *e.g.,* 9:00 a.m.–5:30 p.m. Monday–Friday, the employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate exceptions to that schedule.[356]

As discussed in detail below, most affected workers do not currently work overtime, and there is no reason to expect their hours worked to change when their status changes from exempt to nonexempt. For that group of workers, management would have little or no need to increase their monitoring of hours worked; therefore, these workers are not included in the managerial cost calculation. Under these assumptions, the additional managerial hours worked per week would be 123,000 hours ((10 minutes ÷ 60 minutes) × 738,000 workers).

The median hourly wage in 2022 for a manager was $51.62.[357] Together with a 45 percent benefits rate and a 17 percent overhead cost, this totals $83.63 per hour.[358] Thus, the estimated Year 1 managerial costs total $534.9 million (123,000 hours per week × 52 weeks × $83.63/hour). Although the exact magnitude would vary each year with the number of affected EAP workers, the Department anticipates that employers would incur managerial costs annually.

v. Other Potential Costs

In addition to the costs discussed above, the Department notes that the 2016 and 2019 final rules discussed other potential costs that could not be quantified. These potential costs are discussed qualitatively below. The Department welcomes comments on the potential costs associated with this proposed rule and any data that could help to quantify them.

(a) Reduced Scheduling Flexibility

To the extent that some employers spend more time monitoring nonexempt workers' hours, the proposed rule could impose costs on newly nonexempt, overtime eligible workers who could have a more limited ability to adjust their schedules. However, the proposed rule does not require employers to reduce scheduling flexibility. Employers can continue to offer flexible schedules and require workers to monitor their own hours and to follow the employers' timekeeping rules. Additionally, some exempt workers already monitor their hours for billing purposes. A study by Lonnie Golden found, using data from the General Social Survey (GSS), that ''[i]n general, salaried workers at the lower (less than $50,000) income levels don't have noticeably greater levels of work flexibility that they would 'lose' if they become more like their hourly counterparts.'' [359] Because there is little data or literature on these potential costs, the Department did not quantify potential costs regarding scheduling flexibility.

(b) Preference for Salaried Status

Some of the workers who would become nonexempt as a result of the proposed rule could have their pay changed from salaried to hourly status despite preferring to remain salaried. Research has shown that salaried workers are more likely than hourly workers to receive benefits such as paid vacation time and health insurance [360] and are more satisfied with their benefits.[361] Additionally, when employer demand for labor decreases, hourly workers tend to see their hours cut before salaried workers, making earnings for hourly workers less predictable.[362] However, this literature generally does not control for differences between salaried and hourly workers such as education, job title, or earnings; therefore, this correlation is not necessarily attributable to hourly status.

If workers become nonexempt and the employer chooses to pay them on an hourly rather than salary basis, this may result in the employer reducing the workers' benefits. But the Department notes that this rulemaking would not require employers to reduce workers' benefits. These newly nonexempt workers may continue to be paid a salary, as long as that salary is equivalent to a base wage at least equal to the minimum wage rate for every hour worked, and the employee receives a 50 percent premium on that employee's regular rate for any overtime hours each week.[363] Similarly, employers may continue to provide these workers with the same level of benefits as before, whether paid on an hourly or salary basis. Lastly, the nature of the market mechanism may be such that employers cannot reduce benefits without risking workers leaving, resulting in turnover costs to employers. The Department did not quantify potential costs regarding reduction in workers' benefits.

(c) Increased Prices

As discussed in the transfers section below, businesses may be able to help mitigate increased labor costs following this rulemaking by rebalancing the hours that their employees are working. Businesses that are unable to rebalance these hours and do incur increased

[356] *See* Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act, available at: *https://www.dol.gov/whd/regs/compliance/whdfs21.pdf.*

[357] OEWS 2022. Available at: *https://www.bls.gov/oes/current/oes110000.htm.* This may be an overestimate of the wage rate for managers who monitor workers' hours because (1) it includes very highly paid employees such as CEOs, and (2) some lower-level supervisors are not counted as managers in the data.

[358] The benefits ratio is derived from BLS' 2022 Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

[359] Golden, L. (2014). Flexibility and Overtime Among Hourly and Salaried Workers. Economic Policy Institute. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597174.*

[360] Lambert, S. J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A. C. Crouter, *Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities.* Washington, DC: Urban Institute Press.

[361] Balkin, D. B., & Griffeth, R. W. (1993). The Determinants of Employee Benefits Satisfaction. *Journal of Business and Psychology,* 7(3), 323–339.

[362] Lambert, S. J., & Henly, J. R. (2009). *Scheduling in Hourly Jobs: Promising Practices for the Twenty-First Century Economy.* The Mobility Agenda. Lambert, S. J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A. C. Crouter, *Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities.* Washington, DC: Urban Institute Press.

[363] 29 CFR 778.113–.114.

labor costs might pass along these increased labor costs to consumers through higher prices. The Department anticipates that some firms could offset part of the additional labor costs through charging higher prices for the firms' goods and services. However, because costs and transfers would be, on average, small relative to payroll and revenues, the Department does not expect the proposed rule to have a significant effect on prices. The Department estimated that, on average, costs and transfers make up less than 0.03 percent of payroll and 0.005 percent of revenues, although for specific industries and firms this percentage may be larger (*see* Table 27). Therefore, any potential change in prices related to costs and transfers from this rulemaking would be modest. Further, any significant price increases would not represent a separate category of effects from those estimated in this economic analysis. Rather, such price increases (where they occur) would be the channel through which consumers, rather than employers or employees, bear rule-induced costs (including transfers).

While economic theory suggests that an increase in labor costs in excess of productivity gains would lead to increases in prices, much of the empirical literature has found that wage inflation does not predict price inflation.[364] For example, Peneva et al. (2015) explore the relationship between labor costs and price inflation between 1965 and 2012, finding that the influence of labor costs on prices has decreased over the past several decades and have made a relatively small contribution to price inflation in recent years.[365]

(d) Reduced Profits

The increase in workers' earnings resulting from the proposed salary levels would be a transfer of income from firms to workers, not a cost. However, there are potential secondary effects (both costs and benefits) of the transfer due to the potential difference in the marginal utility of income and the marginal propensity to consume or save between workers and businesses. Thus, the Department acknowledges that the increased employer costs and transfer payments as a result of this proposed rule may reduce the profits of business firms, although (1) some firms may offset some of these costs and transfers by making payroll adjustments, and (2) some firms may mitigate their reduced profits due to these costs and transfers through increased prices. Because costs and transfers are, on average, small relative to payroll revenues, the Department does not expect this rulemaking to have a significant effect on profits.

(e) Hiring Costs

To the extent that firms respond to this proposed rule by reducing overtime hours, they may do so by spreading hours to other workers, including current workers employed for fewer than 40 hours per week by that employer, current workers who remain nonexempt, and newly hired workers. If new workers are hired to absorb these transferred hours, then the associated hiring costs would be a cost of this proposed rule. However, new employees would likely only be hired if their wages, onboarding costs, and training costs are less than the cost of overtime pay for the newly affected workers. The Department does not know how many new employees would be hired and thus did not estimate this cost.

(f) Hours-Related Worker Effects

Following the implementation of this rulemaking, some workers may see an increase in hours worked. For some affected workers, if their employers respond to the rule by increasing their salary to keep their exemption status, the change may also be accompanied by an increase in assigned hours. Additionally, some employers might respond to this regulation by reducing the overtime hours of affected workers and transferring these hours to other workers who remain exempt. This increase in hours could result in reduced personal time for these workers.

4. Transfers

i. Overview

Transfer payments occur when income is redistributed from one party to another. The Department has quantified two transfers from employers to employees that would result from the proposed rule: (1) transfers to ensure compliance with the FLSA minimum wage provision; and (2) transfers to ensure compliance with the FLSA overtime pay provision. Transfers in Year 1 due to the minimum wage provision were estimated to be $48.6 million. The increase in the HCE compensation level does not affect minimum wage transfers because workers eligible for the HCE exemption earn well above the minimum wage. The Department estimates that transfers due to the applicability of the FLSA's overtime pay provision would be $1.2 billion: $932.1 million from the increased standard salary level and $253.5 million from the increased HCE compensation level. Total Year 1 transfers are estimated at $1.2 billion (Table 13).

TABLE 13—TOTAL ANNUAL CHANGE IN EARNINGS FOR AFFECTED EAP WORKERS BY PROVISION, YEAR 1

[Millions]

Provision	Total	Standard salary level	HCE compensation level
Total	$1,234.2	$980.7	$253.5
Minimum wage only	48.6	48.6	.....
Overtime pay only[a]	1,185.6	932.1	253.5

[364] Church, J.D. and Akin, B. (2017). ''Examining price transmission across labor compensation costs, consumer prices, and finished-goods prices,'' *Monthly Labor Review,* U.S. Bureau of Labor Statistics; Emery, K. & Chang, C. (1996). Do Wages Help Predict Inflation?, Federal Reserve Bank of Dallas, Economic Review First Quarter 1996. *https://www.dallasfed.org/~/media/documents/research/er/1996/er9601a.pdf*; Jonsson, M. & Palmqvist, S. (2004). Do Higher Wages Cause Inflation? Sveriges Riksbank Working Paper Series 159. *http://archive.riksbank.se/Upload/WorkingPapers/WP_159.pdf.*

[365] Pevena, E. V. and Rudd, J. B. (2015). ''The Passthrough of Labor Costs to Price Inflation,'' Finance and Economics Discussion Series 2015–042. Washington: Board of Governors of the Federal Reserve System. *http://dx.doi.org/10.17016/FEDS.2015.042.*

Because the overtime premium depends on the employee's regular rate of pay, the estimates of minimum wage transfers and overtime transfers are linked. This can be considered a two-step approach. The Department first identified affected EAP workers with an implicit regular hourly wage lower than the minimum wage, and then calculated the wage increase necessary to reach the minimum wage. Then, the Department estimated overtime payments.

ii. Transfers Due to the Minimum Wage Provision

For this analysis, the hourly rate of pay was calculated as usual weekly earnings divided by usual weekly hours worked. To earn less than the Federal or most state minimum wages, this set of workers must work many hours per week. For example, a worker paid $684 per week must work 94.3 hours per week to earn less than the Federal minimum wage of $7.25 per hour ($684 ÷ $7.25 = 94.3).[366] The applicable minimum wage is the higher of the Federal minimum wage and the state minimum wage as of January 1, 2022. Most affected EAP workers already receive at least the minimum wage; only an estimated 0.2 percent (8,200 in total) earn an implicit hourly rate of pay less than the Federal minimum wage. The Department estimated transfers due to payment of the minimum wage by calculating the change in earnings if wages rose to the minimum wage for workers who become nonexempt.[367]

In response to an increase in the regular rate of pay to the minimum wage, employers may reduce the workers' hours. In theory, since the quantity of labor hours demanded is inversely related to wages, a higher mandated wage would, all things being equal, result in fewer hours of labor demanded. However, the weight of the empirical evidence finds that increases in the minimum wage that are similar in magnitude to what would be caused by this regulatory provision have caused little or no significant job loss.[368] Thus, in the case of this proposed regulation, the Department believes that any disemployment effect due to the minimum wage provision would be negligible. This is partially due to the small number of workers affected by this provision. According to the Wolfson and Belman (2016) meta-analysis cited above, the consensus range for labor demand elasticity was –0.05 to –0.12. However for Year 1 of this analysis, the Department estimated the potential disemployment effects (*i.e.,* the estimated reduction in hours) of the transfer attributed to the minimum wage by multiplying the percent change in the regular rate of pay by a labor demand elasticity of −0.2 (years 2–10 use a long run elasticity of −0.4).[369] [370] The Department chose this labor demand elasticity because it was used in the 2019 final rule and is consistent with the labor demand elasticity estimates used when estimating other transfers further below.

At the new standard salary level, the Department estimated that 8,200 affected EAP workers would, on average, see an hourly wage increase of $1.99, work 3.2 fewer hours per week and receive an increase in weekly earnings of $113.88 as a result of coverage by the minimum wage provisions (Table 14). The total change in weekly earnings due to the payment of the minimum wage was estimated to be $0.9 million per week ($113.88 × 8,200) or $48.6 million in Year 1.

TABLE 14—MINIMUM WAGE ONLY: MEAN HOURLY WAGES, USUAL WEEKLY HOURS AND WEEKLY EARNINGS FOR AFFECTED EAP WORKERS, YEAR 1

Time period	Hourly wage [a]	Usual weekly hours	Usual weekly earnings	Total weekly transfer (1,000s)
Before rule	$11.35	73.2	$808.60	.....
After rule	13.34	69.9	922.48	.....
Change	1.99	−3.2	113.88	$934

Note: Pooled data for 2020–2022 adjusted to reflect 2022.
[a] The applicable minimum wage is the higher of the Federal minimum wage and the state minimum wage.

iii. Transfers Due to the Overtime Pay Provision

(a) Introduction

The FLSA requires covered employers to pay an overtime premium to nonexempt covered workers who work in excess of 40 hours per week. For workers who become nonexempt, the rulemaking would result in a transfer of income to the affected workers, increasing the marginal cost of labor, which employers would likely try to offset by adjusting the wages and/or hours of affected workers. The size of the transfer would depend largely on how employers choose to respond to the updated salary levels. Employers may respond by: (1) paying overtime premiums to affected workers; (2) reducing overtime hours of affected workers and potentially transferring some of these hours to other workers; (3) reducing the regular rate of pay for affected workers working overtime (provided that the reduced rates still exceed the minimum wage); (4) increasing affected workers' salaries to the updated salary or compensation level to preserve their exempt status; or (5) using some combination of these responses. How employers would respond depends on many factors, including the relative costs of each of these alternatives. In turn, the relative costs of each of these alternatives are a function of workers' earnings and hours worked.

[366] The Federal minimum wage has not increased since 2009. Workers in states with minimum wages higher than the Federal minimum wage could earn less than the state minimum wage working fewer hours.

[367] Because these workers' hourly wages will be set at the minimum wage after this proposed rule, their employers will not be able to adjust their wages downward to offset part of the cost of paying the overtime pay premium (which will be discussed in the following section). Therefore, these workers will generally receive larger transfers attributed to the overtime pay provision than other workers.

[368] Wolfson, Paul J. and Belman, Dale, 15 Years of Research on U.S. Employment and the Minimum Wage (December 10, 2016). Tuck School of Business Working Paper No. 2705499. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705499.* Dube, Arindrajit, Impacts of Minimum Wages: Review of the International Evidence (November 2019). *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844350/impacts_of_minimum_wages_review_of_the_international_evidence_Arindrajit_Dube_web.pdf.*

[369] Labor demand elasticity is the percentage change in labor hours demanded in response to a one percent change in wages.

[370] This elasticity estimate represents a short run demand elasticity for general labor, and is based on the Department's analysis of Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

(b) Literature on Employer Adjustments

Two conceptual models are useful for thinking about how employers may respond to when certain employees become eligible for overtime: (1) the ''fixed-wage'' or ''labor demand'' model, and (2) the ''fixed-job'' or ''employment contract'' model.[371] These models make different assumptions about the demand for overtime hours and the structure of the employment agreement, which result in different implications for predicting employer responses.

The fixed-wage model assumes that the standard hourly wage is independent of the statutory overtime premium. Under the fixed-wage model, a transition of workers from overtime exempt to overtime nonexempt would cause a reduction in overtime hours for affected workers, an increase in the prevalence of a 40-hour workweek among affected workers, and an increase in the earnings of affected workers who continue to work overtime.

In contrast, the fixed-job model assumes that the standard hourly wage is affected by the statutory overtime premium. Thus, employers can neutralize any transition of workers from overtime exempt to overtime nonexempt by reducing the standard hourly wage of affected workers so that their weekly earnings and hours worked are unchanged, except when minimum wage laws prevent employers from lowering the standard hourly wage below the minimum wage. Under the fixed-job model, a transition of workers from overtime exempt to overtime nonexempt would have different effects on minimum-wage workers and above-minimum-wage workers. Similar to the fixed-wage model, minimum-wage workers would experience a reduction in overtime hours, an increase in the prevalence of a 40-hour workweek at a given employer (though not necessarily overall), and an increase in earnings for the portion of minimum-wage workers who continue to work overtime for a given employer. Unlike the fixed-wage model, however, above-minimum-wage workers would experience no change.

The Department conducted a literature review to evaluate studies of how labor markets adjust to a change in the requirement to pay overtime. These studies are generally supportive of the fixed-job model of labor market adjustment, in that wages adjust to offset the requirement to pay an overtime premium as predicted by the fixed-job model, but do not adjust enough to completely offset the overtime premium as predicted by the model.

As in the 2016 and 2019 rules, the Department believes the two most important papers in this literature are the studies by Trejo (1991) and Barkume (2010). Analyzing the economic effects of the overtime pay provisions of the FLSA, Trejo (1991) found ''the data analyzed here suggest the wage adjustments occur to mitigate the purely demand-driven effects predicted by the fixed-wage model, but these adjustments are not large enough to neutralize the overtime pay regulations completely.'' Trejo noted, ''In accordance with the fixed job model, the overtime law appears to have a greater impact on minimum-wage workers.'' He also stated, ''[T]he finding that overtime-pay coverage status systematically influences the hours-of-work distribution for nonminimum-wage workers is supportive of the fixed-wage model. No significant differences in weekly earnings were discovered between the covered and non-covered sectors, which is consistent with the fixed-job model.'' However, ''overtime pay compliance is higher for union than for nonunion workers, a result that is more easily reconciled with the fixed wage model.'' Trejo's findings are supportive of the fixed-wage model whose adjustment is incomplete largely due to the minimum-wage requirement.[372]

A second paper by Trejo (2003) took a different approach to testing the consistency of the fixed-wage adjustment models with overtime coverage and data on hours worked.[373] In this paper, he examined time-series data on employee hours by industry. After controlling for underlying trends in hours worked over 20 years, he found changes in overtime coverage had no impact on the prevalence of overtime hours worked. This result supports the fixed-job model. Unlike the 1991 paper, however, he did not examine impacts of overtime coverage on employees' weekly or hourly earnings, so this finding in support of the fixed-job model only analyzes one implication of the model.

Barkume (2010) built on the analytic method used in Trejo (1991).[374] However, Barkume observed that Trejo did not account for ''quasi-fixed'' employment costs (*e.g.,* benefits) that do not vary with hours worked, and therefore affect employers' decisions on overtime hours worked. After incorporating these quasi-fixed costs in the model, Barkume found results consistent with those of Trejo (1991): ''though wage rates in otherwise similar jobs declined with greater overtime hours, they were not enough to prevent the FLSA overtime provisions from increasing labor costs.'' Barkume also determined that the 1991 model did not account for evidence that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining. Barkume found that how much wages and hours worked adjusted in response to the overtime pay requirement depended on what overtime pay would be in absence of regulation.

In addition, Bell and Hart (2003) examined the standard hourly wage, average hourly earnings (including overtime), the overtime premium, and overtime hours worked in Britain.[375] Unlike the United States, Britain does not have national labor laws regulating overtime compensation. Bell and Hart found that after accounting for overtime, average hourly earnings are generally uniform in an industry because firms paying below-market level straight-time wages tend to pay above-market overtime premiums and firms paying above-market level straight-time wages tend to pay below-market overtime premiums. Bell and Hart concluded ''this is consistent with a model in which workers and firms enter into an implicit contract that specifies total hours at a constant, market-determined, hourly wage rate. Their research is also consistent with studies showing that employers may pay overtime premiums either in the absence of a regulatory mandate (*e.g.,* Britain), or when the mandate exists but the requirements are not met (*e.g.,* United States).[376]

On balance, consistent with its 2016 and 2019 rulemakings, the Department

[371] *See* Trejo, S.J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. *American Economic Review,* 81(4), 719–740, and Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[372] Trejo, S.J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. *American Economic Review,* 81(4), 719–740.

[373] Trejo, S.J. (2003). Does the Statutory Overtime Premium Discourage Long Workweeks? Industrial and Labor Relations Review, 56(3), 375–392.

[374] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[375] Bell, D.N.F. and Hart, R.A. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market, *Industrial and Labor Relations Review,* 56(3), 470–480.

[376] Hart, R.A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163.

finds strong support for the fixed-job model as the best approximation for the likely effects of a transition of above-minimum-wage workers from overtime exempt to overtime nonexempt and the fixed-wage model as the best approximation of the likely effects of a transition of minimum-wage workers from overtime exempt to overtime nonexempt. In addition, the studies suggest that although observed wage adjustment patterns are consistent with the fixed-job model, this evidence also suggests that the actual wage adjustment might, especially in the short run, be less than 100 percent as predicted by the fixed-job model. Thus, the hybrid model used in this analysis may be described as an incomplete fixed-job adjustment model.

To determine the magnitude of the adjustment, the Department accounted for the following findings. Earlier research had demonstrated that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining.[377] Barkume (2010) found that the measured adjustment of wages and hours to overtime premium requirements depended on what overtime premium might be paid in absence of any requirement to do so. Thus, when Barkume assumed that workers would receive an average voluntary overtime pay premium of 28 percent in the absence of an overtime pay regulation, which is the average overtime premium that Bell and Hart (2003) found British employers paid in the absence of any overtime regulations, the straight-time hourly wage adjusted downward by 80 percent of the amount that would occur with the fixed-job model.[378] When Barkume assumed workers would receive no voluntary overtime pay premium in the absence of an overtime pay regulation, the results were more consistent with Trejo's (1991) findings that the adjustment was a smaller percentage. The Department modeled an adjustment process between these two findings. Although it seemed reasonable that some premium was paid for overtime in the absence of regulation, Barkume's assumption of a 28 percent initial overtime premium is likely too high for the salaried workers potentially affected by a change in the salary and compensation level requirements for the EAP exemptions because this assumption is based on a study of workers in Britain. British workers were likely paid a larger voluntary overtime premium than American workers because Britain did not have a required overtime pay regulation and so collective bargaining played a larger role in implementing overtime pay.[379] In the sections that follow, the Department uses a method between these two papers to model transfers.

(c) Identifying Types of Affected Workers

The Department identified four types of workers whose work characteristics affect how it modeled employers' responses to the changes in both the standard salary level and HCE compensation level:

- *Type 1:* Workers who do not work overtime.
- *Type 2:* Workers who do not regularly work overtime but occasionally work overtime.
- *Type 3:* Workers who regularly work overtime and become overtime eligible (nonexempt).
- *Type 4:* Workers who regularly work overtime and remain exempt, because it is less expensive for the employer to pay the updated salary level than to pay overtime and incur additional managerial costs.

The Department began by identifying the number of workers in each type. After modeling employer adjustments, it estimated transfer payments. Type 3 and 4 workers were identified as those who regularly work overtime (CPS variable PEHRUSL1 greater than 40). To distinguish Type 3 workers from Type 4 workers, the Department first estimated each worker's weekly earnings if they became nonexempt, to which it added weekly managerial costs for each affected worker of $13.94 ($83.63 per hour × (10 minutes ÷ 60 minutes)).[380] Then, the Department identified as Type 4 those workers whose expected nonexempt earnings plus weekly managerial costs exceeds the updated standard salary level, and, conversely, as Type 3 those whose expected nonexempt earnings plus weekly managerial costs are less than the new standard salary. The Department assumed that firms would include incremental managerial costs in their determination of whether to treat an affected employee as a Type 3 or Type 4 worker because those costs are only incurred if the employee is a Type 3 worker.

Identifying Type 2 workers involved two steps. First, using CPS MORG data, the Department identified those who do not usually work overtime but did work overtime in the survey week (the week referred to in the CPS questionnaire, variable PEHRACT1 greater than 40). Next, the Department supplemented the CPS data with data from the Survey of Income and Program Participation (SIPP) to look at likelihood of working some overtime during the year. Based on 2021 data, the most recent available, the Department found that 31.3 percent of non-hourly workers worked overtime at some point in a year. Therefore, the Department classified a share of workers who reported they do not usually work overtime, and did not work overtime in the reference week, as Type 2 workers such that a total of approximately 31.3 percent of affected workers were Type 2, 3, or 4. Type 2 workers are subdivided into Types 2A and 2B later in the analysis (Table 15).

TABLE 15—TYPES OF AFFECTED WORKERS

Type of worker	Percent of total
Type 1	69
Type 2A	8
Type 2B	8
Type 3	12
Type 4	3

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.

* *Type 1:* Workers who do not work overtime and gain overtime protection.

* *Type 2:* Workers who work occasional overtime and gain overtime protection.

- *Type 2A:* Those who work *unexpected* overtime hours.
- *Type 2B:* Those who work *expected* overtime.

* *Type 3:* Workers who work regular overtime and gain overtime protection.

* *Type 4:* Workers who work regular overtime and remain exempt (*i.e.,* earnings increase to the updated salary or compensation level).

(d) Modeling Changes in Wages and Hours

The incomplete fixed-job model predicts that employers would adjust wages of regular overtime workers but not to the full extent indicated by the fixed-job model, and thus some employees would receive a small increase in weekly earnings due to overtime pay coverage. The Department

[377] Barzel, Y. (1973). The Determination of Daily Hours and Wages. *The Quarterly Journal of Economics,* 87(2), 220–238, demonstrated that modest fluctuations in labor demand could justify substantial overtime premiums in the employment contract model. Hart, R.A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163, showed that establishing an overtime premium in an employment contract can reduce inefficiencies.

[378] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[379] Bell, D.N.F. and Hart, R.A. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market, *Industrial and Labor Relations Review,* 56(3), 470–480.

[380] *See* section VII.C.3.iv (managerial costs).

used the average of two estimates of the incomplete fixed-job model adjustments to model impacts of this proposed rule: [381]

- Trejo's (1991) estimate that the overtime-induced wage change is 40 percent of the adjustment toward the amount predicted by the fixed-job model, assuming an initial zero overtime pay premium, and
- Barkume's (2010) estimate that the wage change is 80 percent of the predicted adjustment assuming an initial 28 percent overtime pay premium.

This is approximately equivalent to assuming that salaried overtime workers implicitly receive the equivalent of a 14 percent overtime premium in the absence of regulation (the midpoint between 0 and 28 percent).

Modeling changes in hourly wages, hours, and earnings for Type 1 and Type 4 workers was relatively straightforward. Type 1 affected EAP workers would become overtime-eligible, but because they do not work overtime, they would see no change in their wages, hours, or weekly earnings. Type 4 workers would remain exempt because their earnings would be raised to at least the updated EAP level (either the standard salary level or HCE compensation level). These workers' earnings would increase by the difference between their current earnings and the amount necessary to satisfy the new salary or compensation level. It is possible employers would increase these workers' hours in response to paying them a higher salary, but the Department did not have enough information to model this potential change.[382]

Modeling changes in wages, hours, and earnings for Type 2 and Type 3 workers was more complex. The Department distinguished those who regularly work overtime (Type 3 workers) from those who occasionally work overtime (Type 2 workers) because employer adjustment to the rule may differ accordingly. Employers are more likely to adjust hours worked and wages for regular overtime workers because their hours are predictable. Conversely, in response to a transient, perhaps unpredicted, shift in market demand for the good or service such employers provide, employers are more likely to pay for occasional overtime rather than adjust hours worked and pay.

The Department treated Type 2 affected workers in two ways due to the uncertainty of the nature of these occasional overtime hours. The Department assumed that 50 percent of these occasional overtime workers worked *unexpected* overtime hours (Type 2A) and the other 50 percent worked *expected* overtime (Type 2B). Workers were randomly assigned to these two groups. Workers with *expected* occasional overtime hours were treated like Type 3 affected workers (incomplete fixed-job model adjustments). Workers with unexpected occasional overtime hours were assumed to receive a 50 percent pay premium for the overtime hours worked and receive no change in base wage or hours (full overtime premium model).[383] When modeling Type 2 workers' hour and wage adjustments, the Department treated those identified as Type 2 using the CPS data as representative of all Type 2 workers.[384] The Department estimated employer adjustments and transfers assuming that the patterns observed in the CPS reference week are representative of an average week in the year. Thus, the Department assumes total transfers for the year are equal to 52 times the transfers estimated for a representative week for which the Department has CPS data. However, these transfers are spread over a larger group including those who occasionally work overtime but did not do so in the CPS reference week.[385]

Since employers would pay more for the same number of labor hours, for Type 2 and Type 3 EAP workers, the quantity of labor hours demanded by employers would decrease. The reduction in hours is calculated using the elasticity of labor demand with respect to wages. The Department used a short-term demand elasticity of -0.20 to estimate the percentage decrease in hours worked in Year 1 and a long-term elasticity of -0.4 to estimate the percentage decrease in hours worked in Years 2–10. These elasticity estimates are based on the Department's analysis of Lichter et al. (2014).[386] [387] Brown and Hamermesh (2019) estimated the elasticity of overtime hours for EAP-exempt workers.[388] This estimate is based on a difference-in-differences in hours for two groups of workers between two time periods. However, some groups of workers are incorrectly defined, so the Department has not used these estimates.[389]

For Type 3 affected workers, and the 50 percent of Type 2 affected workers who worked *expected* overtime, the Department estimated adjusted total hours worked after making wage adjustments using the incomplete fixed-job model. To estimate adjusted hours worked, the Department set the percent change in total hours worked equal to the percent change in average wages multiplied by the wage elasticity of labor demand.[390] Figure 4 is a flow

[381] Both studies considered a population that included hourly workers. Evidence is not available on how the adjustment towards the fixed-job model differs between salaried and hourly workers. The fixed-job model may be more likely to hold for salaried workers than for hourly workers since salaried workers directly observe their weekly total earnings, not their implicit equivalent hourly wage. Thus, applying the partial adjustment to the fixed-job model as estimated by these studies may overestimate the transfers from employers to salaried workers. The Department does not attempt to quantify the magnitude of this potential overestimate, but welcomes comments on how to refine the quantitative approach.

[382] Cherry, Monica, ''Are Salaried Workers Compensated for Overtime Hours?'' *Journal of Labor Research* 25(3): 485–494, September 2004, found that exempt full-time salaried employees earn more when they work more hours, but her results do not lend themselves to the quantification of the effect *on* hours of an increase in earnings.

[383] The Department uses the term ''full overtime premium'' to describe the adjustment process as modeled. The full overtime premium model is a special case of the general fixed-wage model in that the Department assumes the demand for labor under these circumstances is completely inelastic. That is, employers make no changes to employees' hours in response to these temporary, unanticipated changes in demand.

[384] As explained in the previous section, to estimate the population of Type 2 workers, the Department supplemented workers who report working overtime in the CPS reference week with some workers who do not work overtime in the reference week to reflect the fact that different workers work occasional overtime in different weeks.

[385] If a different week was chosen as the survey week, then some of these workers would not have worked overtime. However, because the data are representative of both the population and all twelve months in a year, the Department believes the share of Type 2 workers identified in the CPS data in the given week is representative of an average week in the year.

[386] Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

[387] Some researchers have estimated larger impacts on the number of overtime hours worked. For example, Hamermesh and Trejo (2000) conclude the price elasticity of demand for overtime hours is at least –0.5. The Department decided to use a general measure of elasticity applied to the average change in wages since the increase in the overtime wage is somewhat offset by a decrease in the non-overtime wage as indicated in the fixed-job model. Hamermesh, D. and S. Trejo. (2000)). The Demand for Hours of Labor: Direct Evidence from California. *The Review of Economics and Statistics,* 82(1), 38–47.

[388] Brown, Charles C., and Daniel S. Hamermesh. (2019). ''Wages and Hours Laws: What Do We Know? What Can Be Done?'' RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 68–87. DOI: 10.7758/RSF.2019.5.5.04.

[389] For example, the authors defined the ''non-exempt 1987–1989'' group as workers earning above $223 but below $455 during this period. Because the salary level for the long test was $155 or $170 and was $250 for the short test, *see* section VII.A.1 (Table 1), some of these workers would be exempt.

[390] In this equation, the only unknown is adjusted total hours worked. Since adjusted total hours worked is in the denominator of the left side of the equation and is also in the numerator of the right side of the equation, solving for adjusted total hours worked requires solving a quadratic equation.

chart summarizing the four types of affected EAP workers. Also shown are the effects on exempt status, weekly earnings, and hours worked for each type of affected worker.

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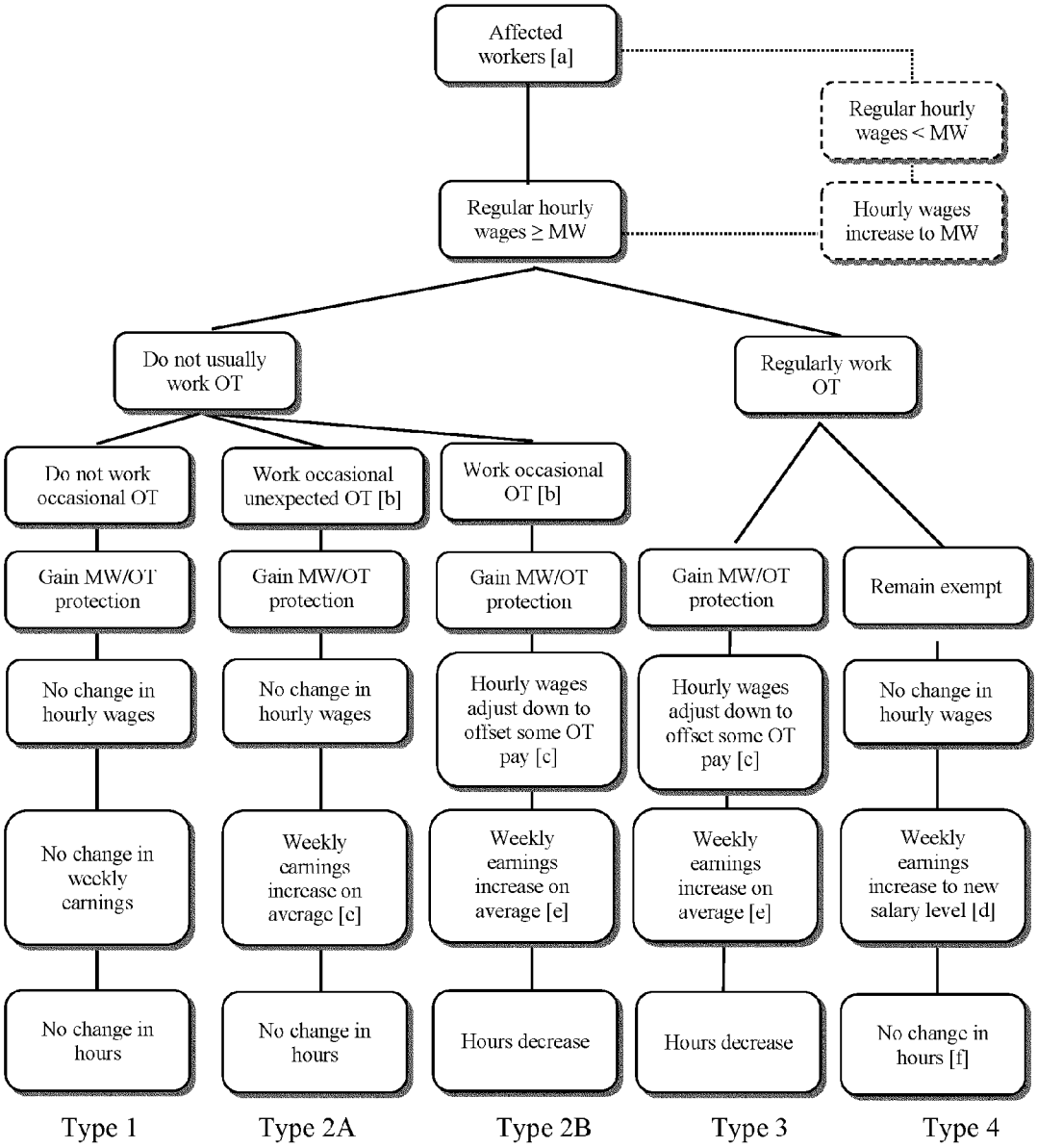
Figure 4: Flow Chart of Proposed Rule's Effect on Earnings and Hours Worked



[a] Those who are exempt under the current EAP exemptions and would gain minimum wage and overtime protection or receive a raise to the increased salary or compensation level.
[b] The Department used two methods to identify occasional overtime workers. The first includes workers who report they usually work 40 hours or fewer per week (identified with variable PEHRUSL1 in CPS MORG), but in the reference week worked more than 40 hours (variable PEHRACT1 in CPS MORG). The second includes reclassifying some additional workers who usually work 40 hours or fewer per week, and in the reference week worked 40 hours or fewer, to match the proportion of workers measured in other data sets who work overtime at any point in the year.

[c] The amount wages are adjusted downwards depends on whether the fixed-job model or the fixed-wage model holds. The Department's primary method uses a combination of the two. Employers reduce the regular hourly wage rate somewhat in response to overtime pay requirements, but the wage is not reduced enough to keep total compensation constant.
[d] Based on hourly wage and weekly hours it is more cost efficient for the employer to increase the worker's weekly salary to the updated salary level than to pay overtime pay.
[e] On average, the Department's modeling of regulatory effects yields a result in which employees' overall weekly earnings will increase despite a small decrease in average hours worked. In some limited cases, employers might decrease employees' hours enough to cause those employees' weekly earnings to decrease.
[f] The Department assumed hours would not change; however, it is possible employers will increase these workers' hours in response to paying them a higher salary or to avoid paying overtime premiums to newly nonexempt coworkers.

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(e) Estimated Number of and Effects on Affected EAP Workers

The Department estimated the proposed rule would affect 3.6 million workers (Table 16), of which 2.5 million are Type 1 workers (68.7 percent of all affected EAP workers), 579,200 were estimated to be Type 2 workers (15.9 percent), 448,400 were Type 3 workers (12.3 percent), and 115,700 were estimated to be Type 4 workers (3.2 percent).

TABLE 16—AFFECTED EAP WORKERS BY TYPE (1,000S), YEAR 1

EAP test	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard salary level	3,399.4	2,335.7	569.9	384.9	108.9
HCE compensation level	248.9	169.2	9.3	63.5	6.8
Total	3,648.3	2,504.9	579.2	448.4	115.7

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
* *Type 1:* Workers who do not work overtime and gain overtime protection.
* *Type 2:* Workers who work occasional overtime and gain overtime protection.
* *Type 3:* Workers who work regular overtime and gain overtime protection.
* *Type 4:* Workers who work regular overtime and remain exempt (*i.e.,* earnings increase to the updated salary level).

The proposed rule would affect some affected workers' hourly wages, hours, and weekly earnings. Predicted changes in implicit wage rates are outlined in Table 17, changes in hours in Table 18, and changes in weekly earnings in Table 19. How these would change depends on the type of worker, but on average the Department projects that weekly earnings would be unchanged or increase while hours worked would be unchanged or decrease.

Type 1 workers would have no change in wages, hours, or earnings due to the overtime pay provision because these workers do not work overtime.[391] Some Type 1 workers who earn less than the Federal or state minimum wage would see an increase in wages, a decrease in hours, and an increase in weekly earnings.

For Type 2A workers, the Department assumed employers would be unable to adjust the hours or regular rate of pay for these occasional overtime workers whose overtime is irregularly scheduled and unpredictable. These workers would receive a 50 percent premium on their regular hourly wage for each hour worked in excess of 40 hours per week, and so average weekly earnings would increase.[392]

For Type 3 workers and Type 2B workers (the 50 percent of Type 2 workers who regularly work occasional overtime, an estimated 738,000 workers), the Department used the incomplete fixed-job model to estimate changes in the regular rate of pay. These workers would see a decrease in their average regular hourly wage and a small decrease in hours. However, because these workers would receive a 50 percent premium on their regular hourly wage for each hour worked in excess of 40 hours per week, their average weekly earnings would increase. The reduction in hours is relatively small and is due to a decrease in labor demand from the increase in the average hourly wage as predicted by the incomplete fixed-job model (Table 18).

Type 4 workers' implicit hourly rates of pay and weekly earnings would increase to meet the updated standard salary level or HCE annual

[391] It is possible that these workers may experience an increase in hours and weekly earnings because of transfers of hours from other newly nonexempt workers who do usually work overtime. Due to the high level of uncertainty in employers' responses regarding the transfer of hours, the Department did not have credible evidence to support an estimation of the number of hours transferred to other workers.

[392] Type 2 workers will not see increases in regular earnings to the new salary or compensation levels (as Type 4 workers do) even if their new earnings in this week exceed those new levels. This is because the estimated new earnings only reflect their earnings in those weeks when overtime is worked; their earnings in typical weeks when they do not work overtime do not exceed the salary or compensation level.

compensation level. Type 4 workers' hours may increase to offset the additional earnings, but due to lack of data, the Department assumed hours would not change.

TABLE 17—AVERAGE REGULAR RATE OF PAY BY TYPE OF AFFECTED EAP WORKER, YEAR 1

Time period	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly non-exempt (T3)	Remain exempt (T4)
Standard Salary Level					
Before rule	$23.55	$24.18	$25.48	$17.82	$20.07
After rule	$23.43	$24.18	$25.36	$16.90	$20.42
Change ($)	−$0.11	$0.00	−$0.12	−$0.92	$0.34
Change (%)	−0.5%	0.0%	−0.5%	−5.2%	1.7%
HCE Compensation Level					
Before rule	$56.10	$60.07	$58.90	$45.92	$48.63
After rule	$55.31	$60.07	$54.99	$43.31	$49.78
Change ($)	−$0.79	$0.00	−$3.91	−$2.61	$1.15
Change (%)	−1.4%	0.0%	−6.6%	−5.7%	2.4%

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
**Type 1:* Workers who do not work overtime and gain overtime protection.
**Type 2:* Workers who work occasional overtime and gain overtime protection.
**Type 3:* Workers who work regular overtime and gain overtime protection.
**Type 4:* Workers who work regular overtime and remain exempt (*i.e.,* earnings increase to the updated salary level).

TABLE 18—AVERAGE WEEKLY HOURS BY TYPE OF AFFECTED EAP WORKER, YEAR 1

Time period	Total	No overtime worked (T1)	Occasional OT (T2)	Regular OT	
				Newly non-exempt (T3)	Remain exempt (T4)
Standard Salary Level [a]					
Before rule	41.0	38.9	40.9	50.4	52.9
After rule	41.0	38.9	40.9	50.0	52.9
Change (hours)	0.0	0.0	0.0	−0.4	0.0
Change (%)	−0.1%	0.0%	−0.1%	−0.8%	0.0%
HCE Compensation Level [a]					
Before rule	43.3	39.5	52.7	50.6	56.0
After rule	43.2	39.5	52.3	50.3	56.0
Change (hours)	−0.1	0.0	−0.4	−0.3	0.0
Change (%)	−0.2%	0.0%	−0.7%	−0.7%	0.0%

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] Usual hours for Types 1, 3, and 4 but actual hours for Type 2 workers identified in the CPS MORG.
**Type 1:* Workers who do not work overtime and gain overtime protection.
**Type 2:* Workers who work occasional overtime and gain overtime protection.
**Type 3:* Workers who work regular overtime and gain overtime protection.
**Type 4:* Workers who work regular overtime and remain exempt (*i.e.,* earnings increase to the updated salary level).

TABLE 19—AVERAGE WEEKLY EARNINGS BY TYPE OF AFFECTED EAP WORKER, YEAR 1

Time period	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly non-exempt (T3)	Remain exempt (T4)
Standard Salary Level [a]					
Before rule	$913.71	$904.82	$947.26	$882.62	$1,038.69
After rule	$919.26	$904.82	$960.66	$906.04	$1,059.00
Change ($)	$5.55	$0.00	$13.39	$23.42	$20.31
Change (%)	0.6%	0.0%	1.4%	2.7%	2.0%
HCE Compensation Level [a]					
Before rule	$2,354.99	$2,323.22	$3,101.59	$2,292.51	$2,704.08

TABLE 19—AVERAGE WEEKLY EARNINGS BY TYPE OF AFFECTED EAP WORKER, YEAR 1—Continued

Time period	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly non-exempt (T3)	Remain exempt (T4)
After rule	$2,374.58	$2,323.22	$3,193.44	$2,348.79	$2,769.00
Change ($)	$19.59	$0.00	$91.85	$56.28	$64.92
Change (%)	0.8%	0.0%	3.0%	2.5%	2.4%

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] The mean of the hourly wage multiplied by the mean of the hours does not necessarily equal the mean of the weekly earnings because the product of two averages is not necessarily equal to the average of the product.
**Type 1:* Workers who do not work overtime and gain overtime protection.
**Type 2:* Workers who work occasional overtime and gain overtime protection.
**Type 3:* Workers who work regular overtime and gain overtime protection.
**Type 4:* Workers who work regular overtime and remain exempt (*i.e.,* earnings increase to the updated salary level).

At the new standard salary level, the average weekly earnings of affected workers would increase $5.55 (0.6 percent), from $913.71 to $919.26. Multiplying the average change of $5.55 by the 3.4 million EAP workers affected by the change in the standard salary level and 52 weeks equals an increase in earnings of $1.0 billion in the first year. For workers affected by the change in the HCE compensation level, average weekly earnings would increase by $19.59. When multiplied by 248,900 affected workers and 52 weeks, the national increase would be $253.5 million in the first year. Thus, total Year 1 transfer payments attributable to this proposed rule would total $1.2 billion.

The Department is only aware of one paper that modeled the impacts of the 2019 rule's increases in the salary and compensation levels. Quach (2021) [393] used administrative payroll data from May 2008 to January 2020 to estimate the impacts of the rescinded 2016 rule and the 2019 rule on employment, earnings, and salary status.[394] The paper has not been published in a peer-reviewed journal and has significant limitations, including that its use of administrative payroll data from ADP means that the findings are not representative as ADP customers do not represent a random sample of the workplace. Furthermore, the paper's analysis only includes the 22 states that have not updated their state or local minimum wages since 2014.[395]

In terms of its findings, concerning employment, the author did not find the impact to be statistically different from zero for either rule, although he did find a significant decrease in employment when state overtime exemption laws were incorporated. Concerning earnings, he found an increase in base weekly earnings and an increase in overtime pay for both rules. The percent change in total pay that he estimates, around 1 to 2 percent depending on the rule, is not vastly different than the Department's estimate of 0.6 percent. Concerning salary status, he found an increase in the number of hourly jobs after the 2016 rule but not after the 2019 rule. His analysis of both rules showed a shift in the number of salaried workers from below to above the threshold (as does the Department's analysis).

The Department has not adjusted its methodology in response to this paper given the concerns listed above, but remains interested in further peer-reviewed research that may provide relevant findings.

Additionally, it can be informative to look at papers which predict the impact of rulemakings. For example, Rohwedder and Wenger (2015) analyzed the effects of increasing the standard salary level from the then baseline level of $455 per week.[396] They compared hourly and salaried workers in the CPS using quantile treatment effects. This methodology estimates the effect of a worker becoming nonexempt by comparing similar workers who are hourly and salaried. They found no statistically significant change in hours or wages on average. However, their point estimates, averaged across all affected workers, show small increases in earnings and decreases in hours, similar to the Department's analysis. For example, using a salary level of $750, they estimated weekly earnings may increase between $2 and $22 and weekly hours may decrease by approximately 0.4 hours.

iv. Potential Transfers Not Quantified

This proposed rule could lead to additional transfers that the Department is unable to quantify. For example, in response to this proposed rule, some employers may decrease the hours of newly nonexempt workers who usually work overtime. These hours may be transferred to other workers, such as non-overtime workers and exempt workers who are not affected by the rule. Depending on how these hours are transferred, it could lead to either a reduction or increase in earnings for other workers. Employers may also offset increased labor costs by reducing bonuses or benefits instead of reducing base wages or hours worked. If this occurs, an employee's overall compensation may not be affected.

The rule could also reduce reliance on social assistance programs for some workers who may receive a transfer of income resulting from this proposed rule if finalized. For low-income workers, this transfer could result in a reduced need for social assistance programs such as Medicaid, the Earned Income Tax Credit (EITC), the Supplemental Nutrition Assistance Program (SNAP), the Temporary Assistance for Needy Families (TANF) program, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and school breakfasts and lunches. A worker earning the current salary level of $684 per week earns $35,568 annually, which is roughly equivalent to the Federal poverty level for a family of five and makes the family eligible for many social assistance programs.[397] Thus, transferring income to these workers

[393] Quach, S. (2022). The Labor Market Effects of Expanding Overtime Coverage. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608506.*

[394] The Department notes that the effective date of the 2019 final rule was in January 2020, so using data from this month may not fully capture the effects of the 2019 rule.

[395] This is a reasonable restriction to minimize the influence of exogenous factors. However, it makes the sample unrepresentative of the U.S.

[396] Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

[397] Department of Health and Human Services (2023). Federal Poverty Level. *https://www.healthcare.gov/glossary/Federal-poverty-level-fpl/.*

could reduce eligibility for government social assistance programs and could therefore also reduce government expenditures.

The Department requests comments and data on additional transfers that could occur if this rule were finalized as proposed.

5. Benefits and Cost Savings

The Department expects that this proposed rule could lead to multiple benefits, which are discussed qualitatively below. The Department welcomes comments on the potential benefits associated with this proposed rule and any data that could help to quantify them.

First, the updated salary level would strengthen the overtime protection of salaried, white-collar employees who do not pass the standard duties test and who earn between the current salary standard salary level and the proposed salary level. These employees are nonexempt but, because they satisfy the current salary level threshold, employers must apply the duties test to determine their exemption status. At the proposed salary level, the number of white-collar salaried employees who fail the duties test but earn at or above the salary level would decrease by 4.1 million. Because these nonexempt employees would not meet the proposed salary level, employers would be able to determine their exemption status based solely on the salary test. If any of these employers previously spent significant time evaluating the duties of these workers to determine exemption status, the change to determining exemption status based on the salary level could lead to some cost savings.

As the Department has noted in prior EAP rulemakings, some salaried, white-collar employees who meet the salary level threshold but do not meet the duties test may be misclassified as exempt from overtime protection due to misapplication of the duties test.[398] To the extent that some of the 4.1 million salaried, white-collar employees who do not meet the duties test and earn between the current $684 per week salary level and the proposed $1,059 per week salary level are misclassified as exempt, the proposed salary level would make it more clear for workers and employers that such workers are not EAP exempt.[399]

Second, this proposed rule could potentially lead to increased worker productivity if workers receive an increase in compensation. Increased productivity could occur through numerous channels, such as employee retention and level of effort. A strand of economic research, commonly referred to as ''efficiency wage'' theory, considers how an increase in compensation may be met with greater productivity.[400] Efficiency wages may elicit greater effort on the part of workers, making them more effective on the job.[401] Other research on increases in the minimum wage have demonstrated a positive relationship between increased compensation and worker productivity. For example, Kim and Jang (2019) showed that wage raises increase productivity for up to two years after the wage increase.[402] They found that in both full and limited-service restaurants productivity increased due to improved worker morale after a wage increase.

Additionally, research demonstrates a correlation between increased earnings and reduced employee turnover.[403] [404] Reducing turnover, in turn, may increase productivity because new employees have less firm-specific skills and knowledge and thus could be less productive and require additional supervision and training.[405] Reduced turnover could also reduce firms' hiring and training costs. As a result, even though marginal labor costs rise, they may rise by less than the amount of the wage change because the higher wages may be offset by increased productivity and reduced hiring costs for firms.

Third, this rulemaking could result in an increase in personal time for some workers. Due to the increase in marginal cost for overtime hours for newly overtime-eligible workers, employers could demand fewer hours from some of the workers affected by this rulemaking. If these workers' pay remains the same, they could benefit from increased personal time and improved work-life balance. Empirical evidence shows that workers in the United States typically work more than workers in other comparatively wealthy countries.[406] Although estimates of the actual level of overwork vary considerably, workers in executive, administrative, and professional occupations tend to work longer hours.[407] They also have the highest percentage of workers who would prefer to work fewer hours compared to other occupational categories.[408] Therefore, the Department believes that this proposed rule may result in reduced time spent working for a group of workers, some of whom may prefer such an outcome.

6. Sensitivity Analysis of Transfer Payments

Because the Department cannot predict employers' precise reactions to the proposed rule, the Department calculated bounds on the size of the estimated transfers from employers to workers, relative to the primary estimates in this RIA. For the upper bound, the Department assumed that the

[398] *See* 84 FR 51279–80; 81 FR 32463; 69 FR 22213.

[399] *See* Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population. RAND conducted a survey to identify the number of workers who may have failed the standards duties test and yet are classified as EAP exempt. The survey, a special module to the American Life Panel, asked respondents: (1) their hours worked, (2) whether they are paid on an hourly or salary basis, (3) their typical earnings, (4) whether they perform certain job responsibilities that are treated as proxies for whether they would justify exempt status, and (5) whether they receive any overtime pay. Using these data, Rohwedder and Wenger found that ''11.5 percent of salaried workers were classified as exempt by their employer although they did not meet the criteria for being so.'' This survey was conducted when the salary level was $455. The exact percentage may no longer be applicable, but the concern that in some instances the duties test may be misapplied remains.

[400] Akerlof, G.A. (1982). Labor Contracts as Partial Gift Exchange. The Quarterly Journal of Economics, 97(4), 543–569.

[401] Another model of efficiency wages, which is less applicable here, is the adverse selection model in which higher wages raise the quality of the pool of applicants.

[402] Kim, H.S., & Jang, S. (2019). Minimum Wage Increase and Firm Productivity: Evidence from the Restaurant Industry. Tourism Management 71, 378–388. *https://doi.org/10.1016/j.tourman.2018.10.029.*

[403] Howes, Candace. (2005). Living Wages and Retention of Homecare Workers in San Francisco. *Industrial Relations,* 44(1), 139–163. Dube, A., Lester,T.W., & Reich, M.. (2014). Minimum Wage Shocks, Employment Flows and Labor Market Frictions. IRLE Working Paper #149–13.

[404] This literature tends to focus on changes in earnings for a specific sector or subset of the labor force. The impact on turnover when earnings increase across sectors (as would be the case with this regulation) may be smaller.

[405] Argote, L., Insko, C. A., Yovetich, N., & Romero, A. A. (1995). Group Learning Curves: The Effects of Turnover and Task Complexity on Group Performance. *Journal of Applied Social Psychology,* 25(6), 512–529. Shaw, J. D. (2011). Turnover Rates and Organizational Performance: Review, Critique, and Research Agenda. *Organizational Psychology Review,* 1(3), 187–213.

[406] For more information, see OECD series, average annual hours actually worked per worker, available at: *http://stats.oecd.org/index.aspx?DataSetCode=ANHRS.*

[407] Boushey, H. and Ansel, B. (2016). Overworked America, The economic causes and consequences of long work hours. Washington Center for Equitable Growth. *https://equitablegrowth.org/research-paper/overworked-america/?longform=true.*

[408] Hamermesh, D.S., Kawaguchi, D., Lee, J. (2014). Does Labor Legislation Benefit Workers? Well-Being after an Hours Reduction. IZA DP No. 8077.

Golden, L., & Gebreselassie, T. (2007). Overemployment Mismatches: The Preference for Fewer Work Hours. *Monthly Labor Review,* 130(4), 18–37.

Hamermesh, D.S. (2014). Not Enough Time? *American Economist,* 59(2).

full overtime premium model is more likely to occur than in the primary model. For the lower bound, the Department assumed that the complete fixed-job model is more likely to occur than in the primary model. Based on these assumptions, estimated transfers may range from $557.3 million to $2.4 billion, with the primary estimate equal to $1.2 billion.

For a reasonable upper bound on transfer payments, the Department assumed that all occasional overtime workers and half of regular overtime workers would receive the full overtime premium (*i.e.,* such workers will work the same number of hours but be paid 1.5 times their implicit initial hourly wage for all overtime hours) (Table 20). The full overtime premium model is a special case of the fixed-wage model where there is no change in hours. For the other half of regular overtime workers, the Department assumed in the upper-bound method that they would have their implicit hourly wage adjusted as predicted by the incomplete fixed-job model (wage rates fall and hours are reduced but total earnings continue to increase, as in the primary method). In the primary model, the Department assumed that only 50 percent of occasional overtime workers and no regular overtime workers would receive the full overtime premium.

The plausible lower bound on transfer payments also depends on whether employees work regular overtime or occasional overtime. For those who regularly work overtime hours and half of those who work occasional overtime, the Department assumed the employees' wages would fully adjust as predicted by the fixed-job model.[409] For the other half of employees with occasional overtime hours, the lower bound assumes they would be paid one and one-half times their implicit hourly wage for overtime hours worked (full overtime premium).

TABLE 20—SUMMARY OF THE ASSUMPTIONS USED TO CALCULATE THE LOWER ESTIMATE, PRIMARY ESTIMATE, AND UPPER ESTIMATE OF TRANSFERS

Lower transfer estimate	Primary estimate	Upper transfer estimate
Occasional Overtime Workers (Type 2)		
50% fixed-job model	50% incomplete fixed-job model	100% full overtime premium.
50% full overtime premium	50% full overtime premium	
Regular Overtime Workers (Type 3)		
100% fixed-job model	100% incomplete fixed-job model	50% incomplete fixed-job model. 50% full overtime premium.

* Full overtime premium model: Regular rate of pay equals the implicit hourly wage prior to the regulation (with no adjustments); workers are paid 1.5 times this base wage for the same number of overtime hours worked prior to the regulation.
* Fixed-job model: Base wages are set at the higher of: (1) a rate such that total earnings and hours remain the same before and after the regulation; thus the base wage falls, and workers are paid 1.5 times the new base wage for overtime hours (the fixed-job model) or (2) the minimum wage.
* Incomplete fixed-job model: Regular rates of pay are partially adjusted to the wage implied by the fixed-job model.

7. Effects by Regions and Industries

This section compares the number of affected workers, costs, and transfers across regions and industries. Although impacts would be more pronounced in some regions or industries, the Department has concluded that in no region or industry are the costs overly burdensome. The proportion of total costs and transfers in each region would be fairly consistent with the proportion of total workers in each region. Affected workers are overrepresented in some industries, but costs and transfers would still be manageable as a share of payroll and of total revenue (*See* Table 24 for regions and Table 27 for industries).

The Department also compared costs and transfers relative to total payrolls and revenues. This provides a common method of assessing the relative effects of the rule on different regions or industries, and the magnitude of adjustments the rule may require on the part of enterprises in each region or industry. The relative costs and transfers expressed as a percentage of payroll are particularly useful measures of the relative size of adjustment faced by organizations in a region or industry because they benchmark against the cost category directly associated with the labor force. Average estimated costs and transfers from this proposed rule are very small relative to current payroll or current revenue—less than a tenth of a percent of payroll and of revenue in each region and in each industry.

Salaries vary across the U.S. geographically. To ensure the proposed standard salary level would not be too high in any region of the country, the Department has used only wages in the lowest-wage region, the South, to set the salary level. However, because wages are lower in the South and the Midwest than the Northeast and the West, impacts may be larger in these two lower-wage regions. This section considers impacts across the four Census regions to ensure the impacts in the lower-wage regions would be manageable. The South has by far the most affected workers (1.5 million), though it also has the most workers of any Census region (Table 21). As a share of potentially affected workers in the region, the South would have somewhat more affected workers relative to other regions (15.2 percent are affected compared with 10.3 to 13.7 percent in other regions). However, as a share of all workers in the region, the South would not be particularly affected relative to other regions (2.9 percent are affected compared with 2.1 to 2.6 percent in other regions).

[409] The straight-time wage adjusts to a level that keeps weekly earnings constant when overtime hours are paid at 1.5 times the straight-time wage. In cases where adjusting the straight-time wage results in a wage less than the minimum wage, the straight-time wage is set to the minimum wage.

TABLE 21—POTENTIALLY AFFECTED AND AFFECTED WORKERS, BY REGION, YEAR 1

Region	Workers subject to FLSA (millions)	Potentially affected workers (millions) [a]	Affected workers (millions) [b]	Affected workers as a precent of potentially affected workers %	Affected workers as a percent of all workers %
All	139.4	28.4	3.6	12.9	2.6
Northeast	24.8	5.7	0.6	11.1	2.6
Midwest	30.4	5.9	0.8	13.7	2.6
South	51.4	9.9	1.5	15.2	2.9
West	32.8	6.9	0.7	10.3	2.1

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] EAP exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Currently EAP exempt workers who will be entitled to overtime protection under the updated earnings levels or whose weekly earnings will increase to the new earnings levels to remain exempt.

Total transfers in the first year were estimated to be $1.2 billion (Table 22). As expected, the transfers in the South would be the largest portion because the largest number of affected workers would be in the South. However, transfers per affected worker would be on the low-end in the South. Annual transfers per worker would be $328 in the South, and between $332 and $357 in other regions.

TABLE 22—ANNUAL TRANSFERS BY REGION, YEAR 1

Region	Total annual change in earnings (millions)	Annual transfer per affected worker	Annual transfers per entity	Percent of total transfers by region (%)
All	$1,234.2	$338	$153	100.0
Northeast	211.2	332	143	17.1
Midwest	279.1	347	166	22.6
South	492.8	328	169	39.9
West	251.1	357	125	20.3

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.

TABLE 23—ANNUAL COSTS BY REGION, YEAR 1

Region	Total direct costs (millions)	Total direct costs per entity	Percent of total direct costs by region (%)
All	$1,202.8	$149	100.0
Northeast	202.8	137	16.9
Midwest	278.5	165	23.2
South	470.5	161	39.1
West	251.1	125	20.9

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.

Direct employer costs are composed of regulatory familiarization costs, adjustment costs, and managerial costs. The Department estimates that total direct employer costs would be the highest in the South ($470.5 million) and lowest in the Northeast ($202.8 million). Transfers and direct employer costs in each region, as a percentage of the total transfers and direct costs, would range from 17.0 percent in the Northeast to 39.5 percent in the South. These proportions are almost the same as the proportions of the total workforce in each region: 17.8 percent in the Northeast and 36.9 percent in the South. Costs and transfers per establishment would be slightly higher in the South ($330) than on average, but still small (Table 24).

Another way to compare the relative effects of this proposed rule by region is to consider the transfers and costs as a proportion of payroll and revenues (Table 24).[410] Nationally, employer costs and transfers would be approximately 0.027 percent of payroll. By region, direct employer costs and transfers as a percent of payroll would be approximately the same (between 0.021 and 0.032 percent of payroll). Employer costs and transfers as a percent of revenue would be 0.005 percent nationally and range between 0.004 and 0.006 percent in each region.

[410] The Department uses 2017 data here because although payroll data are available for 2021, the most recent revenue data are for 2017.

TABLE 24—ANNUAL TRANSFERS AND COSTS AS PERCENT OF PAYROLL AND OF REVENUE BY REGION, YEAR 1

Region	Transfers and costs per entity	Payroll (billions) [a]	Revenue (billions) [a]	Costs and transfers	
				As percent of payroll (%)	As percent of revenue (%)
All	$301	$9,141	$48,894	0.027	0.005
Northeast	279	1,940	9,557	0.021	0.004
Midwest	331	1,879	10,884	0.030	0.005
South	330	3,028	17,193	0.032	0.006
West	250	2,295	11,260	0.022	0.004

[a] Payroll and revenue data exclude the Federal Government.
Sources: Costs and transfers based on pooled CPS data for 2020–2022 adjusted to reflect 2022. Private sector payroll and revenue data from 2017 SUSB. State and local payroll and revenue data from State and Local Government Finances 2020. Inflated to $2022 using GDP deflator.

Impacts may be more pronounced in some industries. In particular, lower-wage industries where more workers may earn between $684 and the proposed new salary level may be impacted more. Additionally, industries where EAP workers are more prevalent may experience larger impacts. To gauge the effect of the proposed rule on industries, the Department estimated affected workers, costs, and transfers for the 13 major industry groups. The Department also compared estimates of combined costs and transfers as a percent of payroll and revenue across industries.

Table 25 presents the number of affected workers by industry. The industry with the most affected workers is professional and business services (687,400). The industry with the largest share of workers affected is financial activities (4.9 percent). This is because the financial activities industry is heavily composed of salaried white-collar workers. As a share of potentially affected workers, the industry with the highest share affected is agriculture, forestry, fishing, & hunting (22.1 percent), followed by leisure and hospitality (21.1 percent).

TABLE 25—POTENTIALLY AFFECTED AND AFFECTED WORKERS, BY INDUSTRY, YEAR 1

Industry	Workers subject to FLSA (1,000s)	Potentially affected workers (1,000s) [a]	Affected workers (1,000s) [b]	Affected workers as a percent of potentially affected workers (%)	Affected workers as a percent of all workers (%)
All	139,397.0	28,359.5	3,648.3	12.9	2.6
Agriculture, forestry, fishing, & hunting	1,331.5	55.6	12.3	22.1	0.9
Mining	619.5	171.1	12.5	7.3	2.0
Construction	8,914.6	1,188.4	154.4	13.0	1.7
Manufacturing	15,129.2	3,900.8	317.1	8.1	2.1
Wholesale trade	3,226.4	850.5	103.9	12.2	3.2
Retail trade	15,381.2	1,853.1	308.7	16.7	2.0
Transportation & utilities	8,507.1	1,033.5	118.9	11.5	1.4
Information	2,559.2	962.4	118.6	12.3	4.6
Financial activities	9,851.4	4,250.7	480.7	11.3	4.9
Professional & business services	16,784.2	6,754.2	687.4	10.2	4.1
Education	14,017.6	1,121.0	201.8	18.0	1.4
Healthcare & social services	20,534.6	3,599.7	626.9	17.4	3.1
Leisure & hospitality	11,597.6	869.1	183.5	21.1	1.6
Other services	5,314.5	736.5	139.2	18.9	2.6
Public administration	5,628.3	1,012.9	182.4	18.0	3.2

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] EAP exempt workers who are white-collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.
[b] Currently EAP exempt workers who will be entitled to overtime protection under the updated earnings levels or whose weekly earnings will increase to the new earnings levels to remain exempt.

Both transfers and costs would be the largest in the professional and business services industry because this industry is large and heavily composed of salaried white-collar workers (Table 26). Combined, in Year 1, these total $471.7 million and represent 19.4 percent of nationwide transfers and costs. Transfers and costs are also large in the healthcare and social services industry, at least partially due to the large size of this industry. However, transfers per affected worker would be relatively low in this industry, $251 in the first year compared with $338 nationally. A third industry with relatively large total transfers and costs is the financial activities industry.

TABLE 26—ANNUAL TRANSFERS AND COSTS BY INDUSTRY, YEAR 1

Industry	Transfers (millions)	Transfer per affected worker	Direct costs (millions) [a]	Transfers and costs (millions)	Percent of total transfers and costs by industry (%)
All	$1,234.2	$338	$1,202.1	$2,436.3	100.0
Agriculture, forestry, fishing, & hunting	4.2	341	3.2	7.4	0.3
Mining	2.9	234	2.6	5.6	0.2
Construction	49.1	318	74.0	123.2	5.1
Manufacturing	114.0	360	91.9	205.9	8.5
Wholesale trade	42.9	413	46.3	89.2	3.7
Retail trade	148.8	482	138.7	287.6	11.8
Transportation & utilities	46.3	389	37.0	83.3	3.4
Information	34.5	290	32.3	66.7	2.7
Financial activities	144.3	300	143.2	287.5	11.8
Professional & business services	250.7	365	221.0	471.7	19.4
Education	54.3	269	42.2	96.5	4.0
Healthcare & social services	157.5	251	164.0	321.5	13.2
Leisure & hospitality	86.8	473	99.2	186.1	7.6
Other services	35.6	256	69.5	105.1	4.3
Public administration	62.2	341	37.0	99.2	4.1

Sources: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] Regulatory familiarization costs exclude 13,981 establishments whose industry is ''not classified.''

To measure the impact on businesses, a comparison of transfers and costs to payroll, revenue, or profit is more helpful than looking at the absolute size of transfers and costs per industry. As a percent of payroll, transfers and costs would be highest in agriculture, forestry, fishing, and hunting; education; and retail trade (Table 27). However, the magnitude of the relative shares would be small, representing less than 0.1 percent of payroll costs in all industries. The Department's estimates of transfers and costs as a percent of revenue by industry also indicated a very small effect of less than 0.02 percent of revenues in any industry. The industries with the largest transfers and costs as a percent of revenue would be education; agriculture, forestry, fishing, and hunting; and professional and business services. Table 27 illustrates that the differences in costs and transfers relative to revenues would be quite small across industry groupings.

The overall magnitude of costs and transfers as a percentage of profits represents less than 1.0 percent of overall profits in each industry.[411] [412] By industry, the value of total costs and transfers as a percent of profits ranges from a low of .02 percent (wholesale trade) to a high of 0.71 percent (agriculture, forestry, fishing, and hunting). Benchmarking against profits is potentially helpful in the sense that it provides a measure of the proposed rule's effect against returns to investment. However, this metric must be interpreted carefully as it does not account for differences across industries in risk-adjusted rates of return which are not readily available for this analysis. The ratio of costs and transfers to profits also does not reflect differences in the firm-level adjustment to profit impacts reflecting cross-industry variation in market structure.[413]

TABLE 27—ANNUAL TRANSFERS, TOTAL COSTS, AND TRANSFERS AND COSTS AS PERCENT OF PAYROLL, REVENUE, AND PROFIT BY INDUSTRY, YEAR 1

Industry	Costs and transfers per entity	Payroll (billions) [a]	Revenue (billions) [a]	Costs and transfers as percent of:		
				Payroll [a]	Revenue [a]	Profit [a]
All	$301.7	$9,140.5	$48,894.1	0.027	0.005	0.052
Agriculture, forestry, fishing, & hunting	323.5	8.3	41.0	0.089	0.018	0.709
Mining	233.0	59.7	476.5	0.009	0.001	[b]
Construction	163.5	471.2	2,346.7	0.026	0.005	0.090
Manufacturing	726.1	805.8	6,522.0	0.026	0.003	0.030
Wholesale trade	228.1	512.7	10,287.6	0.017	0.001	0.020
Retail trade	277.4	524.6	5,773.6	0.055	0.005	0.154
Transportation & utilities	300.4	369.0	1,719.9	0.023	0.005	0.257
Information	414.6	421.2	1,860.4	0.016	0.004	0.022

[411] Internal Revenue Service. (2023). SOI Tax Stats—Corporation Income Tax Returns Complete Report (Publication 16). Available at: *https://www.irs.gov/statistics/soi-tax-stats-corporation-income-tax-returns-complete-report-publication-16.*

[412] Table 1 of the IRS report provides total receipts, net income, and deficits by industry. For each industry, the Department calculated the profit-to-revenue ratio as net income (column (7)) less any deficit (column (8)) divided by total receipts (column (3)). Profits were then calculated as revenues multiplied by profit-to-revenue ratios. Profits could not be used directly because they are limited to only active corporations.

[413] In particular, a basic model of competitive product markets would predict that highly competitive industries with lower rates of return would adjust to increases in the marginal cost of labor arising from the rule through an overall, industry-level increase in prices and a reduction in quantity demanded based on the relative elasticities of supply and demand. Alternatively, more concentrated markets with higher rates of return would be more likely to adjust through some combination of price increases and profit reductions based on elasticities as well as interfirm pricing responses.

TABLE 27—ANNUAL TRANSFERS, TOTAL COSTS, AND TRANSFERS AND COSTS AS PERCENT OF PAYROLL, REVENUE, AND PROFIT BY INDUSTRY, YEAR 1—Continued

Industry	Costs and transfers per entity	Payroll (billions) [a]	Revenue (billions) [a]	Costs and transfers as percent of:		
				Payroll [a]	Revenue [a]	Profit [a]
Financial activities	314.4	896.4	5,881.0	0.032	0.005	0.023
Professional & business services	330.6	1,888.7	3,451.6	0.025	0.014	0.122
Education	876.2	168.8	484.3	0.057	0.020	0.310
Healthcare & social services	346.4	1,175.4	2,986.5	0.027	0.011	0.144
Leisure & hospitality	210.1	423.4	1,429.5	0.044	0.013	0.158
Other services	136.3	213.5	850.6	0.049	0.012	0.183
Public administration	1,100.1	1,201.8	4,782.8	0.008	0.002	[c]

Sources: Pooled CPS data for 2020–2022 adjusted to reflect 2022. Private sector payroll and revenue data from 2017 SUSB. State and local payroll and revenue data from State and Local Government Finances 2020 are used for the Public Administration industry. Profit-to-revenue data from the Internal Revenue Service 2019. Inflated to $2022 using GDP deflator.

[a] Payroll and revenue data exclude the Federal Government. Profit-to-revenue data limited to active corporations. Regulatory familiarization costs, payrolls, and revenues exclude 13,981 establishments whose industry is "not classified." Because transfer payments include all workers, the estimates of costs and transfers as a share of payroll or revenue are slightly overestimated.

[b] Profits were negative in this industry in this year.

[c] Profit is not applicable for public administration.

8. Regulatory Alternatives

The Department considered a range of alternatives before selecting its methods for updating the standard salary level and the HCE compensation level (*see* section IV.A.5). As seen in Table 28, the Department has calculated the salary/compensation levels, the number of affected workers, and the associated costs and transfers for these alternative levels.

The Department proposes to update the standard salary level using earnings for the 35th percentile of full-time salaried workers in the South Census region, $1,059 per week. The alternative methods considered for setting the standard salary level are:

- Alternative 1: 2004/2019 method—$822 per week—20th percentile of earnings of nonhourly full-time workers in the South Census region and in the retail industry nationally.
- Alternative 2: Kantor long test method—$925 per week—10th percentile of earnings of likely exempt workers.
- Alternative 3: 2016 method—$1,145 per week—40th percentile of earnings of nonhourly full-time workers in the South Census region
- Alternative 4: Kantor short test method—$1,378 per week—Kantor long test level multiplied by 149 percent (the historical average relationship between the long and short test levels).

The Department considered using the 2004 methodology (the 20th percentile of full-time salaried white-collar workers in the lowest-wage Census region (currently the South) and in retail nationally), which is currently $822 per week ($42,744 per year). This is also the methodology that the Department used in the 2019 rule.[414] However, the salary level produced by the 2004 methodology is below the current equivalent long test salary level ($925 per week), which the Department considers to be the lower boundary for an appropriate salary level.

The Department also considered setting the standard salary level at the long test level ($925 per week or $48,100 per year). Doing so would ensure the initial screening function of the salary level by restoring overtime protections to those employees who were consistently excluded from the EAP exemption under each iteration of the regulations prior to 2019, either by the long test salary level itself, or under the 2004 rule salary level, which was set equivalent to the long test salary level.[415] However, as explained above, setting the standard salary level at the long test level would perpetuate the problems that have become evident under the 2004 and 2019 rules.

The Department also considered setting the standard salary level at the 40th earnings percentile of salaried white-collar workers in the lowest-wage Census Region (currently the South) ($1,145 per week or $59,540 per year). This salary level is roughly the midpoint between the long and short test salary level alternatives ($925 per week and $1,378 per week, respectively). However, the Department is concerned that this approach could be seen by courts as making salary level determinative of exemption status for too large a portion of employees, as this salary level would make the salary paid by the employer determinative of exemption status for roughly half (47%) of white-collar employees who earn between the long and short test salary levels. The Department is also concerned that this approach would generate the same concerns that led to the district court decision invalidating the 2016 rule (which adopted the same methodology).

Finally, the Department considered setting the standard salary level at the current equivalent of the short test salary level ($1,378 per week or $71,656 per year).[416] This would ensure that all employees who earn between the long and short test salary levels and perform substantial amounts of nonexempt work would be entitled to overtime compensation. However, by making exemption status for all employees who earn between the long and short test levels depend on the salary paid by the employer, this approach would prevent employers from being able to use the EAP exemption for employees earning between these salary levels who do not perform substantial amounts of nonexempt work and thus were historically exempt under the long test.

As described above, the Department proposes to update the HCE compensation level using earnings for the 85th percentile of all full-time salaried workers nationally, $143,988 per year. The Department also evaluated the following alternative methods to set the HCE compensation levels:

- HCE alternative 1: 2019 method[417]—$125,268 annually—80th percentile of earnings of nonhourly full-time workers nationally.
- HCE alternative 2: 2016 method[418]—$172,796 annually—90th percentile of earnings of nonhourly full-time workers nationally.

The Department believes that HCE alternative 1 would not produce a

[414] 84 FR 51260.

[415] *See* section IV.A.1.

[416] *See id.*

[417] *See* 81 FR 32429.

[418] *See* 84 FR 51250.

threshold high enough to reserve the HCE test for employees at the top of today's economic ladder and ensure that the HCE threshold continues to appropriately complement the minimal HCE duties test. The Department also considered setting the HCE threshold at the 90th percentile; however, the Department is concerned that the resulting level ($172,796) would restrict the use of the HCE exemption for employers in low-wage regions and industries. The Department believes its proposal to adjust the HCE total annual compensation threshold to reflect the 85th percentile of earnings of nonhourly full-time workers nationally strikes the appropriate balance and ensures that the HCE test continues to serve its intended function as a streamlined alternative for employees who are highly likely to pass the standard duties test.

TABLE 28—UPDATED STANDARD SALARY AND HCE COMPENSATION LEVELS AND ALTERNATIVES, AFFECTED EAP WORKERS, COSTS, AND TRANSFERS, YEAR 1

Alternative	Salary level	Affected EAP workers (1,000s)	Year 1 effects (millions)	
			Adj. & managerial costs	Transfers
Standard Salary Level (Weekly)				
Alt. #1: 2004/2019 method[a]	$822	825	$159.0	$170.8
Alt #2: Kantor long test[b]	925	1,773	367.4	456.8
Proposed rule: 35th percentile South[c]	1,059	3,399	709.8	980.7
Alt. #3: 2016 method—40th percentile South[c]	1,145	4,312	955.2	1,415.9
Alt. #4: Kantor short test[d]	1,378	7,640	1,728.3	3,136.6
HCE Compensation Level (Annually)				
HCE alt. #1: 2019 method—80th percentile[e]	125,268	166	43.1	151.6
Proposed rule: 85th percentile[e]	143,988	249	65.9	253.5
HCE alt. #2: 2016 method—90th percentile[e]	172,796	295	84.0	330.0

Note: Regulatory familiarization costs are excluded because they do not vary based on the selected values of the salary levels. Additionally, they cannot be disaggregated by exemption type (*i.e.,* standard versus HCE). The Department requests comment on how to refine familiarization cost estimates in a manner that distinguishes among regulatory alternatives.

[a] 20th percentile earnings of nonhourly full-time workers in the South Census region and retail industry (excludes workers not subject to the FLSA, not subject to the salary level test, and in agriculture or transportation). Pooled CPS data for 2020–2022 adjusted to reflect 2022.

[b] 10th percentile earnings of likely exempt workers. Pooled CPS data for 2020–2022 adjusted to reflect 2022.

[c] Designated percentile of earnings of nonhourly full-time workers in the South Census region (excludes workers not subject to the FLSA, not subject to the salary level test, and in agriculture or transportation). CPS 2022 data.

[d] Kantor short test is set as the long test level multiplied by 149 percent. This is the historical average relationship between the two levels.

[e] Designated percentile of earnings of nonhourly full-time workers nationally (excludes workers not subject to the FLSA, not subject to the salary level test, and in agriculture or transportation). CPS 2022 data.

9. Automatic Updates

Between updates to the standard salary and HCE compensation levels, nominal wages typically increase, resulting in an increase in the number of workers qualifying for the EAP exemption, even if there has been no change in their duties or real earnings. Thus, workers whom Congress intended to be covered by the minimum wage and overtime pay provisions of the FLSA may lose those protections. Automatically updating the salary and compensation levels allows these thresholds to keep pace with changes in earnings and continue to serve as an effective dividing line between potentially exempt and nonexempt workers. Furthermore, automatically updating the salary and compensation levels will provide employers more certainty in knowing that these levels will change by smaller amounts on a regular basis, rather than the more disruptive increases caused by much larger changes after longer, uncertain increments of time. This would allow firms to better predict short- and long-term costs and employment needs.

The Department is including in this proposed rule a mechanism for automatically updating the salary and compensation levels every 3 years to reflect current earnings. For purposes of this analysis, the Department assumes that the standard salary would be updated using the same methodology that the Department proposes to use to set the standard salary level: the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). Likewise, the Department assumes that the HCE annual compensation level would be updated using the same methodology the Department proposes to use to set this earnings threshold: the 85th percentile of weekly earnings of full-time salaried workers nationally.

As previously discussed, future automatic updates will set the earnings thresholds using the most recent 12 months of CPS data preceding the Department's notice to automatically update the thresholds. To estimate future thresholds in years when the salary and compensation levels will be updated, the Department used the historic geometric growth rate between 2011 and 2021 in (1) the 35th earnings percentile of full-time salaried workers in the South for the standard salary level and (2) the 85th earnings percentile of full-time salaried workers nationally for the HCE compensation level. For example, between 2011 and 2021, the annual growth rate in the 35th percentile of full-time salaried workers in the South has increased by 2.72 percent. To estimate the first automatic update salary level of $1,148, the Department multiplied $1,059 by 1.0272 to the power of three. Figure 5 shows the projected automatic update levels for the first 10 years. Note that these projections are illustrative estimates based on past wage growth; the actual level at the time of the update will depend on the wage growth that occurs between now and the update date. Figure 6 shows the standard salary levels in both nominal and 2022 dollars.

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Figure 5: Projected Future Salary and Compensation Levels, Nominal Dollars

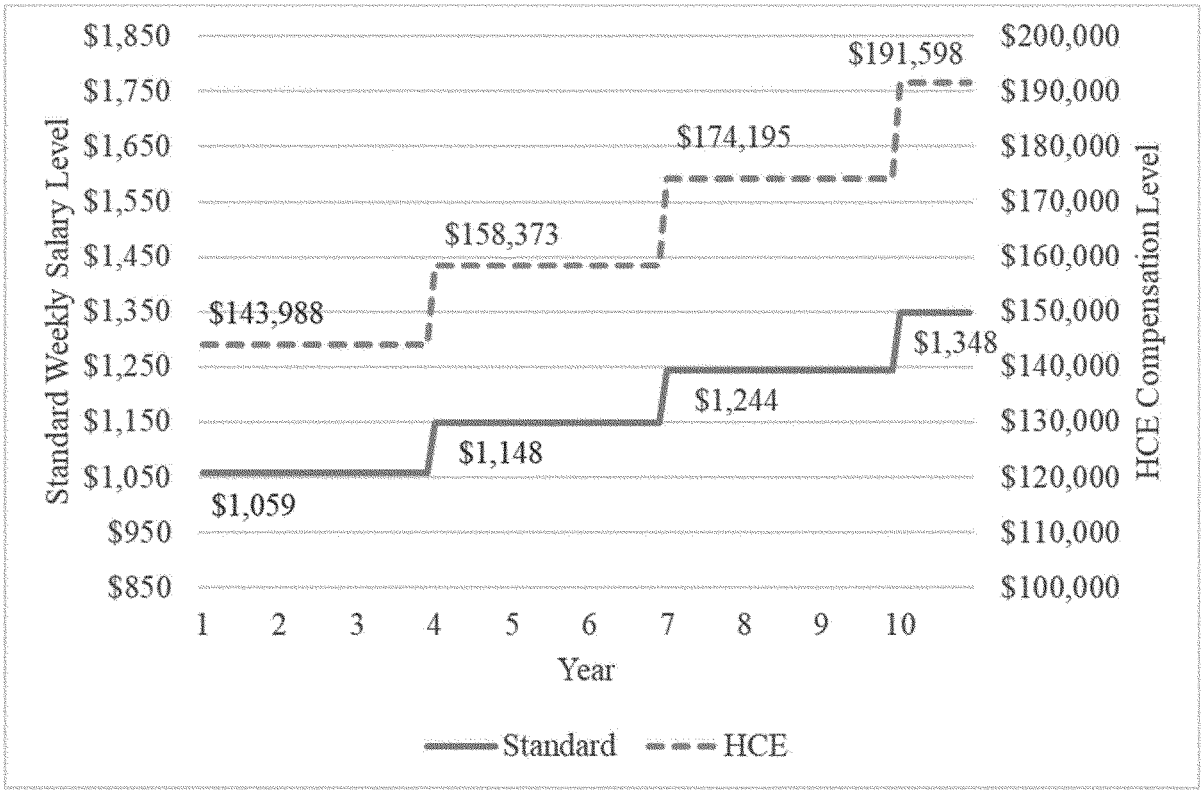
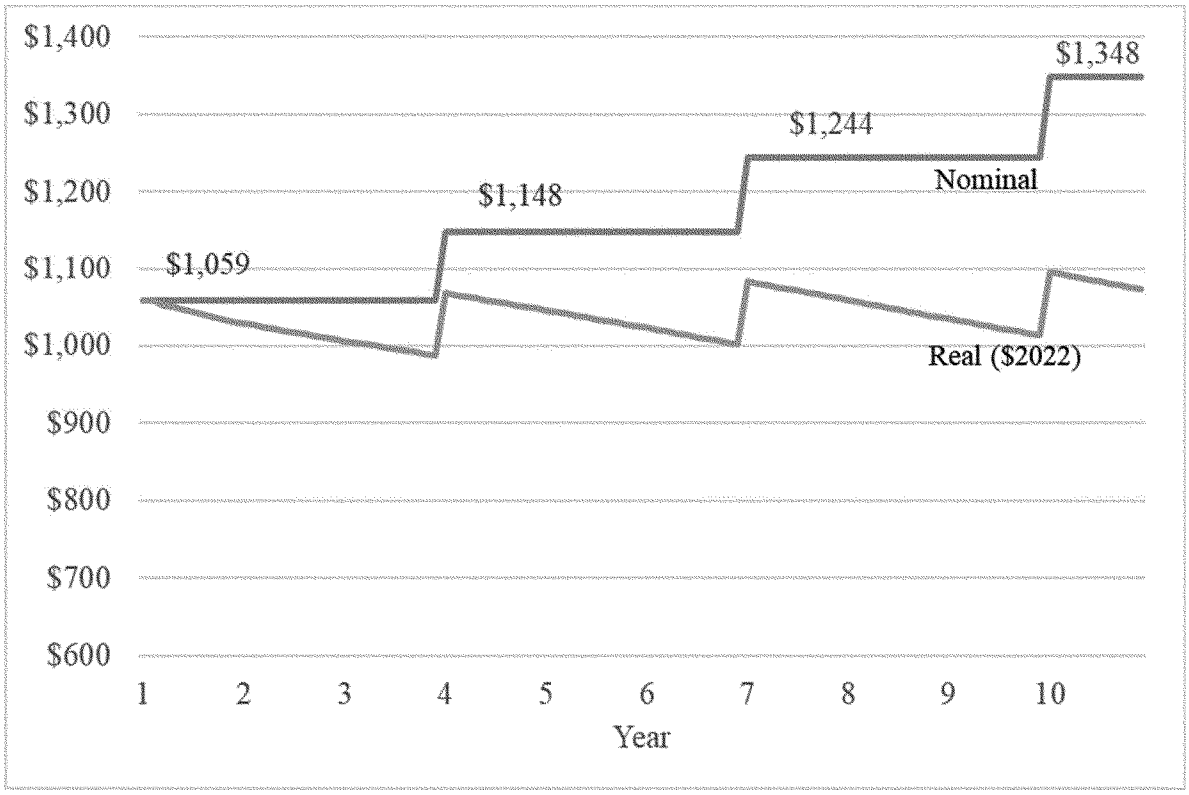


Figure 6: Projected Future Standard Salary Levels, Nominal and Real (Constant 2022 Dollars)



10. Projections

The Department estimated that in Year 1, 3.6 million EAP workers would be affected, with about 248,900 of these attributable to the revised HCE compensation level (Table 29). In Year 10, the number of affected EAP workers was estimated to equal 5.1 million with 768,700 attributable to the updated HCE compensation level. Average annualized costs are $664 million and transfers are $1.3 billion using a 7 percent real discount rate. These projections involved several steps.

1. Use past growth in the earnings distribution to estimate future salary and compensation levels (*see* section VII.C.9).

2. Predict workers' earnings, absent a change in the salary levels.

3. Compare workers' predicted earnings to the predicted salary and compensation levels to estimate affected workers.

4. Project future employment levels.

5. Estimate employer adjustments to hours and pay.

6. Calculate costs and transfers.

Figure 7: 10-Year Projected Number of Affected Workers

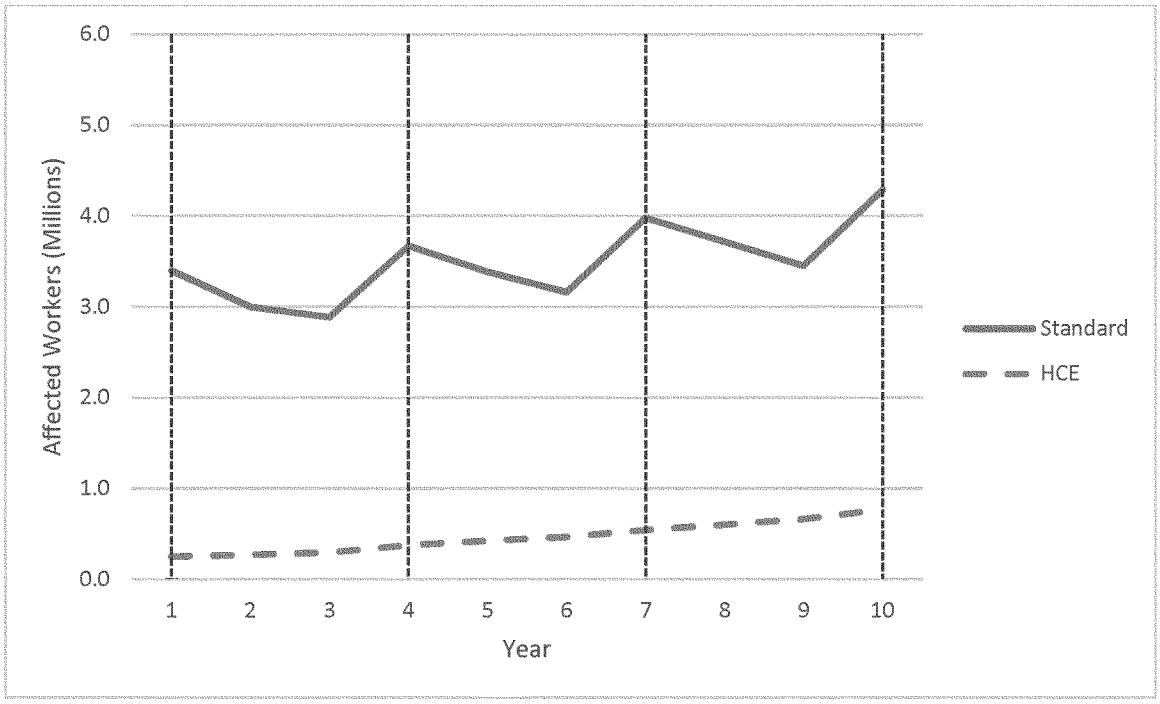


Figure 8: 10-Year Projected Costs and Transfers (Millions $2022)

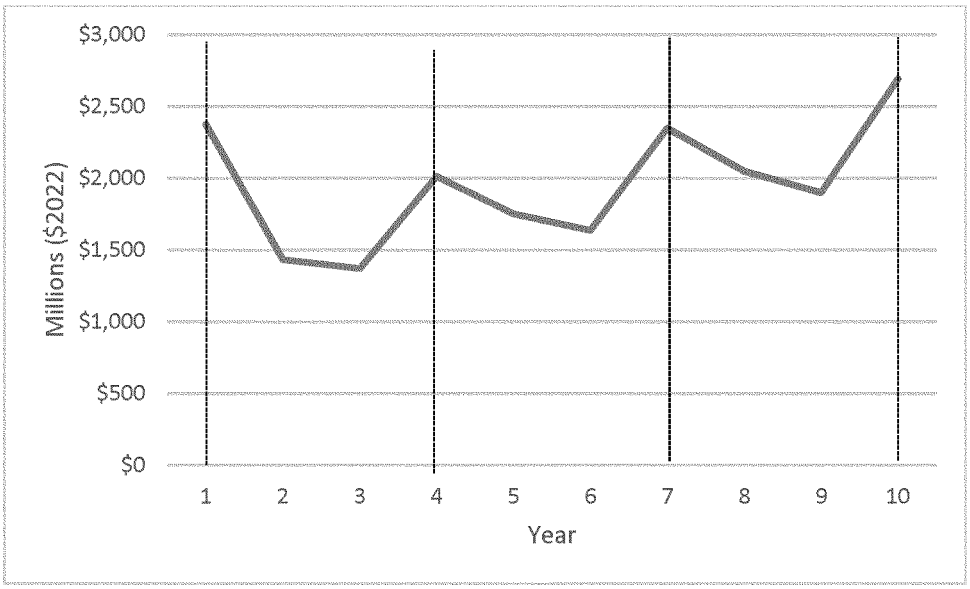


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TABLE 29—PROJECTED COSTS AND TRANSFERS, STANDARD SALARY AND HCE COMPENSATION LEVELS

Year	Affected EAP workers (millions)	Costs (millions $2022)				Transfers (millions $2022)		
		Regulatory familiarization [a]	Adjustment [a]	Managerial	Total	Due to MW	Due to OT	Total
Year 1	3.6	$427.2	$240.8	$534.9	$1,202.8	$48.6	$1,185.6	$1,234.2
Year 2	3.3	0.0	8.1	500.2	508.3	27.1	921.8	949.0
Year 3	3.2	0.0	7.7	470.5	478.2	23.6	891.5	915.1
Year 4	4.0	69.1	11.1	561.5	641.6	20.5	1,382.0	1,402.5
Year 5	3.8	0.0	8.2	534.0	542.2	23.2	1,212.2	1,235.4
Year 6	3.6	0.0	7.2	524.6	531.8	23.0	1,107.3	1,130.3
Year 7	4.5	67.1	12.2	620.1	699.3	23.6	1,661.2	1,684.8
Year 8	4.3	0.0	7.1	583.1	590.2	19.8	1,467.4	1,487.2
Year 9	4.1	0.0	7.9	566.5	574.4	20.1	1,332.6	1,352.8
Year 10	5.1	65.1	15.0	667.9	748.0	17.2	1,963.9	1,981.2
Annualized (3% real discount rate)		67.9	35.7	552.8	656.4	25.2	1,292.9	1,318.1
Annualized (7% real discount rate)		75.0	40.0	548.5	663.6	25.9	1,268.5	1,294.3

[a] Regulatory familiarization costs occur in years when the salary and compensation levels are updated. Adjustment costs occur in all years when there are newly affected workers.

The Department calculated workers' earnings in future years by applying the historical wage growth rate in the workers' industry-occupation to current earnings. The wage growth rate was calculated as the geometric growth rate in median wages using CPS MORG data for occupation-industry categories from 2010–2022.[419] The geometric growth rate is the constant annual growth rate that when compounded (applied to the first year's wage, then to the resulting second year's wage, etc.) yields the last historical year's wage. This rate only depends on the wage values in the first and last year.[420]

The geometric wage growth rates per industry-occupation combination were also calculated from the BLS' Occupational Employment and Wage Statistics (OEWS) survey. In occupation-industry categories where the CPS MORG data had an insufficient number of observations to reliably calculate median wages, the Department used the growth rate in median wages calculated from the OEWS data.[421] Any remaining occupation-industry combinations without sufficient data in either data source were assigned the median of the growth rates in median wages from the CPS MORG data.

The Department compared workers' counter-factual earnings (*i.e.,* absent the rulemaking) to the predicted salary levels. If the counter-factual earnings are below the relevant salary level (*i.e.,* standard or HCE) then the worker is considered affected. In other words, in each year affected EAP workers were identified as those who would be exempt absent the rule change (*e.g.,* would earn at least $684 if exempt under standard salary level) but have projected earnings in the future year that are less than the relevant salary level. The projected number of affected workers also includes workers who were not EAP exempt in the base year but would have become exempt in the absence of this proposed rule in Years 2 through 10. For example, a worker who passes the standard duties test may earn less than $684 in Year 1 but between $684 and the new salary level in subsequent years; such a worker will be counted as an affected worker in those subsequent years. Additionally, the number of affected workers is not limited to newly affected workers. Workers who are affected in a given year may remain affected in subsequent years (*e.g.,* because they earn between $684 and $1,059 in years 1, 2, and 3), and continue to be counted as affected.

The projected number of affected workers also accounts for anticipated employment growth. Employment growth was estimated as the geometric annual growth rate based on the 10-year employment projection from BLS' National Employment Matrix (NEM) for 2021 to 2031 within an occupation-industry category.[422] [423] The Department applied these growth rates to the sample weights of the workers to estimate increased employment levels over time. This is because the Department cannot introduce new observations to the CPS MORG data to represent the newly employed.

For workers newly affected in Year 2 through Year 10, employers' wage and hour adjustments due to the rulemaking are generally estimated as described in section VII.C.4. The only difference is the hours adjustment now uses a long-run elasticity of labor demand of −0.4.[424] Employer adjustments are made in the first year the worker is affected and then applied to all future years in which the worker continues to be affected (unless the worker switches to a Type 4 worker). Workers' earnings in predicted years are earnings post employer adjustments, with overtime pay, and with ongoing wage growth based on historical growth rates (as described above).

The Department quantified three types of direct employer costs in the 10-

[419] To maximize the number of observations used in calculating the median wage for each occupation-industry category, 3 years of data were pooled for each of the endpoint years. Specifically, data from 2010, 2011, and 2012 (converted to 2011 dollars) were used to calculate the 2011 median wage and data from 2020, 2021, and 2022 (converted to 2021 dollars) were used to calculate the 2021 median wage.

[420] The geometric growth rate may be a flawed measure if either or both of the endpoint years were atypical; however, in this instance these values seem typical. An alternative method would be to use the time series of median wage data to estimate the linear trend in the values and continue this to project future median wages. This method may be preferred if either or both of the endpoint years are outliers, since the trend will be less influenced by them. However, the linear trend may be flawed if there are outliers in the interim years. The Department chose to use the geometric mean because individual year fluctuations are difficult to predict and applying the geometric growth rate to each year provides a better estimate of the long-term growth in wages.

[421] To lessen small sample bias in the estimation of the median growth rate, this rate was only calculated using CPS MORG data when these data contained at least 10 observations in each time period.

[422] Bureau of Labor Statistics, Employment Projections Program. 2021–31 National Employment Matrix. *https://www.bls.gov/emp/ind-occ-matrix/matrix.xlsx.*

[423] An alternative method is to spread the total change in the level of employment over the ten years evenly (constant change in the number employed). The Department believes that on average employment is more likely to grow at a constant percentage rate rather than by a constant level (a decreasing percentage rate).

[424] Based on the Department's analysis of the following paper:

Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

year projections: (1) regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. Section VII.C.3. provides details on the methodology for estimating these costs. This section only discusses the aspects specific to projections. Projected costs and transfers were deflated to 2022 dollars using the Congressional Budget Office's projections for the CPI–U.[425]

Regulatory familiarization costs occur in years when the salary and compensation levels are updated. Thus, in addition to Year 1, some regulatory familiarization costs are expected to occur in Year 4, Year 7, and Year 10. The Department assumed 10 minutes per establishment for time to access and read the published notice in the **Federal Register** with the updated standard salary level and HCE compensation level. This time estimate is low because the majority of establishments will not have newly affected workers. The time estimate has been increased from 5 minutes in the 2016 rulemaking. In each of these 3 years regulatory familiarization costs are between $65 and $70 million. Although start-up firms must become familiar with the FLSA, the difference between the time necessary for familiarization with the current part 541 exemptions and those exemptions as modified by this rulemaking is essentially zero. Therefore, projected regulatory familiarization costs for new entrants over the next 9 years are zero (although these new entrants will incur regulatory familiarization costs in years when the salary and compensation levels are updated).

Adjustment costs are a function of the number of newly affected EAP workers and would occur in any year in which workers are newly affected. Adjustment costs would be largest in Year 1, of moderate size in automatic update years, and smaller in other years. Management costs would recur each year for all affected EAP workers whose hours are adjusted. Therefore, managerial costs increase in automatic update years and then modestly decrease between updates since earnings growth will cause some workers to no longer be affected in those years.

The Department projected transfers from employers to employees due to the minimum wage provision and the overtime pay provision. Transfers to workers from employers due to the minimum wage provision would decline from $48.6 million in Year 1 to $17.2 million in Year 10 as increased earnings over time move workers' regular rates of pay above the minimum wage.[426] Transfers due to overtime pay should grow slightly over time because the number of affected workers would increase, although transfers fall in years between automatic updates. Transfers to workers from employers due to the overtime pay provision would increase from $1.2 billion in Year 1 to $2.0 billion in Year 10.

The Department compared projected impacts with and without automatic updating (Table 30). Projections without automatic updating are shown so impacts of the initial increase and subsequent increases can be disaggregated. With triennial automatic updating, the number of affected EAP workers would increase from 3.6 million to 5.1 million over 10 years. Conversely, in the absence of automatic updating, the number of affected EAP workers is projected to decline from 3.6 million in Year 1 to 2.3 million in Year 10. As shown in Figure 9, the number of affected workers decreases from year to year between automatic updates as the real value of the salary and compensation levels decrease, and then increases in update years.

Regarding costs, regulatory familiarization costs are lower without automatic updating because, in the absence of automatic updating, employers would not need to familiarize themselves with updated salary and compensation levels every 3 years. Adjustment costs and managerial costs are a function of the number of affected EAP workers and so will be higher with automatic updating. Average annualized direct costs would be $663.6 million with automatic updating and $520.4 million without automatic updating. Transfers are also a function of the number of affected workers and hence are lower without automatic updating. Average annualized transfers would be $1.3 billion with automatic updating and $868.2 million without automatic updating. Table 30 shows aggregated costs and transfers over the 10-year horizon.

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[425] Congressional Budget Office. 2023. The Budget and Economic Outlook: 2023 To 2033. *See https://www.cbo.gov/system/files/2023-02/58848-Outlook.pdf.*

[426] State minimum wages above the Federal level as of January 1, 2022 were incorporated and used for projected years. Increases in minimum wages were not projected. If state or Federal minimum wages increase over the next 10 years, then estimated projected minimum wage transfers would be underestimated.

Figure 9: 10-Year Projected Number of Affected Workers, with and without Automatic Updating

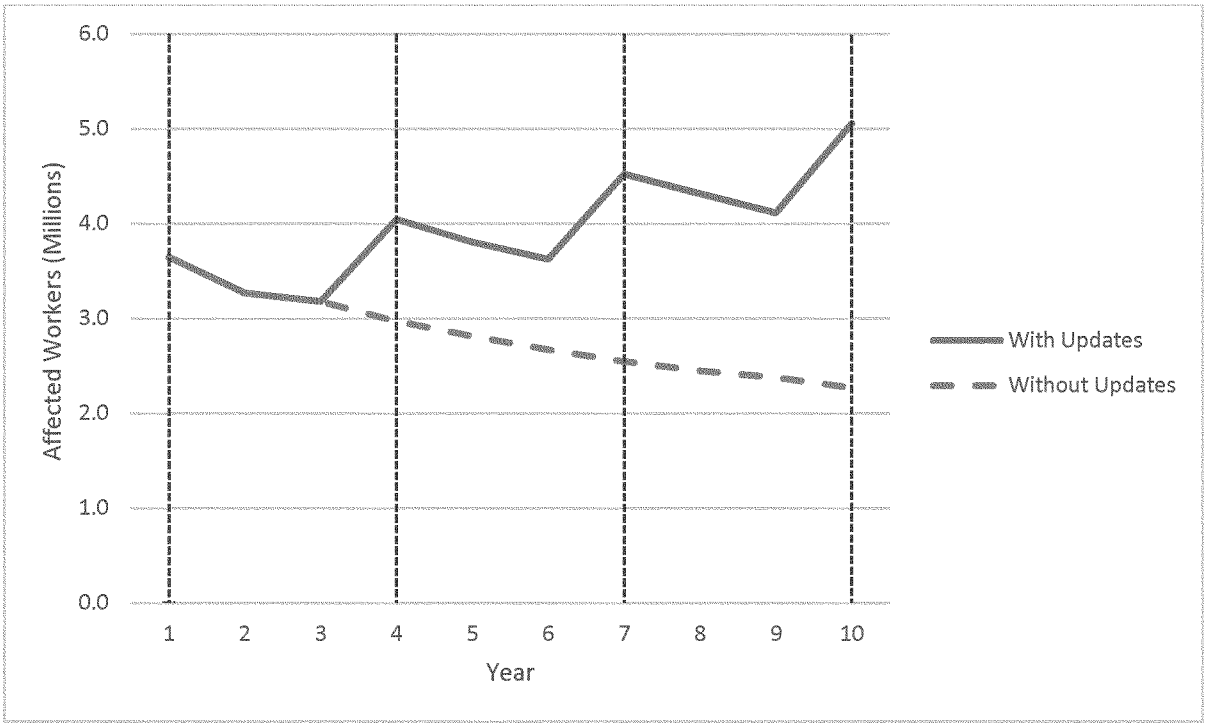

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TABLE 30—COMPARISON OF PROJECTED COSTS AND TRANSFERS WITH AND WITHOUT AUTOMATIC UPDATING

Year	Affected EAP workers (millions)		Costs (millions $2022)		Transfers (millions $2022)	
	With updates	Without updates	With updates	Without updates	With updates	Without updates
Year 1	3.6	3.6	$1,202.8	$1,202.8	$1,234.2	$1,234.2
Year 2	3.3	3.3	508.3	508.3	949.0	949.0
Year 3	3.2	3.2	478.2	478.2	915.1	915.1
Year 4	4.0	3.0	641.6	442.4	1,402.5	860.7
Year 5	3.8	2.8	542.2	421.7	1,235.4	823.4
Year 6	3.6	2.7	531.8	400.5	1,130.3	800.9
Year 7	4.5	2.5	699.3	374.3	1,684.8	769.9
Year 8	4.3	2.4	590.2	357.6	1,487.2	711.3
Year 9	4.1	2.4	574.4	343.4	1,352.8	677.9
Year 10	5.1	2.3	748.0	322.5	1,981.2	646.8
Annualized (3% real discount rate)			656.4	500.2	1,318.1	851.6
Annualized (7% real discount rate)			663.6	520.4	1,294.3	868.2

VIII. Initial Regulatory Flexibility Analysis (IRFA)

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities. The Department has determined that this rulemaking is economically significant. This section (1) provides an overview of the objectives of this proposed rule; (2) estimates the number of affected small entities and employees; (3) discusses reporting, recordkeeping, and other compliance requirements; (4) presents the steps the Department took to minimize the significant economic impact on small entities; and (5) declares that it is unaware of any relevant Federal rules that may duplicate, overlap, or conflict with this proposed rule.

A. Objectives of, and Need for, the Proposed Rule

The FLSA requires covered employers to: (1) pay employees who are covered and not exempt from the Act's requirements not less than the Federal

minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment. The FLSA provides exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional employees, as those terms are ''defined and delimited'' by the Department.[427] The Department's regulations implementing this white-collar exemption are codified at 29 CFR part 541.

To qualify for the EAP exemption under the Department's regulations, the employee generally must meet three criteria: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet a minimum specified amount (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test). In 2004, the Department revised its regulations to include a highly compensated employee test with a higher salary threshold and a minimal duties test.[428] The Department has periodically updated the regulations governing the white-collar exemptions since the FLSA's enactment in 1938. Most recently, the 2019 rule updated the standard salary level test to $684 per week and the HCE compensation level to $107,432 annually.

The goal of this rulemaking is not only to update the single standard salary level to account for earnings growth since the 2019 rule, but also to build on lessons learned in the Department's most recent rulemakings to more effectively define and delimit employees working in a bona fide EAP capacity. As explained in greater detail in sections III and IV.A., above, setting the standard salary level at or below the long test salary level, as the 2004 and 2019 rules did, results in the exemption of lower-salaried employees who traditionally were entitled to overtime protection under the long test either because of their low salary or because they perform large amounts of nonexempt work, in effect significantly broadening the exemption compared to the two-test system. Setting the salary level at the lower end of the historic range of short test salary levels, as the 2016 rule did, would have restored overtime protections to those employees who perform substantial amounts of nonexempt work and earned between the long test salary level and the low end of the short test salary range. However, it would also have resulted in denying employers the use of the exemption for lower-salaried employees who traditionally were not entitled to overtime compensation under the long test, which raised concerns that the Department was in effect narrowing the exemption. By setting a salary level above what would currently be the equivalent of the long test salary level, the proposal would restore the right to overtime pay for salaried white-collar employees who prior to the 2019 rule were always considered nonexempt if they earned below the long test (or long test-equivalent) salary level and ensure that fewer lower paid white-collar employees who perform significant amounts of nonexempt work are included in the exemption. At the same time, by setting it below what would currently be the equivalent of the short test salary level, the proposal would allow employers to continue to use the exemption for many lower paid white-collar employees who were made exempt under the 2004 standard duties test. As such, the proposed salary level would also more reasonably distribute between employees and their employers what the Department now understands to be the impact of the shift from a two-test to a one-test system on employees earning between the long and short test salary levels.

As the Department has previously noted, the amount paid to an employee is ''a valuable and easily applied index to the 'bona fide' character of the employment for which the exemption is claimed,'' as well as the ''principal[ ]'' ''delimiting requirement'' ''prevent[ing] abuse'' of the exemption.[429] Additionally, the salary level test facilitates application of the exemption by saving employees and employers from having to apply the more time-consuming duties analysis to a large group of employees who will not pass it. For these reasons, the salary level test has been a key part of how the Department defines and delimits the EAP exemption since the beginning of its rulemaking on the EAP exemption.[430] At the same time, the salary test's role in defining and delimiting the scope of the EAP exemption must allow for appropriate examination of employee duties.[431] Under the Department's proposal, duties would continue to determine the exemption status for most salaried white-collar employees, addressing the legal concerns that have been raised about excluding from the EAP exemption too many white-collar employees solely based on their salary level.

The Department also proposes to update the HCE total annual compensation requirement to the annualized weekly earnings for the 85th percentile of full-time salaried workers nationally ($143,988 in 2022). Though not as high a percentile as the HCE threshold initially adopted in 2004, which covered 93.7 percent of all full-time salaried workers,[432] the Department's proposed increase to the HCE threshold would ensure it continues to serve its intended function, because the HCE total annual compensation level would be high enough to exclude all but those employees at the very top of the economic ladder.

The Department is also proposing to apply the standard salary level to all territories that are subject to the Federal minimum wage, and to update the special salary levels for American Samoa and the motion picture industry in relation to the new standard salary level. Having not increased these levels since 2004, there is a need to increase the salary levels in U.S. territories, particularly for employees in those territories that are subject to the Federal minimum wage.

In its three most recent part 541 rulemakings, the Department has expressed its commitment to keeping the earnings thresholds up to date to ensure that they remain effective in helping differentiate between exempt and nonexempt employees. Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide EAP employees. This rulemaking is motivated in part by the need to keep the part 541 earnings thresholds up to date. Based on its long experience with updating the salary levels, the Department has determined that adopting a regulatory provision for automatically updating the salary levels, with an exception for pausing future updates under certain conditions, is the most viable and efficient way to ensure the EAP exemption earnings thresholds keep pace with changes in employee

[427] 29 U.S.C. 213(a)(1).

[428] § 541.601.

[429] Stein Report at 19, 24; *see also* 81 FR 32422.

[430] *See* 84 FR 51237.

[431] *See id.* at 51238.

[432] *See* 69 FR 22169 (Table 3).

pay and thus remain effective in helping determine exemption status. Accordingly, the Department is including in this proposed rule a mechanism for automatically updating the salary and compensation levels every 3 years to reflect current earnings. As explained in greater detail in section IV.D., employees and employers alike would benefit from the certainty and stability of regularly scheduled updates using a set methodology.

B. Number of Affected Small Entities

1. Definition of Small Entity

The RFA defines a ''small entity'' as (1) a small not-for-profit organization, (2) a small governmental jurisdiction, or (3) a small business. The Department used the entity size standards defined by SBA and in effect as of 2019, to classify entities as small or large.[433] The most recent size standards were released in 2022 and use the 2022 NAICS. However, because the data used by the Department to estimate the number of small entities uses the 2017 NAICS, the Department used the 2019 standards instead of the 2022 standards.[434]

SBA establishes standards for 6-digit NAICS industry codes, and standard size cutoffs are typically based on either the average number of employees, or average annual receipts. However, some exceptions exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets and small governmental jurisdictions are defined as areas with populations of less than 50,000.[435]

2. Number of Small Entities and Employees

The primary data source used to estimate the number of small entities and employment in these entities is the Statistics of U.S. Businesses (SUSB). Alternative sources were used for industries with asset thresholds (credit unions,[436] commercial banks and savings institutions,[437] agriculture [438]), and public administration.[439] The Department used 2017 data, when possible, to align with the use of 2017 SUSB data. Private households are excluded from the analysis due to lack of data.

For each industry, the SUSB 2017 tabulates employment, establishment, and firm counts by both enterprise employment size (*e.g.,* 0–4 employees, 5–9 employees) and receipt size (*e.g.,* less than $100,000, $100,000-$499,999).[440] Although 2020 SUSB data are available, these data do not disaggregate entities by revenue sizes. The Department combined these data with the SBA size standards to estimate the proportion of firms and establishments in each industry that are considered small, and the proportion of workers employed by a small entity. The Department classified all firms and establishments and their employees in categories below the SBA cutoff as small.[441] If a cutoff fell in the middle of a category, the Department assumed a uniform distribution of employees across that bracket to determine what proportion of establishments should be classified as small.[442] The estimated share of establishments that were small in 2017 was applied to the more recent 2020 SUSB data on the number of small establishments to determine the number of small entities.[443]

The Department also estimated the number of small establishments and their employees by employer type (nonprofit, for-profit, government). This calculation is similar to the calculation of the number of establishments by industry but with different data. Instead of using data by industry, the Department used SUSB data by Legal Form of Organization for nonprofit and for-profit establishments. The estimated share of establishments that were calculated as small with the 2017 data was then applied to the 2020 SUSB counts. For governments, the Department used the number of governments reported in the 2017 Census of Governments.[444]

Table 31 presents the estimated number of establishments/governments and small establishments/governments in the U.S. (hereafter, referred to as ''entities'').[445] The numbers in the following tables are for Year 1; projected impacts are considered later. The Department found that of the 8.1 million entities, 80 percent (6.5 million) are small by SBA standards. These small entities employ 53.6 million workers, about 37 percent of workers (excluding self-employed, unpaid workers, and members of the armed forces). They also account for roughly 35 percent of total payroll ($3.5 trillion of $10.1 trillion).[446]

Although the Department used 6-digit NAICS to determine the number of small entities and the associated number of employees, the following tables aggregate findings to 27 industry categories. This was the most detailed level available while maintaining adequate sample sizes.[447] The Department started with the 51-industry breakdown and aggregated where necessary to obtain adequate sample sizes.

[433] *See https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.*

[434] The SBA size standard changes in 2022 primarily adjusted the standards to the 2022 NAICS, these changes were not substantive. *https://www.govinfo.gov/content/pkg/FR-2022-09-29/pdf/2022-20513.pdf.*

[435] *See http://www.sba.gov/advocacy/regulatory-flexibility-act* for details.

[436] National Credit Union Association. (2018). 2018 Year End Statistics for Federally Insured Credit Unions. Available at: *https://www.cuna.org/advocacy/credit-union---economic-data/data---statistics/credit-union-profile-reports.html.*

[437] Federal Depository Insurance Corporation. (2018). Quarterly Financial Reports-Statistics On Depository Institutions (SDI). Available at: *https://www.fdic.gov/foia/ris/id-sdi/index.html. Data are from 12/31/17.*

[438] United States Department of Agriculture. (2019). 2017 Census of Agriculture: United States Summary and State Data: Volume 1, Geographic Area Series, Part 51. Available at: *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[439] Census of Governments. 2017. Available at: *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.*

[440] The SUSB defines employment as of March 12th.

[441] The Department's estimates of the numbers of affected small entities and affected workers who are employees of small entities includes entities not covered by the FLSA and thus are likely overestimates. The Department had no credible way to estimate which enterprises with annual revenues below $500,000 also did not engage in interstate commerce and hence are not subject to the FLSA.

[442] The Department assumed that the small entity share of credit card issuing and other depository credit intermediation institutions (which were not separately represented in FDIC asset data), is similar to that of commercial banking and savings institutions.

[443] Statistics of U.S. Businesses 2020, *https://www.census.gov/programs-surveys/susb.html.*

[444] Census of Governments 2017. Available at *https://www.census.gov/programs-surveys/cog.html.*

[445] SUSB reports data by ''enterprise'' size designations (a business organization consisting of one or more domestic establishments that were specified under common ownership or control). However, the number of enterprises is not reported for the size designations. Instead, SUSB reports the number of ''establishments'' (individual plants, regardless of ownership) and ''firms'' (a collection of establishments with a single owner within a given state and industry) associated with enterprises size categories. Therefore, numbers in this analysis are for the number of establishments associated with small enterprises, which may exceed the number of small enterprises. The Department based the analysis on the number of establishments rather than firms for a more conservative estimate (potential overestimate) of the number of small businesses.

[446] Since information is not available on employer size in the CPS MORG, respondents were randomly assigned as working in a small business based on the SUSB probability of employment in a small business by detailed Census industry. Annual payroll was estimated based on the CPS weekly earnings of workers by industry size.

[447] The Department required at least 15 affected workers (*i.e.,* observations) in small entities in Year 1.

TABLE 31—NUMBER OF ENTITIES AND EMPLOYEES BY SBA SIZE STANDARDS, BY INDUSTRY AND EMPLOYER TYPE

Industry/employer type	Entities (1,000s)		Workers (1,000s) [a]		Annual payroll (billions)	
	Total	Small	Total	Small business employed	Total	Small
Total	8,090.3	6,459.6	143,444.4	53,585.6	$10,054.5	$3,535.6
Industry [b]						
Agriculture, forestry, fishing, and hunting	22.7	18.9	1,364.4	724.4	62.7	34.6
Mining	23.9	19.2	620.8	285.4	66.0	30.6
Construction	753.3	726.7	8,957.5	5,415.9	608.9	369.2
Manufacturing—durable goods	175.2	160.4	9,694.4	4,506.7	785.7	350.4
Manufacturing—non-durable goods	108.3	96.4	5,522.6	2,649.3	416.7	187.9
Wholesale trade	391.1	301.5	3,231.4	1,354.8	249.6	101.8
Retail trade	1,036.8	661.3	15,430.8	4,804.9	769.4	258.8
Transportation and warehousing	257.8	203.2	7,152.0	1,746.5	439.5	106.7
Utilities	19.5	7.8	1,455.4	310.6	137.3	28.3
Information	160.9	93.2	2,570.4	691.7	254.6	67.5
Finance	295.5	132.0	4,865.2	902.9	514.9	97.1
Insurance	181.3	139.7	2,765.4	585.4	$245.3	$51.6
Real estate and rental and leasing	437.7	339.0	2,308.4	1,223.1	173.0	92.7
Professional and technical services	943.2	841.5	11,575.6	5,104.8	1,291.5	555.8
Management, administrative and waste management services	483.5	397.8	5,377.8	2,338.5	284.0	111.6
Educational services	110.1	97.6	14,093.6	3,546.7	955.6	223.2
Hospitals	7.1	1.4	7,820.6	282.1	632.3	21.2
Health care services, except hospitals	736.1	567.4	10,187.6	4,466.2	631.5	271.6
Social assistance	185.0	149.8	2,938.8	1,590.5	138.0	71.4
Arts, entertainment, and recreation	151.9	138.4	2,381.3	1,185.8	120.8	59.7
Accommodation	69.2	58.1	1,048.8	408.3	49.3	19.2
Food services and drinking places	664.7	516.6	8,222.4	4,697.9	263.8	151.3
Repair and maintenance	216.1	198.6	1,655.6	1,171.9	90.0	63.3
Personal and laundry services	248.6	221.5	1,520.5	1,184.7	62.4	47.7
Membership associations and organizations	306.6	294.4	2,019.0	1,399.8	138.0	93.6
Public administration [c]	90.1	65.7	8,032.3	1,006.6	654.4	68.5
Employer Type						
Nonprofit, private	596.3	504.5	10,318.0	3,876.8	741.4	249.6
For profit, private	7,403.9	5,874.3	110,919.2	46,388.3	7,688.9	3,072.6
Government (state and local)	90.1	65.7	18,041.2	3,320.6	1,241.3	213.3

Note: Establishment data are from SUSB 2020; worker and payroll data from pooled CPS MORG data for 2020–2022 adjusted to reflect 2022.
[a] Excludes the self-employed, unpaid workers, and workers in private households.
[b] Summation across industries may not add to the totals reported due to suppressed values and some entities not reporting an industry.
[c] Entity number represents the total number of governments, including state and local. Data from Census of Governments, 2017.

Estimates are not limited to entities subject to the FLSA because the Department cannot estimate which enterprises do not meet the enterprise coverage requirements because of data limitations. Although not excluding such entities and associated workers only affects a small percentage of workers generally, it may have a larger effect (and result in a larger overestimate) for non-profits, because revenue from charitable activities is not included when determining enterprise coverage.

3. Number of Affected Small Entities and Employees

The calculation of the number of affected EAP workers was explained in detail in section VII.B. Here, the Department focuses on how these workers were allocated to either small or large entities. To estimate the probability that an exempt EAP worker in the CPS data is employed by a small entity, the Department assumed this probability is equal to the proportion of all workers employed by small entities in the corresponding industry. That is, if 50 percent of workers in an industry are employed in small entities, then on average small entities are expected to employ one out of every two exempt EAP workers in this industry.[448] The Department applied these probabilities to the population of exempt EAP workers to find the number of workers (total exempt EAP workers and total affected by the rule) that small entities employ. No data are available to determine whether small businesses (or small businesses in specific industries) are more or less likely than non-small businesses to employ exempt EAP workers or affected EAP workers. Therefore, the best assumption available is to assign the same rates to all small and non-small businesses.[449] [450]

The Department estimated that small entities employ 1.3 million of the 3.6 million affected workers (36.8 percent) (Table 32). This composes 2.5 percent of the 53.6 million workers that small entities employ. The sectors with the highest total number of affected workers employed by small entities are professional and technical services (238,000); health care services, except hospitals (120,000); and retail trade (103,000). The sectors with the largest percent of workers employed by small entities who are affected include:

[448] The Department used CPS microdata to estimate the number of affected workers. This was done individually for each observation in the relevant sample by randomly assigning them a small business status based on the best available estimate of the probability of a worker to be employed in a small business in their respective industry.

[449] A strand of literature indicates that small businesses tend to pay lower wages than larger businesses. This may imply that workers in small businesses are more likely to be affected than workers in large businesses; however, the literature does not make clear what the appropriate alternative rate for small businesses should be.

[450] Workers are designated as employed in a small business based on their industry of employment. The share of workers considered small in nonprofit, for profit, and government entities is therefore the weighted average of the shares for the industries that compose these categories.

insurance (6.8 percent); finance (5.4 percent); and information (4.9 percent).

TABLE 32—NUMBER OF AFFECTED WORKERS EMPLOYED BY SMALL ENTITIES, BY INDUSTRY AND EMPLOYER TYPE

Industry	Workers (1,000s)		Affected workers (1,000s) [a]	
	Total	Small business employed	Total	Small business employed
Total	143,444.4	53,585.6	3,648.3	1,341.1
Industry				
Agriculture, forestry, fishing, and hunting	1,364.4	724.4	12.3	6.8
Mining	620.8	285.4	12.5	5.1
Construction	8,957.5	5,415.9	154.4	93.4
Manufacturing—durable goods	9,694.4	4,506.7	203.8	94.0
Manufacturing—non-durable goods	5,522.6	2,649.3	113.3	53.6
Wholesale trade	3,231.4	1,354.8	103.9	50.4
Retail trade	15,430.8	4,804.9	308.7	103.1
Transportation and warehousing	7,152.0	1,746.5	87.8	29.1
Utilities	1,455.4	310.6	31.1	6.0
Information	2,570.4	691.7	118.6	33.9
Finance	4,865.2	902.9	241.6	49.1
Insurance	2,765.4	585.4	170.7	39.9
Real estate and rental and leasing	2,308.4	1,223.1	68.3	34.7
Professional and technical services	11,575.6	5,104.8	572.2	238.2
Management, administrative and waste management services	5,377.8	2,338.5	115.2	42.1
Educational services	14,093.6	3,546.7	201.8	44.2
Hospitals	7,820.6	282.1	212.6	5.6
Health care services, except hospitals	10,187.6	4,466.2	290.8	120.4
Social assistance	2,938.8	1,590.5	123.5	72.3
Arts, entertainment, and recreation	2,381.3	1,185.8	92.9	48.6
Accommodation	1,048.8	408.3	15.5	6.1
Food services and drinking places	8,222.4	4,697.9	75.1	42.4
Repair and maintenance	1,655.6	1,171.9	19.8	14.2
Personal and laundry services	1,520.5	1,184.7	19.6	12.5
Membership associations and organizations	2,019.0	1,399.8	99.4	66.0
Public administration	8,032.3	1,006.6	182.4	29.5
Employer Type				
Nonprofit, private	10,318.0	3,876.8	381.5	162.1
For profit, private	110,919.2	46,388.3	2,868.4	1,119.4
Government (state and local)	18,041.2	3,320.6	398.3	59.7

Note: Worker data are from pooled CPS MORG data for 2020–2022 adjusted to reflect 2022.

[a] Estimation of affected workers employed by small entities was done at the most detailed industry level available. Therefore, at the more aggregated industry level shown in this table, the ratio of small business employed to total employed does not equal the ratio of affected small business employed to total affected for each industry, nor does it equal the ratio for the national total because relative industry size, employment, and small business employment differs from industry to industry.

Because no information is available on how affected workers would be distributed among small entities, the Department estimated a range of effects. At one end of this range, the Department assumed that each small entity employs no more than one affected worker, meaning that at most 1.3 million of the 6.5 million small entities will employ an affected worker. Thus, these assumptions provide an upper-end estimate of the number of affected small entities. (However, it provides a lower-end estimate of the effect per small entity because costs are spread over a larger number of entities; the impacts experienced by an entity would increase as the share of its workers that are affected increases.) For the purpose of estimating a lower-range number of affected small entities, the Department used the average size of a small entity as the typical size of an affected small entity, and assumed all workers are affected. This can be considered an approximation of all employees at an entity affected.[451] The average number of employees in a small entity is the number of workers that small entities employ divided by the total number of small establishments in that industry. The number of affected employees at small businesses is then divided by this average number of employees to calculate 179,700 affected small entities.

Table 33 summarizes the estimated number of affected workers that small entities employ and the expected range for the number of affected small entities by industry. The Department estimated that the rule would affect 1.3 million workers who are employed by somewhere between 179,700 and 1.3

[451] This is not the true lower bound estimate of the number of affected entities. Strictly speaking, a true lower bound estimate of the number of affected small entities would be calculated by assuming all employees in the largest small entity are affected. For example, if the SBA standard is that entities with 500 employees are ''small,'' and 1,350 affected workers are employed by small entities in that industry, then the smallest number of entities that could be affected in that industry (the true lower bound) would be three. However, because such an outcome appears implausible, the Department determined a more reasonable lower estimate would be based on average establishment size.

million small entities; this comprises from 2.8 percent to 20.8 percent of all small entities. It also means that from 5.1 million to 6.3 million small entities would incur no more than minimal regulatory familiarization costs (*i.e.,* 6.5 million minus 1.3 million equals 5.1 million; 6.5 million minus 179,700 equals 6.3 million, using rounded values). The table also presents the average number of affected employees per establishment using the method in which all employees at the establishment would be affected. For the other method, by definition, there would always be one affected employee per establishment. Also displayed is the average payroll per small establishment by industry (based on both affected and non-affected small entities), calculated by dividing total payroll of small businesses by the number of small businesses (Table 31) (applicable to both methods).

TABLE 33—NUMBER OF SMALL AFFECTED ENTITIES AND EMPLOYEES BY INDUSTRY AND EMPLOYER TYPE

Industry	Affected workers in small entities (1,000s)	Number of small affected entities (1,000s) [a]		Per entity	
		One affected employee per entity [b]	All employees at entity affected [c]	Affected employees [a]	Average annual payroll ($1,000s)
Total	1,341.1	1,341.1	179.7	7.5	$547.3
Industry					
Agriculture, forestry, fishing, and hunting	6.8	6.8	0.2	38.4	1,833.6
Mining	5.1	5.1	0.3	14.9	1,594.3
Construction	93.4	93.4	12.5	7.5	508.1
Manufacturing—durable goods	94.0	94.0	3.3	28.1	2,184.4
Manufacturing—non-durable goods	53.6	53.6	2.0	27.5	1,949.1
Wholesale trade	50.4	50.4	11.2	4.5	337.7
Retail trade	103.1	103.1	14.2	7.3	391.3
Transportation and warehousing	29.1	29.1	3.4	8.6	525.0
Utilities	6.0	6.0	0.2	39.9	3,634.2
Information	33.9	33.9	4.6	7.4	723.9
Finance	49.1	49.1	7.2	6.8	735.5
Insurance	39.9	39.9	9.5	4.2	369.4
Real estate and rental and leasing	34.7	34.7	9.6	3.6	273.6
Professional and technical services	238.2	238.2	39.3	6.1	660.5
Management, administrative and waste management services	42.1	42.1	7.2	5.9	280.5
Educational services	44.2	44.2	1.2	36.3	2,286.8
Hospitals	5.6	[d] 4.2	0.0	201.6	15,137.3
Health care services, except hospitals	120.4	120.4	15.3	7.9	478.7
Social assistance	72.3	72.3	6.8	10.6	476.7
Arts, entertainment, and recreation	48.6	48.6	5.7	8.6	431.4
Accommodation	6.1	6.1	0.9	7.0	330.8
Food services and drinking places	42.4	42.4	4.7	9.1	292.9
I Repair and maintenance	14.2	14.2	2.4	5.9	318.8
Personal and laundry services	12.5	12.5	2.3	5.3	215.3
Membership associations and organizations	66.0	66.0	13.9	4.8	318.1
Public administration [e]	29.5	29.5	1.9	15.3	1,042.9
Employer Type					
Nonprofit, private	162.1	162.1	21.1	7.7	494.8
For profit, private	1,119.4	1,119.4	141.8	7.9	523.1
Government (state and local)	59.7	59.7	1.2	50.5	3,246.6

Note: Establishment data are from SUSB 2020; worker and payroll data from pooled CPS MORG data for 2020–2022 adjusted to reflect 2022.

[a] Estimation of both affected small entity employees and affected small entities was done at the most detailed industry level available. Therefore, the ratio of affected small entities employees to total small entity employees for each industry may not match the ratio of small affected entities to total small entities at the more aggregated industry level presented in the table, nor will it equal the ratio at the national level because relative industry size, employment, and small business employment differs from industry to industry.

[b] This method may overestimate the number of affected entities and therefore the ratio of affected workers to affected entities may be greater than 1-to-1. However, the Department addresses this issue by also calculating effects based on the assumption that 100 percent of workers at an entity are affected.

[c] For example, on average, a small entity in the construction industry employs 7.5 workers (5.4 million employees divided by 726,700 small entities). This method assumes if an entity is affected then all 7.5 workers are affected. Therefore, in the construction industry this method estimates there are 12,500 small affected entities (93,400 affected small entity workers divided by 7.5).

[d] Number of entities is smaller than number of affected employees; thus, total number of entities is reported.

[e] Entity number represents the total number of state and local governments.

4. Impacts to Affected Small Entities

For small entities, the Department estimated various types of effects, including regulatory familiarization costs, adjustment costs, managerial costs, and payroll increases borne by employers. The Department estimated a range for the number of affected small entities and the impacts they incur. While the upper and lower bounds are likely over- and under-estimates, respectively, of effects per small entity, the Department believes that this range of costs and payroll increases provides

the most accurate characterization of the effects of the rule on small employers.[452] Furthermore, the smaller estimate of the number of affected entities (*i.e.,* where all employees at each affected employer are assumed to be affected) will result in the largest costs and payroll increases per entity as a percent of establishment payroll and revenue, and the Department expects that many, if not most, entities will incur smaller costs, payroll increases, and effects relative to entity size.

Parameters that are used in the small business cost analysis for Year 1 are provided in Table 34, along with summary data of the impacts. See section C.3 of the Regulatory Impact Analysis for a more fulsome discussion on these costs.

TABLE 34—OVERVIEW OF PARAMETERS USED FOR COSTS TO SMALL BUSINESSES AND THE IMPACTS ON SMALL BUSINESSES

Small business costs	Cost
Direct and Payroll Costs	
Average total cost per affected entity [a]	$4,323.
Range of total costs per affected entity [a]	$1,833–$146,781.
Average percent of revenue per affected entity	0.16%.
Average percent of payroll per affected entity	0.79%.
Direct Costs	
Regulatory familiarization:	
Time (first year)	1 hour per entity.
Time (update years)	10 minutes per entity.
Hourly wage	$52.80.
Adjustment:	
Time (first year affected)	75 minutes per newly affected worker.
Hourly wage	$52.80.
Managerial:	
Time (weekly)	10 minutes per affected worker whose hours change.
Hourly wage	$83.63.
Payroll Increases	
Average payroll increase per affected entity [a]	$2,638.
Range of payroll increases per affected entity [a]	$769–$103,871.

[a] Using the methodology where all employees at an affected small firm are affected. This assumption generates upper-end estimates. Lower-end cost estimates are significantly smaller.

The Department expects total direct employer costs would range from $294.6 million to $356.0 million for affected small entities (*i.e.,* those with affected employees) in the first year (an average cost of between $265 to $1,640 per entity) (Table 35). Small entities that do not employ affected workers would incur $270.2 million to $331.6 million in regulatory familiarization costs (an average cost of $52.80 per entity). The three industries with the highest costs (professional and technical services; health care services, except hospitals; and retail trade) account for about 35 percent of the costs. Hospitals are expected to incur the largest cost per establishment ($42,900 using the method where all employees are affected), although the costs are not expected to exceed 0.3 percent of payroll. The food services and drinking places industry is expected to experience the largest effect as a share of payroll (estimated direct costs compose 0.68 percent of average entity payroll).

TABLE 35—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE

Industry	Direct cost to small entities in year 1 [a]					
	One affected employee			All employees affected		
	Total (millions) [a]	Cost per affected entity	Percent of annual payroll	Total (millions) [b]	Cost per affected entity	Percent of annual payroll
Total	$356.0	$265	0.05	$294.6	$1,640	0.30
Industry						
Agriculture, forestry, fishing, and hunting	1.8	265	0.01	1.5	8,221	0.45
Mining	1.4	265	0.02	1.1	3,219	0.20
Construction	24.8	265	0.05	20.5	1,637	0.32
Manufacturing—durable goods	25.0	265	0.01	20.2	6,025	0.28
Manufacturing—non-durable goods	14.2	265	0.01	11.5	5,895	0.30
Wholesale trade	13.4	265	0.08	11.3	1,008	0.30
Retail trade	27.4	265	0.07	22.7	1,598	0.41
Transportation and warehousing	7.7	265	0.05	6.4	1,880	0.36

[452] As noted previously, these are not the true lower and upper bounds. The values presented are the highest and lowest estimates the Department believes are plausible.

TABLE 35—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Direct cost to small entities in year 1 [a]					
	One affected employee			All employees affected		
	Total (millions) [a]	Cost per affected entity	Percent of annual payroll	Total (millions) [b]	Cost per affected entity	Percent of annual payroll
Utilities	1.6	265	0.01	1.3	8,527	0.23
Information	9.0	265	0.04	7.4	1,630	0.23
Finance	13.0	265	0.04	10.8	1,507	0.20
Insurance	10.6	265	0.07	9.0	943	0.26
Real estate and rental and leasing	9.2	265	0.10	7.9	820	0.30
Professional and technical services	63.2	265	0.04	52.7	1,343	0.20
Management, administrative and waste management services	11.2	265	0.10	9.3	1,303	0.46
Educational services	11.7	265	0.01	9.5	7,777	0.34
Hospitals	1.5	265	0.00	1.2	42,910	0.28
Health care services, except hospitals	32.0	265	0.06	26.4	1,726	0.36
Social assistance	19.2	265	0.06	15.7	2,311	0.48
Arts, entertainment, and recreation	12.9	265	0.06	10.6	1,874	0.43
Accommodation	1.6	265	0.08	1.3	1,547	0.47
Food services and drinking places	11.2	265	0.09	9.3	1,986	0.68
Repair and maintenance	3.8	265	0.08	3.1	1,307	0.41
Personal and laundry services	3.3	265	0.13	2.8	1,190	0.55
Membership associations and organizations	17.5	265	0.08	14.8	1,064	0.33
Public administration	7.8	265	0.03	6.4	3,311	0.32
Employer Type						
Nonprofit, private	42.6	263	0.05	35.2	1,669	0.34
For profit, private	344.8	308	0.06	293.1	2,068	0.40
Government (state and local)	16.2	272	0.01	13.1	11,119	0.34

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] Direct costs include regulatory familiarization, adjustment, and managerial costs.
[b] The range of costs per entity depends on the number of affected entities. The minimum assumes that each affected entity has one affected worker (therefore, the number of affected entities is equal to the number of affected workers). The maximum assumes the share of workers in small entities who are affected is also the share of small entity entities that are affected.

It is possible that the costs of the proposed rule may be disproportionately large for small entities, especially because small entities often have limited human resources personnel on staff. However, the Department expects that small entities would rely on compliance assistance materials provided by the Department or industry associations to become familiar with the final rule once issued. Additionally, the Department notes that the proposed rule is quite limited in scope because the changes all relate to the salary component of the part 541 regulations. Finally, the Department believes that most entities have at least some nonexempt employees and, therefore, already have policies and systems in place for monitoring and recording their hours. The Department believes that applying those same policies and systems to the workers whose exemption status changes would not be an unreasonable burden on small businesses.

Average weekly earnings for affected EAP workers in small entities are expected to increase by about $6.91 per week per affected worker, using the incomplete fixed-job model [453] described in section VII.C.4.iii.[454] This would lead to $482.2 million in additional annual wage payments to employees in small entities (less than 0.5 percent of aggregate affected establishment payroll; Table 36). The largest payroll increases per establishment are expected in hospitals (up to $103,900 per entity); utilities (up to $20,900 per entity); and non-durable goods manufacturing (up to $11,700 per entity). However, average payroll increases per entity would exceed one percent of average annual payroll in only three sectors: food services and drinking places (2.5 percent); management, administrative and waste management services (1.2 percent); and transportation and warehousing (1.1 percent).

TABLE 36—YEAR 1 SMALL ESTABLISHMENT PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE

Industry	Increased payroll for small entities in year 1 [a]				
	Total (millions)	One affected employee		All employees affected	
		Per entity	Percent of annual payroll	Per entity	Percent of annual payroll
Total	$482.2	$360	0.07%	$2,683	0.49%

[453] The incomplete fixed-job model reflects the Department's determination that an appropriate estimate of the impact on the implicit hourly rate of pay for regular overtime workers should be determined using the average of Barkume's and Trejo's two estimates of the incomplete fixed-job model adjustments: a wage change that is 40 percent of the adjustment toward the amount predicted by the fixed-job model, assuming an initial zero overtime pay premium, and a wage change that is 80 percent of the adjustment assuming an initial 28 percent overtime pay premium.

[454] This is an average increase for all affected workers (both standard test and HCE), and reconciles to the weighted average of individual salary changes discussed in the Transfers section.

TABLE 36—YEAR 1 SMALL ESTABLISHMENT PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Increased payroll for small entities in year 1 [a]				
	Total (millions)	One affected employee		All employees affected	
		Per entity	Percent of annual payroll	Per entity	Percent of annual payroll
Industry					
Agriculture, forestry, fishing, and hunting	0.9	126	0.01	4,837	0.26
Mining	1.7	330	0.02	4,918	0.31
Construction	30.0	321	0.07	2,391	0.47
Manufacturing—durable goods	31.5	335	0.02	9,423	0.43
Manufacturing—non-durable goods	22.8	426	0.02	11,707	0.60
Wholesale trade	24.7	491	0.15	2,206	0.65
Retail trade	51.3	497	0.13	3,613	0.92
Transportation and warehousing	20.0	687	0.14	5,907	1.13
Utilities	3.1	524	0.01	20,888	0.57
Information	12.0	353	0.05	2,622	0.36
Finance	15.9	324	0.04	2,214	0.30
Insurance	11.8	297	0.08	1,244	0.34
Real estate and rental and leasing	15.8	456	0.17	1,646	0.60
Professional and technical services	77.5	326	0.05	1,975	0.30
Management, administrative and waste management services	24.4	580	0.21	3,407	1.21
Educational services	9.0	204	0.01	7,417	0.32
Hospitals	2.9	515	0.00	103,871	0.69
Health care services, except hospitals	38.3	318	0.07	2,502	0.52
Social assistance	10.5	145	0.03	1,539	0.32
Arts, entertainment, and recreation	14.3	295	0.07	2,523	0.58
Accommodation	1.7	279	0.09	1,959	0.59
Food services and drinking places	34.2	808	0.28	7,345	2.51
Repair and maintenance	7.0	490	0.16	2,893	0.91
Personal and laundry services	2.8	221	0.11	1,183	0.55
Membership associations and organizations	10.7	162	0.05	769	0.24
Public administration	7.3	249	0.02	3,810	0.37
Employer Type					
Nonprofit, private	49.3	304	0.06	2,336	0.47
For profit, private	421.3	376	0.07	2,972	0.57
Government (state and local)	11.6	194	0.01	9,816	0.30

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.
[a] Aggregate change in total annual payroll experienced by small entities under the updated salary levels after labor market adjustments. This amount represents the total amount of (wage) transfers from employers to employees.

Table 37 presents estimated first year direct costs and payroll increases combined per entity and the costs and payroll increases as a percent of average entity payroll. The Department presents only the results for the upper bound scenario where all workers employed by the entity are affected. Combined costs and payroll increases per establishment range from $1,800 in membership associations to $146,800 in hospitals. Combined costs and payroll increases compose more than two percent of average annual payroll in one sector, food services and drinking places (3.2 percent).

However, comparing costs and payroll increases to payrolls overstates the effects on entities because payroll represents only a fraction of the financial resources available to an establishment. The Department approximated revenue per affected small establishment by calculating the ratio of small business revenues to payroll by industry from the 2017 SUSB data then multiplying that ratio by average small entity payroll.[455] Using this approximation of annual revenues as a benchmark, only one sector would have costs and payroll increases amounting to close to one percent of revenues, food services and drinking places (1.0 percent).

[455] The Department used this estimate of revenue, instead of small business revenue reported directly from the 2017 SUSB so revenue aligned with payrolls in 2022.

TABLE 37—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, TOTAL AND PER ENTITY, BY INDUSTRY AND EMPLOYER TYPE, USING ALL EMPLOYEES IN ENTITY AFFECTED METHOD

Industry	Costs and payroll increases for small affected entities, all employees affected			
	Total (millions)	Per entity [a]	Percent of annual payroll	Percent of estimated revenues [b]
Total	$776.8	$4,323	0.79%	0.16%
Industry				
Agriculture, forestry, fishing, and hunting	2.3	13,058	0.71	0.14
Mining	2.8	8,136	0.51	0.07
Construction	50.5	4,028	0.79	0.18
Manufacturing—durable goods	51.7	15,448	0.71	0.15
Manufacturing—non-durable goods	34.3	17,601	0.90	0.12
Wholesale trade	36.1	3,214	0.95	0.07
Retail trade	73.9	5,210	1.33	0.13
Transportation and warehousing	26.4	7,786	1.48	0.35
Utilities	4.4	29,415	0.81	0.06
Information	19.4	4,252	0.59	0.17
Finance	26.7	3,721	0.51	0.15
Insurance	20.8	2,187	0.59	0.13
Real estate and rental and leasing	23.7	2,466	0.90	0.20
Professional and technical services	130.2	3,317	0.50	0.20
Management, administrative and waste management services	33.7	4,710	1.68	0.68
Educational services	18.5	15,194	0.66	0.27
Hospitals	4.1	146,781	0.97	0.41
Health care services, except hospitals	64.7	4,228	0.88	0.37
Social assistance	26.2	3,850	0.81	0.38
Arts, entertainment, and recreation	24.9	4,397	1.02	0.33
Accommodation	3.0	3,506	1.06	0.26
Food services and drinking places	43.5	9,332	3.19	1.00
Repair and maintenance	10.1	4,200	1.32	0.37
Personal and laundry services	5.5	2,373	1.10	0.39
Membership associations and organizations	25.4	1,833	0.58	0.14
Public administration	13.7	7,122	0.68	0.17
Employer Type				
Nonprofit, private	94.40	3,570	1.00	0.30
For profit, private	585.30	3,532	1.00	0.20
Government (state and local)	12.20	9,264	0.60	0.20

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.

[a] Total direct costs and transfers for small entities in which all employees are affected. Impacts to small entities in which one employee is affected will be a fraction of the impacts presented in this table.

[b] Revenues estimated by calculating the ratio of estimated small business revenues to payroll from the 2017 SUSB, and multiplying by payroll per small entity. For the public administration sector, the ratio was calculated using revenues and payroll from the 2017 Census of Governments.

5. Projected Effects to Affected Small Entities in Year 2 Through Year 10

To determine how small businesses would be affected in future years, the Department projected costs to small businesses for 9 years after Year 1 of the rule. Projected employment and earnings were calculated using the same methodology described in section VII.B.3. Affected employees in small firms follow a similar pattern to affected workers in all entities: the number decreases gradually between automatic update years, and then increases. There are 1.3 million affected workers in small entities in Year 1 and 1.9 million in Year 10. Table 38 reports affected workers in these 2 years only.

TABLE 38—PROJECTED NUMBER OF AFFECTED WORKERS IN SMALL ENTITIES, BY INDUSTRY

Industry	Affected workers in small entities (1,000s)	
	Year 1	Year 10
Total	1,341.1	1,872.1
Agriculture, forestry, fishing, and hunting	6.8	7.6
Mining	5.1	7.1
Construction	93.4	127.3
Manufacturing—durable goods	94.0	125.3
Manufacturing—non-durable goods	53.6	78.5

TABLE 38—PROJECTED NUMBER OF AFFECTED WORKERS IN SMALL ENTITIES, BY INDUSTRY—Continued

Industry	Affected workers in small entities (1,000s)	
	Year 1	Year 10
Wholesale trade	50.4	73.3
Retail trade	103.1	125.6
Transportation and warehousing	29.1	40.2
Utilities	6.0	7.2
Information	33.9	39.6
Finance	49.1	59.2
Insurance	39.9	60.2
Real estate and rental and leasing	34.7	55.4
Professional and technical services	238.2	342.6
Management, administrative and waste management services	42.1	56.3
Educational services	44.2	62.1
Hospitals	5.6	8.8
Health care services, except hospitals	120.4	172.0
Social assistance	72.3	118.6
Arts, entertainment, and recreation	48.6	78.9
Accommodation	6.1	10.6
Food services and drinking places	42.4	56.4
Repair and maintenance	14.2	21.2
Personal and laundry services	12.5	15.1
Membership associations and organizations	66.0	80.8
Public administration	29.5	42.4

Note: Worker data are from Pooled CPS data for 2020–2022 adjusted to reflect 2022.

Direct costs and payroll increases for small entities vary by year but generally decrease between automatic updates as the real value of the salary and compensation levels decrease and the number of affected workers consequently decreases. In automatic updating years, costs would increase due to newly affected workers and some regulatory familiarization costs. Direct costs and payroll increases for small businesses would be fairly close in Year 10 (an automatic update year) and Year 1, $0.8 billion in Year 1 and $1.0 billion in Year 10 (Table 39 and Figure 10).

TABLE 39—PROJECTED DIRECT COSTS AND PAYROLL INCREASES FOR AFFECTED SMALL ENTITIES, BY INDUSTRY, USING ALL EMPLOYEES IN ENTITY AFFECTED METHOD

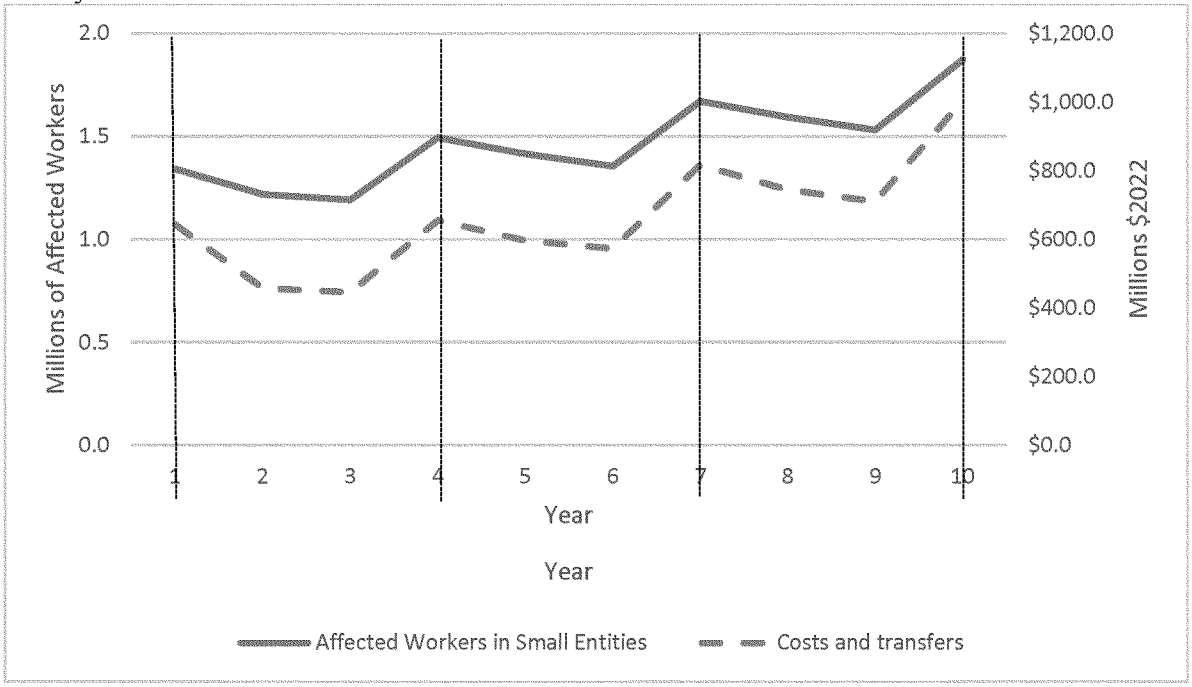
Industry	Costs and payroll increases for small affected entities, all employees affected (millions $2022)	
	Year 1	Year 10
Total	$776.8	$1,015.9
Agriculture, forestry, fishing, and hunting	2.3	5.6
Mining	2.8	3.3
Construction	50.5	65.1
Manufacturing—durable goods	51.7	64.3
Manufacturing—non-durable goods	34.3	43.8
Wholesale trade	36.1	62.7
Retail trade	73.9	74.6
Transportation and warehousing	26.4	70.4
Utilities	4.4	3.7
Information	19.4	15.9
Finance	26.7	33.0
Insurance	20.8	25.1
Real estate and rental and leasing	23.7	29.7
Professional and technical services	130.2	166.8
Management, administrative and waste management services	33.7	29.0
Educational services	18.5	24.3
Hospitals	4.1	15.7
Health care services, except hospitals	64.7	70.4
Social assistance	26.2	37.3
Arts, entertainment, and recreation	24.9	39.7
Accommodation	3.0	5.0
Food services and drinking places	43.5	51.3
Repair and maintenance	10.1	17.4
Personal and laundry services	5.5	2.3

TABLE 39—PROJECTED DIRECT COSTS AND PAYROLL INCREASES FOR AFFECTED SMALL ENTITIES, BY INDUSTRY, USING ALL EMPLOYEES IN ENTITY AFFECTED METHOD—Continued

Industry	Costs and payroll increases for small affected entities, all employees affected (millions $2022)	
	Year 1	Year 10
Membership associations and organizations	25.4	28.0
Public administration	13.7	31.4

Note: Pooled CPS data for 2020–2022 adjusted to reflect 2022.

Figure 10: 10-Year Projected Number of Affected Workers in Small Entities, and Associated Costs and Payroll Increases



C. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

The FLSA sets minimum wage, overtime pay, and recordkeeping requirements for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked.

Pursuant to section 11(c) of the FLSA, the Department's regulations at part 516 require covered employers to maintain certain records about their employees. Bona fide EAP workers are subject to some of these recordkeeping requirements but exempt from others related to pay and worktime.[456] Thus, although this rulemaking would not introduce any new recordkeeping requirements, employers would need to keep some additional records for affected employees who become newly nonexempt if they do not presently record such information. As indicated in this analysis, this proposed rule expands minimum wage and overtime pay coverage to 3.6 million affected EAP workers, of which 1.3 million are employed by a small entity. This would result in an increase in employer burden and was estimated in the PRA portion (section VI) of this proposed rule. Note that the burdens reported for the PRA section of this proposed rule include the entire information collection and not merely the additional burden estimated as a result of this proposed rule.

D. Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

This section describes the steps the agency has taken to minimize the economic impact on small entities, consistent with the stated objectives of the FLSA. It includes a statement of the factual, policy, and legal reasons for the selected standard and HCE levels adopted in the proposed rule and why alternatives were rejected.

In this proposed rule, the Department sets the standard salary level equal to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). Based on 2022 data, this results in a salary level of $1,059 per week. By setting a salary level above the long test salary level, the proposal would ensure that fewer lower paid white-collar employees who perform significant amounts of nonexempt work are

[456] *See* 29 CFR 516.3 (providing that employers need not maintain the records required by 29 CFR 516.2(a)(6) through (10) for their EAP workers).

included in the exemption. At the same time, by setting it below the short test salary level, the proposal would allow employers to continue to use the exemption for many lower paid white-collar employees who were made exempt under the 2004 standard duties test. Thus, the Department believes that the proposed salary level would also more reasonably distribute between employees and their employers the impact of the shift from a two-test to a one-test system on employees earning between the long and short test salary levels. As in prior rulemakings, the Department has not proposed to establish multiple salary levels based on region, industry, employer size, or any other factor, which stakeholders have generally agreed would significantly complicate the regulations.[457] Instead, the Department has again proposed to set the standard salary level using earnings data from the lowest-income Census Region, in part to accommodate small employers and employers in low-income industries.[458]

The Department has proposed to set the HCE total annual compensation level equal to the 85th percentile of earnings of full-time salaried workers nationally ($143,988 annually based on 2022 data). The Department believes that this level avoids costs associated with evaluating, under the standard duties test, the exemption statuses of large numbers of highly-paid white-collar employees, many of whom would have remained exempt even under that test, while providing a meaningful and appropriate complement to the more lenient HCE duties test. While the proposed threshold is higher than the HCE level adopted in the 2019 rule (which was set equal to the 80th percentile of earnings for salaried workers nationwide), the proposed HCE threshold in this rule would be lower than the HCE percentile adopted in the 2004 and 2016 rules, which covered 93.7 and 90 percent of salaried workers nationwide, respectively. The Department further believes that nearly all of the highly-paid white-collar workers earning above this threshold ''would satisfy any duties test.'' [459]

1. Differing Compliance and Reporting Requirements for Small Entities

This proposed rule provides no differing compliance requirements and reporting requirements for small entities. The Department has strived to minimize respondent recordkeeping burden by requiring no specific form or order of records under the FLSA and its corresponding regulations. Moreover, employers would normally maintain the records under usual or customary business practices.

2. Least Burdensome Option or Explanation Required

The Department believes it has chosen the most effective option that updates and clarifies the rule and results in the least burden. Among the options considered by the Department, the least restrictive option was using the 2004 methodology (the 20th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census region, currently the South, and in retail nationally) to set the standard salary level, which was also the methodology used in the 2019 rule. As noted above, however, the salary level produced by the 2004 methodology is below the long test salary level, which the Department considers to be the lower boundary for an appropriate salary level in a one-test system using the current standard duties test. Using the 2004 methodology thus does not address the Department's concerns discussed above under Objectives of, and Need for, the Proposed Rule.

Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

i. Differing Compliance or Reporting Requirements That Take Into Account the Resources Available to Small Entities

The FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees. To establish differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department has not proposed differing compliance or reporting requirements for small businesses.

ii. The Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements for Small Entities

This proposed rule imposes no new reporting requirements. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

iii. The Use of Performance Rather Than Design Standards

Under this proposed rule, employers may achieve compliance through a variety of means. Employers may elect to continue to claim the EAP exemption for affected employees by adjusting salary levels, hiring additional workers or spreading overtime hours to other employees, or compensating employees for overtime hours worked. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

iv. An Exemption From Coverage of the Rule, or Any Part Thereof, for Such Small Entities

Creating an exemption from coverage of this rulemaking for businesses with as many as 500 employees, those defined as small businesses under SBA's size standards, is inconsistent with the FLSA, which applies to all employers that satisfy the enterprise coverage threshold or employ individually covered employees, regardless of employer size.[460]

E. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

The Department is not aware of any Federal rules that duplicate, overlap, or conflict with this proposed rule.

IX. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA),[461] requires agencies to prepare a written statement for proposed rulemaking that includes any Federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $192 million ($100 million in 1995 dollars adjusted for inflation to 2022) or more in at least one year. This statement must: (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, present its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

This proposed rule is issued pursuant to section 13(a)(1) of the Fair Labor Standards Act (FLSA or Act), 29 U.S.C. 213(a)(1). The section exempts from the FLSA's minimum wage and overtime

[457] *See* 84 FR 51239; 81 FR 32411; 69 FR 22171.

[458] *See* 84 FR 51238; 81 FR 32527; 69 FR 22237.

[459] 84 FR 51250 (internal citation omitted).

[460] *See* 29 U.S.C. 203(s).

[461] 2 U.S.C. 1501 *et seq.*

pay requirements ''any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act] . . .).'' [462] The requirements of the exemption are contained in part 541 of the Department's regulations. Section 3(e) of the FLSA [463] defines ''employee'' to include most individuals employed by a state, political subdivision of a state, or interstate governmental agency. Section 3(x) of the FLSA [464] also defines public agencies to include the government of a state or political subdivision thereof, or any interstate governmental agency.

B. Costs and Benefits

For purposes of the UMRA, this proposed rule includes a Federal mandate that is expected to result in increased expenditures by the private sector of more than $192 million in at least one year, but the rule will not result in increased expenditures by state, local and tribal governments, in the aggregate, of $192 million or more in any one year.

Based on the economic impact analysis of this proposed rule, the Department determined that Year 1 costs for state and local governments would total $184.1 million, of which $74.0 million are direct employer costs and $110.1 million are payroll increases (Table 40). In subsequent years, state and local governments may experience payroll increases of as much as $192.5 million per year.

The proposed rule would result in Year 1 costs to the private sector of approximately $2.2 billion, of which $1.1 billion are direct employer costs and $1.1 billion are payroll increases. In subsequent years, the Department estimated that the private sector may experience a payroll increase of as much as $1.8 billion per year.

TABLE 40—SUMMARY OF YEAR 1 IMPACTS BY TYPE OF EMPLOYER

Impact	Total	Private	Government [a]
Affected EAP Workers (1,000s)			
Number	3,648	3,250	392
Direct Employer Costs (Millions)			
Regulatory familiarization	$427.2	$422.4	$4.8
Adjustment	240.8	214.5	25.9
Managerial	534.9	490.0	43.3
Total direct costs	1,202.8	1,126.8	74.0
Payroll Increases (Millions)			
From employers to workers	$1,234.2	$1,121.4	$110.1
Direct Employer Costs & Payroll Increases (Millions)			
From employers	$2,437.0	$2,248.2	$184.1

[a] Includes only state, local, and tribal governments.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material.[465] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of $63.7 billion to $127.3 billion (using 2022 GDP). A regulation with a smaller aggregate effect is not likely to have a measurable effect in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's RIA estimates that the total first-year costs (direct employer costs and payroll increases from employers to workers) of the proposed rule would be approximately $2.2 billion for private employers and $184.1 million for state and local governments. Given OMB's guidance, the Department has determined that a full macro-economic analysis is not likely to show any measurable effect on the economy. Therefore, these costs are compared to payroll costs and revenue to demonstrate the feasibility of adapting to these new rules.

Total first-year state and local government costs compose 0.02 percent of state and local government payrolls.[466] First-year state and local government costs compose 0.004 percent of state and local government revenues (projected 2022 revenues were estimated to be $4.8 trillion).[467] Effects of this magnitude will not result in significant disruptions to typical state and local governments. The $184.1 million in state and local government costs constitutes an average of approximately $2,000 for each of the approximately 90,126 state and local entities. The Department considers these costs to be quite small both in absolute terms and in relation to payroll and revenue.

Total first-year private sector costs compose 0.029 percent of private sector

[462] 29 U.S.C. 213(a)(1).

[463] 29 U.S.C. 203(e).

[464] 29 U.S.C. 203(x).

[465] 2 U.S.C. 1532(a)(4).

[466] 2020 state and local government payrolls were $1.1 trillion, inflated to 2022 payroll costs of $1.2 trillion using the GDP deflator. State and Local Government Finances 2020. Available at *https://www.census.gov/data/datasets/2020/econ/local/public-use-datasets.html.*

[467] 2020 state and local revenues were $4.3 trillion, inflated to 2022 dollars using the GDP deflator. State and Local Government Finances 2020. Available at *https://www.census.gov/data/datasets/2020/econ/local/public-use-datasets.html.*

payrolls nationwide.[468] Total private sector first-year costs compose 0.005 percent of national private sector revenues (revenues in 2022 are projected to be $43.7 trillion).[469] The Department concludes that effects of this magnitude are affordable and will not result in significant disruptions to typical firms in any of the major industry categories.

C. Summary of State, Local, and Tribal Government Input

The Department held a series of stakeholder listening sessions between March 8, 2022 and June 3, 2022 to gather input on its part 541 regulations. Stakeholders invited to participate in these listening sessions included representatives from labor unions; worker advocate groups; industry associations; small business associations; state and local governments; tribal governments; non-profits; and representatives from specific industries such as K–12 education, higher education, healthcare, retail, restaurant, manufacturing, and wholesale. Stakeholders were invited to share their input on issues including the appropriate EAP salary level, the costs and benefits of increasing the salary level to employers and employees, the methodology for updating the salary level and frequency of updates, and whether changes to the duties test are warranted. A listening session was held specifically for state and local governments on April 1, 2022, and a session for tribal governments was held on May 12, 2022. The input received at these listening sessions aided the Department in drafting its proposed rule.

D. Least Burdensome Option or Explanation Required

This proposed rule has described the Department's consideration of various options throughout the preamble (*see* section IV.A.5) and economic impact analysis (*see* section VII.C.8). The Department believes that it has chosen the least burdensome but still cost-effective methodology to update the salary level consistent with the Department's statutory obligation to define and delimit the scope of the EAP exemption. Although some alternative options considered would set the standard salary level at a rate lower than the proposed level, that outcome would not necessarily be the most cost-effective or least-burdensome. A salary level equal to or below the long test level would result in the exemption of lower-salaried employees who traditionally were entitled to overtime protection under the long test either because of their low salary or because they perform large amounts of nonexempt work, effectively placing the impact of the move from a two-test system to a one-test system on employees.

Selecting a standard salary level in a one-test system inevitably affects the risk and cost of providing overtime protection to employees paid between the long and short test salary levels. Too low of a salary level shifts the impact of the move to a one-test system to employees by exempting lower-salaried employees who perform large amounts of nonexempt work. However, too high a salary level shifts the impact of the move to a one-test system to employers by denying them the use of the exemption for lower-salaried employees who traditionally were exempt under the long duties test, thereby increasing their labor costs. The Department determined that setting the standard salary level equivalent to the earnings of the 35th percentile of full-time salaried workers in the lowest-wage Census region and automatically updating it every three years to reflect current earnings appropriately accounts for the shift from a two-test to a one-test system for determining exemption status, protecting lower-paid white-collar employees who traditionally have been entitled to overtime protection, while allowing employers to use the exemption for EAP employees earning less than the short test salary level.

The Department believes that the proposed rule could reduce burden on employers of nonexempt workers who earn between the current and proposed standard salary level. Currently, employers must rely on the duties test to determine the exemption status of these workers. But if this proposal is finalized, the exemption status of these workers will be determined based on the simpler salary level test.

X. Executive Order 13132, Federalism

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

XI. Executive Order 13175, Indian Tribal Governments

This proposed rule will not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

For the reasons set out in the preamble, the Wage and Hour Division, Department, of Labor proposes to amend 29 CFR part 541 as follows:

PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER, AND OUTSIDE SALES EMPLOYEES

■ 1. The authority citation for part 541 is revised to read as follows:

Authority: 29 U.S.C. 213; Pub. L. 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945–53 Comp., p. 1004); Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 2. Add § 541.5 to read as follows:

§ 541.5 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision must be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding be one of utter invalidity or unenforceability, in which event the provision will be severable from part 541 and will not affect the remainder thereof.

■ 3. Amend § 541.100, by revising paragraph (a)(1) to read as follows:

§ 541.100 General rule for executive employees.

(a) * * *

(1) Compensated on a salary basis at not less than the level set forth in § 541.600;

* * * * *

■ 4. Amend § 541.200, by revising paragraph (a)(1) to read as follows:

[468] Private sector payroll costs are projected to be $7.8 trillion in 2022 based on private sector payroll costs of $6.6 trillion in 2017, inflated to 2022 dollars using the GDP deflator. 2017 Economic Census of the United States.

[469] Private sector revenues in 2017 were $37.0 trillion using the 2017 Economic Census of the United States. This was inflated to 2022 dollars using the GDP deflator.

§ 541.200 General rule for administrative employees.

(a) * * *

(1) Compensated on a salary or fee basis at not less than the level set forth in § 541.600;

* * * * *

■ 5. Amend § 541.204, by revising paragraph (a)(1) to read as follows:

§ 541.204 Educational establishments.

(a) * * *

(1) Compensated on a salary or fee basis at not less than the level set forth in § 541.600; or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

* * * * *

■ 6. Amend § 541.300, by revising paragraph (a)(1) to read as follows:

§ 541.300 General rule for professional employees.

(a) * * *

(1) Compensated on a salary or fee basis at not less than the level set forth in § 541.600; and

* * * * *

■ 7. Amend § 541.400, by revising the first sentence of paragraph (b) to read as follows:

§ 541.400 General rule for computer employees.

* * * * *

(b) The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis at not less than the level set forth in § 541.600. * * *

* * * * *

■ 8. Revise § 541.600 to read as follows:

§ 541.600 Amount of salary required.

(a) *Standard salary level.* (1) To qualify as an exempt executive, administrative, or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate per week of not less than the standard salary level (the 35th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region), unless employed in American Samoa as set forth in paragraph (b) of this section, exclusive of board, lodging, or other facilities. As of [EFFECTIVE DATE OF THE FINAL RULE], and until such time as the standard salary level is updated pursuant to § 541.607, the standard salary level is $1,059 per week. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(2) Beginning 3 years from the date the $1,059 per week salary level takes effect, and every 3 years thereafter, the Secretary will update the amount of the required standard salary level pursuant to § 541.607.

(b) *American Samoa.* To qualify as an exempt executive, administrative, or professional employee under section 13(a)(1) of the Act, an employee in American Samoa (except if employed by the Federal Government), must be compensated on a salary basis at a rate of not less than 84 percent of the standard salary level applicable under paragraph (a) of this section (*e.g.,* $890 per week when the standard salary level is $1,059), exclusive of board, lodging, or other facilities. Provided that 90 days after the highest industry minimum wage for American Samoa equals the minimum wage under section 6(a)(1) of the Act, exempt employees employed in all industries in American Samoa must be paid the full standard salary level set forth in paragraph (a) of this section, subject to the exceptions provided in paragraphs (d) through (f) of this section. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(c) *Frequency of payment.* The salary level requirement may be translated into equivalent amounts for periods longer than one week. For example, the $1,059 per week requirement described in paragraph (a) of this section would be met if the employee is compensated biweekly on a salary basis of not less than $2,118, semimonthly on a salary basis of not less than $2,295, or monthly on a salary basis of not less than $4,589. However, the shortest period of payment that will meet this compensation requirement is one week.

(d) *Alternative salary level for academic administrative employees.* In the case of academic administrative employees, the salary level requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in § 541.204(a)(1).

(e) *Hourly rate for computer employees.* In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than $27.63 an hour, as provided in § 541.400(b).

(f) *Exceptions to the standard salary criteria.* In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (*see* § 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (*see* § 541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (*see* § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

■ 9. Amend § 541.601 by:

■ a. Adding introductory text to paragraph (a);

■ b. Revising paragraph (a)(1);

■ c. Revising paragraph (a)(2);

■ d. Adding paragraph (a)(3);

■ e. Revising the first sentence of paragraph (b)(1); and

■ f. Revising the second, third, and fourth sentences of paragraph (b)(2).

The revisions and additions read as follows:

§ 541.601 Highly compensated employees.

(a) An employee shall be exempt under section 13(a)(1) of the Act if:

(1) The employee receives not less than the total annual compensation level (the annualized earnings amount of the 85th percentile of full-time nonhourly workers nationally), and the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in subpart B, C, or D of this part. As of [EFFECTIVE DATE OF THE FINAL RULE], and until such time as the total annual compensation level is updated pursuant to § 541.607, such an employee must receive total annual compensation of at least $143,988.

(2) Beginning 3 years from the date the $143,988 total annual compensation level takes effect, and every 3 years thereafter, the Secretary will update the required total annual compensation amount pursuant to § 541.607.

(3) Where the annual period covers periods both prior to and after the $143,988 total annual compensation level takes effect, or the effective date of any future change to the total annual compensation requirement made pursuant to § 541.607, the amount of total annual compensation due will be determined on a proportional basis.

(b)(1) Total annual compensation must include at least a weekly amount equal to that required by § 541.600(a) paid on a salary or fee basis as set forth in §§ 541.602 and 541.605, except that § 541.602(a)(3) will not apply to highly compensated employees. * * *

(2) * * * For example, for a 52-week period beginning [EFFECTIVE DATE OF

FINAL RULE], an employee may earn $120,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $25,000 in commissions. However, due to poor sales in the final quarter of the year, the employee only earns $20,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $3,988 to the employee. * * *

* * * * *

■ 10. Amend § 541.604 by:

■ a. Revising the second, third, and fourth sentences of paragraph (a); and

■ b. Revising the third sentence in paragraph (b).

The revisions read as follows:

§ 541.604 Minimum guarantee plus extras.

(a) * * * Thus, for example, an exempt employee guaranteed at least $1,059 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $1,059 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $1,059 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. * * *

(b) * * * Thus, for example, an exempt employee guaranteed compensation of at least $1,125 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $325 per shift without violating the $1,059 per week salary basis requirement. * * *

■ 11. Amend § 541.605 by revising the second sentence of paragraph (b) to read as follows:

§ 541.605 Fee basis.

* * * * *

(b) * * * Thus, for example, an artist paid $550 for a picture that took 20 hours to complete meets the $1,059 minimum salary requirement for exemption since earnings at this rate would yield the artist $1,100 if 40 hours were worked. * * *

■ 12. Add § 541.607 to read as follows:

§ 541.607 Automatic updates to amounts of salary and compensation required.

(a) *Standard salary level.* (1) Beginning 3 years from [EFFECTIVE DATE OF THE FINAL RULE], and every 3 years thereafter, the amount required to be paid to an exempt employee on a salary or fee basis, as applicable, pursuant to § 541.600(a) will be updated to reflect current earnings data.

(2) The Secretary will determine the lowest-wage Census Region for paragraph (a)(1) of this section using the 35th percentile of weekly earnings of full-time nonhourly workers in the Census Regions based on data from the Current Population Survey as published by the Bureau of Labor Statistics.

(b) *Highly compensated employees.* (1) Beginning 3 years from [EFFECTIVE DATE OF THE FINAL RULE], and every 3 years thereafter, the amount required in total annual compensation for an exempt highly compensated employee pursuant to § 541.601 will be updated to reflect current earnings data.

(2) The Secretary will use the 85th percentile of weekly earnings of full-time nonhourly workers nationally based on data from the Current Population Survey as published by the Bureau of Labor Statistics for paragraph (b)(1) of this section.

(c) *Notice.* (1) Not fewer than 150 days before each automatic update of earnings requirements under this section, the Secretary will publish a notice in the **Federal Register** stating the updated amounts required by paragraphs (a) and (b) of this section, which shall be determined by applying the methodologies set forth in those paragraphs to data from the four quarters preceding the notice as published by the Bureau of Labor Statistics.

(2) No later than the effective date of the updated earnings requirements, the Wage and Hour Division will publish on its website the applicable earnings requirements for employees paid pursuant to this part.

(d) *Delay of updates.* An automatic update to the earnings thresholds is delayed from taking effect for a period of 120 days if the Secretary has separately published a notice of proposed rulemaking in the **Federal Register**, not fewer than 150 days before the date the automatic update is set to take effect, proposing changes to the earnings threshold(s) and/or automatic updating mechanism. If the Secretary does not issue a final rule affecting the scheduled automatic update to the earnings thresholds by the end of the 120-day extension, the updated amounts published in accordance with paragraph (c)(1) of this section will take effect upon the expiration of the 120-day period. The 120-day delay of a scheduled update under this paragraph will not change the effective dates for future automatic updates of the earnings requirements under this section.

■ 13. Revise § 541.709 to read as follows:

§ 541.709 Motion picture producing industry.

(a) *Base rate.* The requirement that the employee be paid ''on a salary basis'' does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $1,617 per week (exclusive of board, lodging, or other facilities), except as provided in paragraph (b) of this section. Thus, an employee in this industry who is otherwise exempt under subparts B, C, or D of this part, and who is employed at a base rate of at least the applicable current minimum amount a week is exempt if paid a proportionate amount (based on a week of not more than 6 days) for any week in which the employee does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

(1) The employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least the minimum weekly amount if 6 days were worked; or

(2) The employee is in a job category having the minimum weekly base rate and the daily base rate is at least one-sixth of such weekly base rate.

(b) *Updating the base rate.* Upon the date of each increase to the standard salary level pursuant to § 541.607, the base rate required to be paid to an exempt motion picture producing employee pursuant to this section will be updated from the previously applicable base rate, adjusted by the same percentage as the updated standard salary set by § 541.607(a), and rounded to the nearest multiple of $1.00.

Julie A. Su,

Acting Secretary, Department of Labor.

[FR Doc. 2023–19032 Filed 9–7–23; 8:45 am]

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Part III

Department of Justice

Executive Office for Immigration Review

8 CFR Parts 1001, 1003, 1239, et al.

Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure; Proposed Rule

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1001, 1003, 1239, and 1240

[Docket No. EOIR 021–0410; AG Order No. 5738–2023]

RIN 1125–AB18

Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: In December 2020, the Department of Justice issued a final rule (the ''AA96 Final Rule'') establishing novel limits on the authority of immigration judges and the Board of Immigration Appeals (''BIA'' or ''Board'') to manage their dockets and efficiently dispose of cases. Among other changes, the AA96 Final Rule would have required the BIA to set simultaneous briefing schedules for every appeal, limited the authority of immigration judges and the BIA to temporarily pause cases while the United States Citizenship and Immigration Services (''USCIS'') adjudicates a noncitizen's pending visa application, and restricted the BIA's discretion to remand matters to immigration judges in light of legal and factual errors. The AA96 Final Rule was enjoined shortly after its issuance in March 2021, and it has not been in effect since that date. After careful reconsideration, the Department proposes to restore longstanding procedures in place prior to the AA96 Final Rule, including administrative closure, and to clarify and codify other established practices. Given the aforementioned injunction, the proposed regulatory language largely reflects the currently operative status quo. The Department believes that this rule will promote the efficient and expeditious adjudication of cases, afford immigration judges and the BIA flexibility to efficiently allocate their limited resources, and protect due process for parties before immigration judges and the BIA.

DATES: Electronic comments must be submitted, and written comments must be postmarked or otherwise indicate a shipping date on or before November 7, 2023. The electronic Federal Docket Management System at *www.regulations.gov* will accept electronic comments until 11:59 p.m. Eastern Time on that date.

ADDRESSES: If you wish to provide comments regarding this rulemaking, you must submit comments, identified by the agency name and reference RIN 1125–AB18 or EOIR Docket No. 021–0410, by one of the two methods below.

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the website instructions for submitting comments.
- *Mail:* Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of electronic submission, please direct the mail/shipment to: Raechel Horowitz, Chief, Immigration Law Division, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041. To ensure proper handling, please reference the agency name and RIN 1125–AB18 or EOIR Docket No. 021–0410 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

FOR FURTHER INFORMATION CONTACT: Raechel Horowitz, Chief, Immigration Law Division, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041, telephone (703) 305–0289.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule via one of the methods and by the deadline stated above. The Department of Justice (''Department'') also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the proposed rule; explain the reason for any recommended change; and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFYING INFORMATION'' in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You also must prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.*

Personally identifying information located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. The Department may withhold from public viewing information provided in comments that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.* To inspect the agency's public docket file in person, you must make an appointment with the agency. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for agency contact information.

II. Legal Authority

The Department issues this proposed rule pursuant to section 103(g) of the Immigration and Nationality Act (''INA''), 8 U.S.C. 1103(g), as amended by the Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135 (as amended). Under the HSA, the Attorney General retains authority to ''establish such regulations, . . . issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out'' the Attorney General's authorities under the INA. HSA 1102, 116 Stat. at 2273–74; INA 103(g)(2), 8 U.S.C. 1103(g)(2).

III. History and Background

On August 26, 2020, the Department published a notice of proposed rulemaking (''NPRM'' or ''proposed

rule'') that proposed to amend the Executive Office for Immigration Review (''EOIR'') regulations regarding the handling of appeals to the Board. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020) (''AA96 NPRM''). The Department proposed multiple changes to the processing of appeals to ''ensure the consistency, efficiency, and quality of its adjudications.'' *Id.* at 52491. In addition, the Department proposed to amend the regulations to expressly state that immigration judges and Appellate Immigration Judges [1] have no ''freestanding'' authority to administratively close cases. *Id.* Finally, the Department proposed to delete inapplicable or unnecessary provisions regarding the forwarding of the record of proceeding on appeal. *Id.*[2] The AA96 NPRM set forth a 30-day comment period, stating that any public comments must be submitted by September 25, 2020. *Id.* The Department received 1,287 comments during the comment period.[3]

On December 16, 2020, the Department published a final rule, wherein it responded to comments received during the notice-and-comment period and adopted the regulatory language proposed in the AA96 NPRM with minor changes. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 81588 (Dec. 16, 2020) (''AA96 Final Rule''). The AA96 Final Rule's effective date was January 15, 2021, *id.* at 81588, but the rule was enjoined on March 10, 2021, in litigation described in further detail below. *See Centro Legal de la Raza* v. *Exec. Off. for Immigr. Rev.,* 524 F. Supp. 3d 919 (N.D. Cal. 2021).

[1] Historically, Department rules, including the AA96 Final Rule, used the term ''Board member'' to refer to members of the Board. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 81588, 81590 (Dec. 16, 2020). The Department has begun using the term ''Appellate Immigration Judge'' to refer to members of the Board, and that is the term used in this NPRM. Although ''Board member'' and ''Appellate Immigration Judge'' are synonymous, *see* 8 CFR 1003.1(a)(1)–(2), the Department believes that ''Appellate Immigration Judge'' is a more accurate description of the role of members of the Board. *See* Organization of the Executive Office for Immigration Review, 84 FR 44537, 44539 (issued as interim final rule) (Aug. 26, 2019).

[2] In addition, the Department proposed to update outdated references to the former Immigration and Naturalization Service (''INS''). 85 FR at 52507 n.36.

[3] The Department posted 1,284 of the comments received for public review. The Department did not post three of the comments received because they were either non-substantive or duplicates of other comments that were posted.

A. Briefing Schedule Changes at the Board of Immigration Appeals

1. Before Promulgation of the AA96 Final Rule

Prior to the AA96 Final Rule, the regulations specified that appeals involving detained noncitizens [4] were subject to a simultaneous briefing schedule, wherein both parties had 21 days to file simultaneous briefs, unless the Board specified a shorter period. 8 CFR 1003.3(c)(1) (2019). The regulations permitted parties subject to a simultaneous briefing schedule to submit reply briefs within 21 days of the deadline for the initial brief, when permitted by the Board. *Id.* For cases involving non-detained noncitizens, the regulations provided for a consecutive briefing schedule. The appellant had 21 days to file an initial brief, unless the Board specified a shorter period, and the appellee then had an equivalent amount of time, including any extensions granted to the appellant, to file a reply brief. *Id.*

Appellate Immigration Judges were authorized, upon written motion, to extend the filing deadline of an initial brief or a reply brief for up to 90 days for good cause shown. *Id.* Appellate Immigration Judges generally granted briefing extensions in 21-day increments but would also grant longer extensions for good cause shown. The regulations also authorized Appellate Immigration Judges to request supplemental briefing from parties after the briefing deadline expired. *Id.*

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule amended 8 CFR 1003.3(c)(1) to require a simultaneous briefing schedule for all cases before the Board, regardless of the noncitizen's detention status. 85 FR at 81588. The AA96 Final Rule also reduced the allowable time to extend a briefing schedule from a maximum of 90 days to a maximum of 14 days and limited all parties to one briefing extension. *Id.* at 81654 (''If an extension is granted, it is granted to both parties, and neither party may request a further extension.''). The AA96 Final Rule specified that no party was entitled to a briefing extension as a matter of right and that briefing extensions should only be granted upon an ''individualized consideration of good cause.'' *Id.* The AA96 Final Rule also shortened the maximum amount of time for submitting reply briefs from 21 days to 14 days, and only when the Board permitted filing of a reply brief. *Id.*

[4] For purposes of the discussion in this preamble, the Department uses the term ''noncitizen'' colloquially and synonymous with the term ''alien'' as it is used in the INA. *See* INA 101(a)(3), 8 U.S.C. 1101(a)(3). This NPRM is also proposing to define the term ''noncitizen'' to be synonymous with the term ''alien,'' as explained later in this preamble.

B. Administrative Closure Authority

1. Before Promulgation of the AA96 Final Rule

Prior to the AA96 Final Rule, 8 CFR 1003.1(d)(1)(ii) (2019) and 1003.10(b) (2019) stated that EOIR adjudicators ''may take any action consistent with their authorities under the [INA] and the regulations as is appropriate and necessary for the disposition'' of the case. Although the regulations have never explicitly stated that EOIR adjudicators have general administrative closure authority, numerous courts of appeals and the Board have interpreted ''any action'' to include using docket management tools such as administrative closure. *See Romero* v. *Barr,* 937 F.3d 282, 292 (4th Cir. 2019) (explaining that ''[8 CFR] 1003.10(b) and 1003.1(d)(1)(ii) unambiguously confer[ ] upon [immigration judges] and the BIA the general authority to administratively close cases''); *Meza Morales* v. *Barr,* 973 F.3d 656, 667 n.6 (7th Cir. 2020) (Barrett, J.) (concluding that ''[8 CFR] 1003.10(b) grants immigration judges the power to administratively close cases''); *Arcos Sanchez* v. *Att'y Gen.,* 997 F.3d 113, 122 (3d Cir. 2021) (explaining ''that the plain language establishes that general administrative closure authority is unambiguously authorized by these regulations''); *Matter of Avetisyan,* 25 I&N Dec. 688, 692 (BIA 2012) (stating that EOIR adjudicators may utilize continuances or administrative closure ''to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket''). *But see Hernandez-Serrano* v. *Barr,* 981 F.3d 459, 466 (6th Cir. 2020) (concluding that ''[8 CFR] 1003.10(b) and 1003.1(d) do not delegate to [immigration judges] or the Board the general authority to suspend indefinitely immigration proceedings by administrative closure'' (internal quotation marks omitted)); *Garcia-DeLeon* v. *Garland,* 999 F.3d 986, 991–93 (6th Cir. 2021) (subsequently ruling that immigration judges and the Board do have authority to grant administrative closure to permit a noncitizen to apply for a provisional unlawful presence waiver).

Since 1958, regulations have authorized EOIR adjudicators to exercise their discretion as may be ''appropriate and necessary'' for the disposition of a case. Miscellaneous Amendments to Chapter, 23 FR 2670,

2671 (Apr. 23, 1958) (''Subject to any specific limitation prescribed by the act and this chapter, special inquiry officers shall also exercise the discretion and authority conferred upon the Attorney General by the act as is appropriate and necessary for the disposition of such cases.'');[5] *see also Hernandez-Serrano,* 981 F.3d at 464 (''As early as 1958, regulations granted the predecessors to [immigration judges] (called 'special inquiry officers') and the Board authority to take actions 'appropriate and necessary for the disposition of' their cases.''). In 2000, the Department published an NPRM that proposed more expansive authority: that EOIR adjudicators could take ''any action'' appropriate and necessary for the disposition of a case. *See* Authorities Delegated to the Director of the Executive Office for Immigration Review, the Chairman of the Board of Immigration Appeals, and the Chief Immigration Judge, 65 FR 81434, 81436–37 (Dec. 26, 2000). The Department adopted this regulatory language for Board members in 2002, and for immigration judges in 2007.[6]

Since at least the 1980s,[7] immigration judges and the Board have exercised their authority to use administrative closure as a docketing tool, where appropriate, to remove cases from their active dockets and to regulate the course of proceedings. *See Arcos Sanchez,* 997 F.3d at 116–17 (recognizing that adjudicators have used administrative closure dating back to the 1980s).

In 1984, the EOIR Office of the Chief Immigration Judge issued an Operating Policies and Procedures Memorandum (''OPPM'') setting forth options available to immigration judges in cases where noncitizens failed to appear for their hearings, including the option to administratively close cases. EOIR, OPPM 84–2: *Cases in Which Respondents/Applicants Fail to Appear for Hearing,* 1984 WL 582760 (Mar. 7, 1984). The OPPM included language specifying that administratively closed cases were to be considered ''no longer pending before the Immigration Judge,'' and that no further action would be taken until ''the case is presented for re-calendaring and further proceedings.'' *Id.* at *2. The OPPM provided a non-exhaustive list of factors for immigration judges to consider such as adequacy of notice; likelihood that a deportation order, if entered in absentia, would be enforced; the nature of charges; and the need for parties to be present. *Id.* at *1.

The next significant development in the exercise of administrative closure came in 1986, shortly after President Reagan signed into law the Immigration Reform and Control Act of 1986, Public Law 99–603, 100 Stat. 3359. The Immigration Reform and Control Act created a pathway to lawful status for certain undocumented noncitizens who had entered the United States prior to January 1, 1982. Immigration judges used administrative closure to pause removal proceedings while noncitizens pursued this newly available pathway to lawful status. *See, e.g., Veliz* v. *Caplinger,* No. 96–1508, 1997 WL 61456, at *1 (E.D. La. Feb. 12, 1997) (noting that the removal proceedings before the agency were administratively closed to allow noncitizens to apply for legalization under the Immigration Reform and Control Act).

As administrative closure became more common, the Board began to address questions related to its use. For example, in 1988, the Board published a decision in which it determined that an immigration judge improperly exercised administrative closure authority. *Matter of Amico,* 19 I&N Dec. 652, 654 (BIA 1988) (determining that the immigration judge's decision to administratively close a case rather than hold proceedings in absentia was ''inappropriate'' because administrative closure would have permitted the noncitizen to avoid an order of deportation by failing to appear). In its decision, the Board clarified that administratively closing a case ''does not result in a final order'' and ''is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations.'' *Id.* at 654 n.1. In 1990, the Board published *Matter of Lopez-Barrios* and *Matter of Munoz-Santos,* both of which held that an immigration judge could not administratively close a case if either party to the proceedings opposed closure. *Matter of Lopez-Barrios,* 20 I&N Dec. 203 (BIA 1990), *overruled by Matter of Avetisyan,* 25 I&N Dec. at 697; *Matter of Munoz-Santos,* 20 I&N Dec. 205 (BIA 1990), *overruled by Matter of Avetisyan,* 25 I&N Dec. at 697.[8]

Over the next decade, the Department entered into binding settlement agreements and issued numerous regulations that required immigration judges and the Board to administratively close cases or provided that parties could request administrative closure in a variety of specified situations. *See, e.g., Barahona-Gomez* v. *Ashcroft,* 243 F. Supp. 2d 1029, 1035 (N.D. Cal. 2002) (''[I]f the [Respondent] fails to appear for the scheduled hearing . . . the case shall be administratively closed, following which, should the Respondent come forward, the hearing shall be recalendared[.]''); *American Baptist Churches* v. *Thornburgh,* 760 F. Supp. 796, 805 (N.D. Cal. 1991) (''*ABC*'') (ordering that proceedings before EOIR be administratively closed, generally, for class members); Adjustment of Status for Certain Nationals of Nicaragua and Cuba, 63 FR 27823, 27830 (May 21, 1998) (implementing administrative closure procedures for noncitizens who appeared eligible to adjust status under the Nicaraguan Adjustment and Central American Relief Act of 1997 (''NACARA'')) (8 CFR 245.13(d)(3) (1999)); Adjustment of Status for Certain Nationals of Haiti, 64 FR 25756, 25769 (May 12, 1999) (requiring EOIR adjudicators to exercise administrative closure in cases where noncitizens appeared to be eligible to file an application for adjustment of status under the Haitian Refugee Immigration Fairness Act of 1998 (''HRIFA'') and met various other requirements) (8 CFR 245.15(p)(4) (2000)); Executive Office for Immigration Review; Adjustment of Status for Certain Nationals of Nicaragua, Cuba, and Haiti, 66 FR 29449, 29452 (May 31, 2001) (providing that a noncitizen for whose case an immigration judge or the Board has granted a motion to reopen under particular statutes may move to have proceedings administratively closed to seek adjustment of status) (8 CFR 245.13(m)(1)(ii) (2002)); V Nonimmigrant Classification; Spouses and Children of Lawful Permanent Residents, 66 FR 46697, 46700 (Sept. 7, 2001) (''If the [noncitizen] appears eligible for V nonimmigrant status, the

[5] Initially, the adjudicators who reviewed and decided deportation cases were known as special inquiry officers. INA 101(b)(4), 8 U.S.C. 1101(b)(4) (1952). These adjudicators later became known as immigration judges. *See* INA 101(b)(4), 8 U.S.C. 1101(b)(4) (defining ''immigration judge''); Immigration Judge, 38 FR 8590 (Apr. 4, 1973) (''The term 'immigration judge' means special inquiry officer.'').

[6] Although the same NPRM proposed this regulatory authority for both the Board and immigration judges, the regulatory language was codified for the Board and immigration judges in separate final rules. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 54877, 54902–904 (Aug. 26, 2002); Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 FR 53673, 53677–78 (Sept. 20, 2007).

[7] Indeed, EOIR records indicate that administrative closure was used as early as 1974.

[8] These decisions did not suggest that adjudicators did not have the authority to administratively close cases. Rather, they, as well as numerous subsequent administrative decisions, addressed when using administrative closure might be ''appropriate'' under the regulations. *See* 8 CFR 236.1 (1958) (permitting adjudicators to exercise authorities only as ''appropriate and necessary''); *see also* 8 CFR 1003.1(d)(1)(ii) (2019); 8 CFR 1003.10(b) (2019).

immigration judge or the Board, whichever has jurisdiction, shall administratively close the proceeding or continue the motion indefinitely.'') (8 CFR 214.15(l) (2002)); New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for ''T'' Nonimmigrant Status, 67 FR 4783, 4797 (Jan. 31, 2002) (stating that T-visa applicants may request administrative closure) (codifying language later moved to 8 CFR 1214.2(a)); Adjustment of Status for Certain Aliens from Vietnam, Cambodia, and Laos in the United States, 67 FR 78667, 78673 (Dec. 26, 2002) (authorizing certain nationals of Vietnam, Cambodia, and Laos to move for administrative closure pending their applications for adjustment of status, but preventing the immigration judge or the Board from ''defer[ring] or dismiss[ing] the proceeding'' without the former Immigration and Naturalization Service's consent) (codifying language later moved to 8 CFR 1245.21(c)).

Since 2011, the U.S. Department of Homeland Security (''DHS'') has issued a number of enforcement priority memoranda, some of which have subsequently been rescinded, that included discussions of when U.S. Immigration and Customs Enforcement (''ICE'') attorneys should exercise prosecutorial discretion in pursuing removal, which noncitizens were considered priorities for removal, and methods for implementing those priorities as to noncitizens who were already in removal proceedings, including by filing joint motions to administratively close proceedings. *See, e.g.,* Memorandum for All Field Office Directors et al., from John Morton, Director, ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* at 2 (Jun. 17, 2011) (describing prosecutorial discretion as a decision ''not to assert the full scope of the enforcement authority available to the agency''), *https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf;* Memorandum for Tae D. Johnson, Acting Director, ICE, from Alejandro N. Mayorkas, Secretary, DHS, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), *https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.*

Many pending removal-related cases before EOIR and the federal courts at the time potentially fell under the memoranda's criteria for low priorities for removal. *Cf. In re Immigr. Petitions for Rev. Pending in U.S. Ct. of Appeals for Second Cir.,* 702 F.3d 160, 160 (2d Cir. 2012) (''[The petitioner] is one of more than a thousand cases in our Court that are actually or potentially subject to a future decision by the Government as to whether it will or can remove petitioners if their petitions are denied.''). The use of administrative closure served to facilitate the exercise of prosecutorial discretion by allowing DHS counsel to request that certain low-priority cases be removed from immigration judges' active calendars and the Board's docket, thereby allowing adjudicators to focus on higher priority cases.

In 2012, the Board published *Matter of Avetisyan,* which overruled the Board's prior precedent in *Matter of Lopez-Barrios* and *Matter of Munoz-Santos.* In *Matter of Avetisyan,* the Board established that EOIR adjudicators could administratively close proceedings over a party's objection and set forth a list of factors that adjudicators should consider when determining whether administrative closure was appropriate.[9] 25 I&N Dec. at 688. In so holding, the Board stated that EOIR adjudicators' authority to administratively close proceedings stemmed from their general regulatory authority, under 8 CFR 1003.10(b) and 1003.1(d)(1)(ii), to take any appropriate and necessary action. *Id.* at 691. The Board found that an EOIR adjudicator's determination to administratively close a case over DHS's objection would not undermine DHS's prosecutorial discretion, as prosecutorial discretion related to DHS's decision to commence removal proceedings. *Id.* at 694. In contrast, the Board determined that once jurisdiction over removal proceedings vests with EOIR, the EOIR adjudicator has the authority to regulate the course of proceedings, including to administratively close cases where appropriate. *Id.*

The Board also explained that EOIR adjudicators should independently weigh all relevant factors in determining whether to administratively close a case, including but not limited to:

(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action [the respondent] is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.

Id. at 696. The Board later held that ''the primary consideration for an Immigration Judge in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits.'' *Matter of W–Y–U–,* 27 I&N Dec. 17, 20 (BIA 2017).

In 2013, DHS published a final rule that allowed certain noncitizens in removal proceedings to apply for provisional unlawful presence waivers of inadmissibility while still in the United States, but only if their removal proceedings had been administratively closed and not recalendared at the time they filed for the waiver. Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 FR 535, 577 (Jan. 3, 2013) (codifying language that was later moved to 8 CFR 212.7(e)(4)(iii)).[10] DHS further articulated that administrative closure is an appropriate and common procedural tool for dispensing with non-priority cases. *Id.* at 544 (''Under its prosecutorial discretion (PD) policies, ICE has been reviewing cases pending

[9] Notably, before *Matter of Avetisyan* overruled the Board's prior precedent on this issue, the Board had encouraged DHS to consider moving for administrative closure rather than multiple continuances in ''appropriate circumstances, such as where there is a pending prima facie approvable visa petition.'' *Matter of Hashmi,* 24 I&N Dec. 785, 791 n.4 (BIA 2009); *see also Matter of Rajah,* 25 I&N Dec. 127, 135 n.10 (BIA 2009). The Board described administrative closure as ''an attractive option in these situations, as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge.'' *Matter of Hashmi,* 24 I&N Dec. at 791 n.4. The Board also noted that administrative closure could ''avoid the repeated rescheduling of a case that is clearly not ready to be concluded.'' *Id.*

[10] Pursuant to INA 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B), noncitizens who are inadmissible because they accrued more than 180 days of unlawful presence while in the United States and subsequently depart the United States may seek waiver of this ground of inadmissibility. Prior to the DHS rulemaking, such noncitizens, if not eligible to adjust status within the United States, had to request a waiver at their consular interview after leaving the United States and triggering the ground of inadmissibility. 78 FR at 536. In 2013, DHS established the provisional unlawful presence waiver process. *Id.* It began allowing noncitizens who are immediate relatives (spouses, children, and parents) of U.S. citizens to apply for a waiver while remaining in the United States, and, upon provisional approval, travel abroad to attend their consular interview for an immigrant visa, thus mitigating the likelihood that such individuals would be required to wait outside of the United States, apart from their immediate relatives, while the waiver was adjudicated. *Id.* In 2016, to further improve administrative efficiency, DHS expanded the provisional unlawful presence waiver process to all noncitizens statutorily eligible for an immigrant visa and a waiver of inadmissibility based on unlawful presence in the United States. Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 FR 50244 (July 29, 2016).

before EOIR and all incoming cases to ensure that they are aligned with the agency's civil enforcement priorities and that ICE is effectively using its finite resources. For cases that ICE determines are not enforcement priorities, it exercises its discretion where appropriate, typically by moving for administrative closure.''). That same year, the Office of the Chief Immigration Judge encouraged immigration judges to use administrative closure where the parties reached an ''alternate case resolution'' through prosecutorial discretion. *See* EOIR, OPPM 13–01: *Continuances and Administrative Closure* at 4 (Mar. 7, 2013) (rescinded), *https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf.*

In 2017, the effectiveness of administrative closure for streamlining EOIR's cases was briefly referenced in a study conducted by an outside consultant. *See* EOIR, Booz Allen Hamilton, *Legal Case Study: Summary Report* at 26 (Apr. 6, 2017) (recommending that the Department engage in discussions with DHS to explore the development of policies regarding administrative closure as one way to improve processing efficiency).[11]

In 2018, the longstanding practice of administrative closure stopped when the Attorney General issued *Matter of Castro-Tum,* overruling *Matter of Avetisyan* and all Board precedents inconsistent with the Attorney General's decision. *Matter of Castro-Tum,* 27 I&N Dec. 271, 271 (A.G. 2018), *overruled by Matter of Cruz-Valdez,* 28 I&N Dec. 326 (A.G. 2021). In *Castro-Tum,* the Attorney General held that EOIR adjudicators lack the general authority under the regulations to administratively close cases and, as a result, lack the authority to administratively close cases unless a regulation or a settlement agreement expressly provided such authority. *Id.* at 272.

Matter of Castro-Tum has been rejected by the majority of those courts of appeals that have considered it. The Third, Fourth, and Seventh Circuits rejected *Matter of Castro-Tum,* holding that the pre-AA96 regulations unambiguously provide EOIR adjudicators with general authority to administratively close cases. *See Romero,* 937 F.3d at 297 (concluding that 8 CFR 1003.10(b) and 1003.1(d)(1)(ii) ''unambiguously confer upon [immigration judges] and the BIA the general authority to administratively close cases''); *Arcos Sanchez,* 997 F.3d at 122 (''[W]e hold that the plain language establishes that general administrative closure authority is unambiguously authorized by these regulations.''); *Meza Morales,* 973 F.3d at 667 n.6 (concluding that 8 CFR 1003.10(b) ''grants immigration judges the power to administratively close cases''). The Sixth Circuit reached a different conclusion, finding that the pre-AA96 regulations do not confer such general authority. *Hernandez-Serrano,* 981 F.3d at 466 (citing *Matter of Castro-Tum,* 27 I&N Dec. at 272). However, the Sixth Circuit subsequently clarified that ''administrative closure for the limited purpose of permitting noncitizens to apply for provisional unlawful presence waivers'' was an ''appropriate and necessary'' act under 8 CFR 1003.1(d)(1)(ii) and 1003.10(b), as codified prior to the AA96 Final Rule. *Garcia-DeLeon,* 999 F.3d 986 at 992–93.

Recently, the Second Circuit held that neither the immigration judge nor the BIA abused its discretion in relying on *Matter of Castro-Tum*—which was in effect at the time of the agency's adjudications—to deny a noncitizen's motion for administrative closure. *Garcia* v. *Garland,* 64 F.4th 62, 76 (2d Cir. 2023). The Second Circuit concluded that the pre-AA96 regulations were ambiguous as to whether they authorized general administrative closure and deferred to the Attorney General's interpretation in *Matter of Castro-Tum. See id.* at 72–75. However, the Second Circuit noted that—after the BIA issued its decision in the case—the Attorney General issued *Matter of Cruz-Valdez,* 28 I&N Dec. at 326, which overruled *Matter of Castro-Tum. Garcia* v. *Garland,* 64 F.4th at 69. In *Cruz-Valdez,* the Attorney General explained that ''three courts of appeals have rejected *Castro-Tum,*'' that *Castro-Tum* ''departed from long-standing practice,'' and that the matter was the subject of an ongoing rulemaking. *See Matter of Cruz-Valdez,* 28 I&N Dec. at 328–29 (directing EOIR adjudicators to continue applying the standard for administrative closure set forth in *Matter of Avetisyan* and *Matter of W–Y–U-,* except in jurisdictions where a court of appeals has held otherwise, while the Department reconsiders the AA96 Final Rule). Against this backdrop, the Second Circuit left open the possibility that other interpretations of the regulations could also be permissible. *See Garcia* v. *Garland,* 64 F.4th at 69 (noting that ''the Attorney General has supplanted *Matter of Castro-Tum* with a new interpretation of the applicable regulations'').

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule amended 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) and related provisions to expressly state that EOIR adjudicators do not have ''freestanding authority'' to administratively close cases before EOIR. 85 FR at 81651, 81655. Rather, the AA96 Final Rule expressly limited administrative closure authority to express grants of such authority by regulation or judicially approved settlement. *See, e.g.,* 8 CFR 1214.2(a), 1214.3, 1240.62(b), 1240.70(f)–(h), 1245.13(d)(3)(i), 1245.15(p)(4)(i), 1245.21(c); *Barahona-Gomez,* 243 F. Supp. 2d at 1035–36 (discussing settlement agreement requiring immigration judges and the Board to administratively close class members' cases).

The AA96 Final Rule was consistent with the Attorney General's holding in *Matter of Castro-Tum,* 27 I&N Dec. at 284, that 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) do not provide for general administrative closure authority.[12] The AA96 Final Rule asserted that general administrative closure authority improperly allows immigration judges to determine which immigration cases should be adjudicated and which ones should not. 85 FR at 81599. The AA96 Final Rule stated that general authority to administratively close cases was improper because ''in practice, unlike continuances, administrative closure has at times been used to effectively terminate cases through indefinite delay.'' *Id.*

C. Termination and Dismissal

As discussed above, the regulations in place prior to the AA96 Final Rule conferred on EOIR adjudicators the general authority to ''take any action consistent with their authorities under the Act and regulations'' as ''appropriate and necessary for the disposition'' of such cases. 8 CFR 1003.1(d)(1)(ii), 1003.10(b). The regulations further state that immigration judge orders ''shall direct the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate.'' 8 CFR 1240.12(c). Further, immigration judges are ''authorized to

[11] The Department has considered the various proposals made in the report. For example, in 2021, EOIR finalized a rule implementing electronic filing at all immigration courts and the BIA. *See* Booz Allen Hamilton, *Legal Case Study: Summary Report* at 23; Executive Office for Immigration Review Electronic Case Access and Filing, 86 FR 70708 (Dec. 13, 2021) (''ECAS Rule'').

[12] Moreover, the AA96 Final Rule cited the Attorney General's explanation that general administrative closure authority conflicts with regulatory requirements to resolve matters in a ''timely'' fashion. 85 FR 81588 (Dec. 16, 2020) at 81599.

issue orders in the alternative or in combination as [they] may deem necessary.'' *Id.*

The regulations, as published prior to and unchanged by the AA96 Final Rule, provide immigration judges with explicit authority to terminate or dismiss removal proceedings after the commencement of proceedings in certain circumstances. With respect to dismissal, 8 CFR 1239.2(c) provides that after commencement of proceedings, government counsel or certain enumerated officers under 8 CFR 239.1(a) may move to dismiss proceedings on grounds set forth in 8 CFR 239.2(a), which include where: (1) the respondent is a national of the United States; (2) the respondent is not deportable or inadmissible under immigration laws; (3) the respondent is deceased; (4) the respondent is not in the United States; (5) the Notice to Appear was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act, but the respondent's failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act; (6) the Notice to Appear was improvidently issued; or (7) circumstances of the case have changed after the Notice to Appear was issued to such an extent that continuation is no longer in the best interest of the government. 8 CFR 1239.2(c). Dismissal of proceedings is without prejudice to DHS or the noncitizen. *Id.*

With respect to termination, 8 CFR 1239.2(f) provides that ''[a]n immigration judge may terminate removal proceedings to permit the [noncitizen] to proceed to a final hearing on a pending application or petition for naturalization when the [noncitizen] has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors[.]'' 8 CFR 1239.2(f). The regulation also provides that ''in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.'' *Id.*

The regulations also confer authority on immigration judges to dismiss or terminate proceedings in other discrete circumstances. *See, e.g.,* 8 CFR 1216.4(a)(6) (authorizing termination upon joint motion of the parties for failure to properly file a Petition to Remove the Conditions on Residence, Form I–751); 8 CFR 1235.3(b)(5)(iv) (authorizing termination where U.S. citizenship, permanent residence, or asylee or refugee status is found in claimed status review proceedings); *id.* at 1235.3(b)(5)(iv) (authorizing termination where U.S. citizenship, permanent residence, or asylee or refugee status is found in claimed status review proceedings); *id.* at 1238.1(e) (authorizing termination upon DHS motion in order for DHS to commence administrative removal under section 238 of the Act); *see also id.* at 1245.13(l) (deeming proceedings terminated upon the granting of adjustment of status for certain Nicaraguan and Cuban nationals).[13]

Additionally, the Board has held that the immigration judge may terminate proceedings when there is a proper reason to do so, such as where DHS cannot meet its burden to sustain charges of removability ''or in other specific circumstances consistent with the law and applicable regulations.'' *Matter of Sanchez-Herbert,* 26 I&N Dec. 43, 45 (BIA 2012); *see also Matter of Lopez-Barrios,* 20 I&N Dec. at 204.

In 2018, the Attorney General held that, under the regulations, EOIR adjudicators lacked the ''inherent authority'' to terminate proceedings except as expressly authorized. *Matter of S–O–G– & F–D–B–,* 27 I&N Dec. 462, 463 (A.G. 2018). In reaching that conclusion, the Attorney General relied heavily on the decision in *Matter of Castro-Tum. See id.* at 463, 466. However, the Attorney General subsequently overruled *Matter of S–O–G– & F–D–B–,* explaining that ''[t]he precedential basis for that opinion ha[d] been significantly eroded by the overruling of *Castro-Tum,*'' [14] and that it ''imposed 'rigid procedural requirements that would undermine . . . fair and efficient adjudication' in certain immigration cases.'' *Matter of Coronado Acevedo,* 28 I&N Dec. 648, 651 (A.G. 2022) (quoting *Matter of A–C–A–A–,* 28 I&N Dec. 351, 351 (A.G. 2021)). Accordingly, *Matter of Coronado Acevedo* held that ''immigration judges and the Board should be permitted to consider and, where appropriate, grant termination'' in certain limited circumstances pending the outcome of a rulemaking to reconsider the regulations at issue in both *Matter of Castro-Tum* and *Matter of S–O–G– & F–D–B–. Id.* at 652.

D. Sua Sponte Reopening or Reconsideration and Self-Certification

1. Before Promulgation of the AA96 Final Rule

EOIR adjudicators have long had the authority to *sua sponte* reopen or reconsider cases, under rules promulgated in 1958 that remained in effect until the issuance of the AA96 Final Rule. *See* Miscellaneous Amendments to Chapter, 23 FR 9115, 9117 (Nov. 26, 1958); 8 CFR 1003.2(a)(1) and 1003.23(b)(1) (2019).[15] However, even prior to 1958, courts recognized such authority. *See Dada* v. *Mukasey,* 554 U.S. 1, 12–13 (2008) (discussing

[13] Although codified separately in the regulations, termination and dismissal authority have been referenced interchangeably by EOIR. *See, e.g., Matter of Coronado Acevedo,* 28 I&N Dec. 648, 648 n.1 (A.G. 2022) (''This labeling distinction is not material when a movant asks an immigration judge or the Board to end a case pursuant to a provision that does not use one of those labels. Except where a distinction between the two terms exists in regulations, this opinion refers to 'termination' and 'dismissal' interchangeably.''); *Matter of Vizcarra-Delgadillo,* 13 I&N Dec. 51, 55 (BIA 1968) (holding that the immigration judge had authority to *terminate* proceedings as ''improvidently begun'' in a case where INS moved for dismissal and both parties agreed to the motion to dismiss); *Matter of G–N–C,* 22 I&N Dec. 281, 284 (BIA 1998) (using the term ''dismissal'' and ''termination'' interchangeably in a case involving an INS motion for dismissal of proceedings under former 8 CFR 239.2(c)); *Matter of W–C–B-,* 24 I& N Dec. 118, 122 (BIA 2007) (stating that once jurisdiction vests with an immigration judge, a Notice to Appear cannot be cancelled but instead DHS must ''move for dismissal of the matter, *i.e.,* request termination of the removal proceeding'' under 8 CFR 239.2(c)); *Matter of Andrade Jaso & Carbajal Ayala,* 27 I&N Dec. 557, 559 (BIA 2019) (holding that the ''immigration judge properly granted the DHS's motion to dismiss the proceedings without prejudice'' under 8 CFR 1239.2(c)); *see also* 78 FR 535 (Jan. 3, 2013) at 544 (preamble to a DHS final rule stating that ''[i]f the Form I–601A is approved for [a noncitizen] whose proceedings have been administratively closed, the [noncitizen] should seek termination or dismissal of the proceedings, without prejudice, by EOIR . . . or risk becoming ineligible for the immigrant visa based on another ground of inadmissibility''). While used interchangeably, the regulations limit dismissal to only those cases where DHS has moved for dismissal. Nevertheless, both termination and dismissal result in concluding removal proceedings without entering an order of removal.

[14] In particular, the Fourth Circuit has indicated that it ''fail[ed] to see how the general power to terminate proceedings'' would be inconsistent with the ''authorities bestowed by the INA.'' *Gonzalez* v. *Garland,* 16 F.4th 131, 141–42 (4th Cir. 2021) (''We have found no provisions stating that the [immigration judge] or BIA *cannot* terminate removal proceedings, and the Government does not cite to any.''). Further, in that case, the Fourth Circuit rejected the Government's position that section 240(c)(1)(A) of the Act, 8 U.S.C. 1229a(c)(1)(A), which states that ''[a]t the conclusion of the proceeding, the immigration judge shall decide whether [a noncitizen] is removable from the United States,'' precludes termination. *Gonzalez,* 16 F.4th at 141. Specifically, the court concluded that a statutory requirement that an immigration judge decide whether a noncitizen is removable does not limit the immigration judge's actions after making that determination, and that there are circumstances where delay or termination after such determination may be appropriate. *Id.*

[15] The 1958 rule amended, inter alia, part 3.2 of Title 8 of the CFR. Following the creation of DHS in 2003 after the passage of the HSA, EOIR's regulations were moved from Chapter I of Title 8 to Chapter V. Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824 (Feb. 28, 2003). Part 3.2 was subsequently duplicated for EOIR at part 1003.2. *Id.* at 9830.

reopening as ''a judicial creation later codified by federal statute'' and citing decisions using reopening as early as 1916).

As originally implemented by the Department, the *sua sponte* authority of immigration judges and Appellate Immigration Judges was not limited by time or number requirements. In 1996, however, the Department issued a rule establishing time and number limitations on motions to reopen to implement statutory changes made by the Immigration Act of 1990, Public Law 101–649, 104 Stat. 4978. Immigration Act of 1990, sec. 545(d), 104 Stat. at 5066 (''[T]he Attorney General shall issue regulations with respect to . . . the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions[.]''); Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 FR 18900 (Apr. 29, 1996). At the time, the Department declined to include a ''good cause'' exception to the time and number limitations for motions to reopen filed by a party in proceedings because the same goal was accomplished by *sua sponte* authority. 61 FR at 18902; *see also Avila-Santoyo* v. *U.S. Att'y Gen.,* 713 F.3d 1357, 1363 (11th Cir. 2013) (same).

Additionally, prior to the AA96 Final Rule, the Board had the authority to self-certify cases. 8 CFR 1003.1(c) (2019). Under this authority, the Board could, in its discretion, review decisions of an immigration judge and DHS by its own certification. 8 CFR 1003.1(b)–(c) (2019). The Board could exercise this authority even in cases where a party's appeal was untimely or defective, after determining that the parties were given a fair opportunity to make representations before the Board. *Id.*

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule revised the regulations to limit the longstanding general *sua sponte* authority to reopen or reconsider cases and established that *sua sponte* reopening or reconsideration could only be used to correct typographical errors or defects in service. 85 FR at 81654–55 (8 CFR 1003.23(b)(1)). The AA96 Final Rule also limited exceptions to the time and numerical limits on filing a motion to reopen to cases where a change in fact or law post-dating the entry of a final order vitiated the grounds for removal and the movant demonstrated diligence in pursuing the motion. *Id.* (8 CFR 1003.23(b)(4)(v)). The Department chose to apply these restrictions on immigration judges' and the Board's *sua sponte* reopening authority to all pending cases. *Id.* at 81646–47. The Department explained that this rescission was needed because *sua sponte* authority had been used improperly. *Id.* at 81628. Additionally, the Department explained that the Attorney General rescinded his delegation of *sua sponte* authority to reopen or reconsider given the lack of a meaningful standard to guide a decision whether to order reopening or reconsideration of cases through the use of *sua sponte* authority. *Id.*

The AA96 Final Rule also amended 8 CFR 1003.1(c) to remove the Board's authority to self-certify cases in order to accept untimely or defective appeals in exceptional circumstances. The Department explained that the change was necessary due to similar concerns such as the lack of standards for the use of the self-certification authority, inconsistent applications resulting from the lack of a defined standard for determining when ''exceptional'' circumstances exist, the potential for lack of notice to the parties when the Board elected to use its self-certification authority, the potential for inconsistent application and abuse of self-certification authority, and the strong interest in finality of EOIR's adjudications. *Id.* at 81591.

E. Board Findings of Fact—Administrative Notice

1. Before Promulgation of the AA96 Final Rule

Prior to the AA96 Final Rule, the regulations generally precluded the Board from engaging in fact-finding in the course of deciding appeals. 8 CFR 1003.1(d)(3)(iv) (2019). However, the regulations authorized the Board to take ''administrative notice of commonly known facts such as current events or the contents of official documents.'' *Id.*

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule expanded the regulations regarding administrative notice in several ways. First, in addition to permitting the Board to take administrative notice of the content of official documents and current events, the rule further permitted the Board to take administrative notice of ''[f]acts that can be accurately and readily determined from official government sources and whose accuracy is not disputed'' and ''[u]ndisputed facts contained in the record.'' 85 FR at 81651 (8 CFR 1003.1(d)(3)(iv)(A)(3), (4)). The AA96 Final Rule went on to state that where the Board intends to rely on administratively noticed facts to reverse an immigration judge's grant of relief or protection from removal, the Board is required to notify the parties of its intent and provide them at least 14 days within which to respond to the notice. *Id.* (8 CFR 1003.1(d)(3)(iv)(B)). However, the AA96 Final Rule did not require the Board to notify the parties if it relied on an administratively noticed fact to uphold an immigration judge's denial. *See id.* (8 CFR 1003.1(d)(3)(v)).

F. Board Findings of Fact—Voluntary Departure

1. Before Promulgation of the AA96 Final Rule

Voluntary departure is a discretionary form of relief that ''allows certain favored [noncitizens] . . . to leave the country willingly'' either before the conclusion of removal proceedings or after being found deportable. *Dada,* 554 U.S. at 8. A noncitizen must apply for voluntary departure in the first instance before an immigration judge; otherwise, the opportunity to seek such relief will be deemed waived. *See, e.g., Matter of J–Y–C–,* 24 I&N Dec. 260, 261 n.1 (BIA 2007) (declining to consider claim raised for the first time on appeal). Likewise, the noncitizen must raise the issue of voluntary departure in any appeal to the Board; otherwise, it will be deemed waived. *See Matter of Cervantes,* 22 I&N Dec. 560, 561 n.1 (BIA 1999) (refusing to address an issue not raised on appeal).

Prior to the AA96 Final Rule, the regulations described an immigration judge's authority to grant voluntary departure but did not articulate the Board's authority to do so. *See generally* 8 CFR 1240.26 (2019). The regulations stated that in limited circumstances, the Board could reinstate an order of voluntary departure when removal proceedings had been reopened for a purpose other than solely requesting voluntary departure. 8 CFR 1240.26(h) (2019).[16] The Board could remand cases to the immigration court to consider whether a noncitizen was eligible for voluntary departure or for the

[16] Although the regulations have never explicitly stated that the Board has the authority to grant voluntary departure, the Eleventh Circuit has stated that the Board has the authority to grant or deny voluntary departure in the first instance pursuant to its general (pre-AA96) regulatory authority under 8 CFR 1003.1(d)(3)(ii) to ''review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.'' *Blanc* v. *U.S. Att'y Gen.,* 996 F.3d 1274, 1278 (11th Cir. 2021) (''At the agency level, the Board of Immigration Appeals itself can grant—or deny—voluntary departure.'').

immigration judge to review whether a noncitizen had received proper voluntary departure advisals. *See Matter of Gamero,* 25 I&N Dec. 164, 168 (BIA 2010) (concluding that ''a remand is the appropriate remedy when the mandatory advisals have not been provided by the Immigration Judge'').

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule delegated explicit authority to the Board to consider issues relating to the immigration judge's decision on voluntary departure de novo and to issue final decisions on requests for voluntary departure based on the record evidence. 85 FR at 81652, 81655 (8 CFR 1003.1(d)(7)(ii)(E); 1240.26(k)). The AA96 Final Rule barred the Board from remanding a case to the immigration court solely to consider a request for voluntary departure or for the immigration judge's failure to provide advisals following a grant of voluntary departure. *Id.* at 81652.

Specifically, the AA96 Final Rule provided that the Board could issue an order of voluntary departure, with an alternate order of removal, where: (1) the noncitizen requested voluntary departure before the immigration judge; (2) the notice of appeal specified that the noncitizen was appealing an immigration judge's denial of voluntary departure and raised specific factual and legal challenges on this issue; and (3) the Board determined that the noncitizen was otherwise eligible for voluntary departure. *Id.* The AA96 Final Rule mandated that if the Board did not grant the request for voluntary departure, it would be required to deny the request. *Id.*

The AA96 Final Rule further provided that in instances where the Board determined that the immigration judge incorrectly denied a noncitizen's request for voluntary departure or failed to provide appropriate advisals, it would be required to consider the request for voluntary departure de novo and, if warranted, it must enter an order granting voluntary departure with an alternate order of removal. *Id.* at 81655.

Furthermore, the AA96 Final Rule specified that in cases where DHS appealed an immigration judge's decision, the Board could not grant voluntary departure unless: (1) the noncitizen requested voluntary departure before the immigration judge and provided or proffered evidence to support the request; (2) the immigration judge either granted voluntary departure or did not rule on the request; and (3) the noncitizen otherwise met the statutory and regulatory criteria for voluntary departure. *Id.*

Lastly, the AA96 Final Rule specified that the Board could impose conditions that it deemed necessary to ensure the noncitizen's timely departure from the United States and required the Board to provide written advisals of such conditions and other duties associated with voluntary departure. *Id.* at 81655–56. The noncitizen could accept the grant of voluntary departure or could decline by providing written notice within five days of receipt of the Board's decision, failing to timely post any required bond, or otherwise failing to comply with the Board's order. *Id.* at 81656.

G. Board Remand Authority—Additional Findings of Fact

1. Before Promulgation of the AA96 Final Rule

The Board does not engage in fact-finding when adjudicating appeals of immigration judges' decisions. 8 CFR 1003.1(d)(3)(i). Accordingly, under the pre-AA96 regulations, a party asserting that the Board could not properly resolve an appeal without further fact-finding would file a motion to remand. 8 CFR 1003.1(d)(3)(iv) (2019).

Generally, motions to remand are subject to the same substantive requirements as motions to reopen, particularly where a party seeks remand during the pendency of a direct appeal to present new evidence or to apply for a newly available form of relief not considered by the immigration judge. *See Rodriguez* v. *INS,* 841 F.2d 865, 867 (9th Cir. 1987) (substantive requirements of a motion to remand are the same as a motion to reopen); *Matter of Coelho,* 20 I&N Dec. 464, 471 (BIA 1992) (explaining ''where a motion to remand is really in the nature of a motion to reopen or a motion to reconsider, it must comply with the substantive requirements for such motions''). Additionally, prior to the AA96 Final Rule, the Board had regulatory authority to *sua sponte* remand a case for further fact-finding where necessary. 8 CFR 1003.1(d)(3)(iv) (2019); *see also Matter of S–H–,* 23 I&N Dec. 462, 466 (BIA 2002) (exercising *sua sponte* remand authority).

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule restricted the Board's authority to remand for further fact-finding or consideration of new evidence. 85 FR at 81651 (8 CFR 1003.1(d)(3)(iv)(C)–(D)). First, the AA96 Final Rule provided that the Board may only grant motions to remand for further fact-finding when: (1) the party seeking remand preserved the issue before the immigration judge; (2) the party seeking remand attempted to adduce the additional facts before the immigration judge, if it bore the burden of proof; (3) additional fact-finding would alter the outcome of the case; (4) additional fact-finding would not be cumulative of the evidence already presented or contained in the record; and (5) either the immigration judge's factual findings were clearly erroneous, the immigration judge committed an error of law that required additional fact-finding on remand, or remand to DHS was warranted following a de novo review. *Id.* (8 CFR 1003.1(d)(3)(iv)(D)). Second, the AA96 Final Rule prohibited the Board from *sua sponte* remanding a case for further fact-finding except when necessary to determine whether the immigration judge had jurisdiction over the case. *Id.* (8 CFR 1003.1(d)(3)(iv)(C)).

The AA96 Final Rule provided exceptions to these general restrictions on remand authority under 8 CFR 1003.1(d)(6)(iii) and (d)(7)(v)(B). 85 FR at 81651–52. Under paragraph (d)(6)(iii), DHS could move the Board to remand the record to the immigration judge to consider whether, in light of new information gained by identity, law enforcement, or security investigations or examinations, any pending applications for relief or protection should be denied. *Id.* If DHS failed to report the results of such investigations or examinations, the regulations directed the Board to remand the case to the immigration judge for further proceedings under 8 CFR 1003.47(h). *Id.* Paragraph (d)(7)(v)(B) reiterated that the Board was not limited in remanding a case based on new evidence or information gained from identity, law enforcement, or security investigations or examinations; to address a question of jurisdiction over an application or proceedings; or to address a question regarding grounds of removability in sections 212 or 237 of the Act, 8 U.S.C. 1182, 1227. 85 FR at 81652.

H. Board Remand Authority—Errors in Fact or Law

1. Before Promulgation of the AA96 Final Rule

Prior to the AA96 Final Rule, the regulations broadly authorized the Board to remand cases ''as . . . appropriate, without entering a final decision on the merits of the case.'' 8 CFR 1003.1(d)(7) (2019). However, as the AA96 Final Rule explained, the regulation granted this authority without any further guidance or instructions regarding when the Board

could order a remand instead of issuing a final order. 85 FR at 81589.

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule restricted the Board's authority to remand for errors in fact or law or consideration of material changes in fact or law. *Id.* at 81652 (8 CFR 1003.1(d)(7)(ii)). Specifically, the AA96 Final Rule provided that the Board could not remand a case without first identifying the standard of review that it had applied, as well as the specific error or errors made by the immigration judge. *Id.* The Board also could not remand a case based on a ''totality of the circumstances'' standard of review or based on a legal argument that was not presented in 8 CFR 1003.1(d)(7)(ii)(D) through (E), with certain exceptions. *Id.*

Additionally, the AA96 Final Rule barred the Board from remanding a case *sua sponte,* unless the remand solely involved a question of jurisdiction. *Id.* As discussed above, the Board also could not remand a case solely for consideration of voluntary departure or as the result of the failure to give required advisals for a grant of voluntary departure. *Id.* Moreover, the AA96 Final Rule generally barred remanding based on any legal arguments that did not pertain to an ''issue of jurisdiction over an application or the proceedings,'' or to ''material change[s] in fact or law'' underlying a removability ground or grounds that occurred after the date of the immigration judge's decision and substantial evidence indicated that the material change would vitiate all grounds of removability. *Id.*

I. Background Check

1. Before Promulgation of the AA96 Final Rule

In 2005, the Department implemented regulations covering background and security investigations in proceedings before immigration judges and the Board. *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 FR 4743 (Jan. 31, 2005) (''Background Check Rule'') (issued as interim final rule). The Background Check Rule amended Department regulations to ensure that the necessary identity, law enforcement, and security investigations (hereinafter ''background checks'') are promptly initiated and have been completed by DHS prior to the granting of certain forms of relief or protection from removal. 8 CFR 1003.1(d)(6) (2019).

Under the framework implemented by the Background Check Rule, applicants for relief or protection from removal in proceedings before EOIR have an obligation to comply with applicable requirements to provide biometrics and other biographical information, and failure to comply with such requirements within the time allowed constitutes abandonment of the application, with certain exceptions. *Id.;* 8 CFR 1003.47(c), (d).

Prior to the AA96 Final Rule, the Board could address incomplete or outdated background checks by either remanding the case to the immigration judge or placing adjudication of the case on hold until background checks were completed or updated. 8 CFR 1003.1(d)(6)(ii)(A), (B) (2019). However, the Board was not required to remand or hold a case if dismissing the appeal or when denying the relief sought. 8 CFR 1003.1(d)(6)(iv) (2019).

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule limited the Board's authority to remand a decision with incomplete or outdated background checks. 85 FR at 81651 (8 CFR 1003.1(d)(6)(ii)–(iii)). Under the new framework, the Board was only permitted to place such cases on hold and to notify the parties about the hold, including certain advisals about the consequences for failure to comply with background check requirements. *Id.*

Further, the AA96 Final Rule required the Board to deem an application for relief from removal abandoned if a noncitizen failed to comply with background check procedures within 90 days of DHS's instruction notice under 8 CFR 1003.1(d)(6)(ii), unless the noncitizen demonstrated good cause prior to the end of the 90-day period, or if the noncitizen was detained. *Id.* at 81651–52 (8 CFR 1003.1(d)(6)(iii)). If the noncitizen demonstrated good cause within the 90-day period, the Board could give the noncitizen one extension of up to 30 additional days to comply. *Id.* at 81652. The AA96 Final Rule further required that the Board adjudicate the remainder of the appeal within 30 days after an application was deemed abandoned and enter an order of removal or a grant of voluntary departure, as appropriate. *Id.*

Regarding motions to remand, the AA96 Final Rule permitted DHS to file a motion to remand if it obtained relevant information when completing or updating background checks so that the immigration judge could consider whether, in light of the new information, any pending applications for relief or protection should be denied. *Id.* Additionally, the AA96 Final Rule instructed the Board to remand the case to the immigration judge if DHS failed to report the results of background checks within 180 days of the Board's notice. *Id.*

J. Adjudication Timelines

1. Before Promulgation of the AA96 Final Rule

Prior to the AA96 Final Rule, the regulations provided for a case management system that set forth, in relevant part, procedures for initial screening for cases appealed to the Board and general guidance regarding a decision's timeliness. 8 CFR 1003.1(e)(1), (8) (2019). Regarding initial screening, the regulations established that cases would be referred to a screening panel for review and that appeals subject to summary dismissal must be ''promptly dismissed.'' 8 CFR 1003.1(e)(1) (2019). However, the Board did not have a concrete timeline for such review or dismissal. *Id.* As for timeliness, the regulations provided that in all cases, other than those subject to summary dismissal, the Appellate Immigration Judge or panel should issue a decision on the merits ''as soon as practicable,'' prioritizing cases involving detained noncitizens. 8 CFR 1003.1(e)(8) (2019). The regulations further set forth a 90-day decision deadline for cases adjudicated by a single Appellate Immigration Judge, beginning upon completion of the record on appeal, and a 180-day deadline for cases adjudicated by a three-member panel, beginning once an appeal was assigned to the three-member panel. 8 CFR 1003.1(e)(8)(i) (2019). However, the Board Chairman [17] could extend those deadlines in exigent circumstances. 8 CFR 1003.1(e)(8)(ii) (2019). The Chairman could also suspend the regulatory deadlines and indefinitely hold a case or group of cases in anticipation of an impending decision by the United States Supreme Court, a United States Court of Appeals, the Board sitting *en banc,* or impending Department regulations. 8 CFR 1003.1(e)(8)(iii) (2019). Moreover, the Chairman was required to notify the EOIR Director and the Attorney General if an Appellate Immigration Judge consistently failed to meet the assigned deadlines or adhere to the case management system, as well as to prepare an annual report assessing the timeliness of the disposition of cases by

[17] The Board Chairman, or the Chairman, is also known as the ''Chief Appellate Immigration Judge.'' *See* Organization of the Executive Office for Immigration Review, 85 FR 69465, 69466 (Nov. 3, 2020) (final rule).

each Appellate Immigration Judge. 8 CFR 1003.1(e)(8)(v) (2019).

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule imposed numerous internal deadlines for adjudicating Board appeals. 85 FR at 81652–53 (8 CFR 1003.1(e)). For example, the rule required the Board screening panel to review cases within 14 days of the filing of a Notice of Appeal, the filing of a motion, or the receipt of a remand from a federal court. *Id.* (8 CFR 1003.1(e)(1)). Following an initial review, the Board had to adjudicate requests for summary dismissal no later than 30 days after the filing of the Notice of Appeal, subject to limited exceptions, and interlocutory appeals within 30 days of the filing of the appeal, unless referred to a three-member panel. *Id.* After the screening panel completed its review, the Board would then have seven days to order a transcript and would be required to set a briefing schedule within seven days after the transcript was provided, subject to limited exceptions. *Id.* at 81653 (8 CFR 1003.1(e)(8)).

The AA96 Final Rule also required that the Board assign each case to a single Appellate Immigration Judge within seven days of the completion of the record on appeal. *Id.* The single Appellate Immigration Judge would then determine whether to adjudicate the appeal independently or to designate the case for decision by a three-member panel. *Id.*

The AA96 Final Rule did not alter the completion deadlines of 90 days for a single-member decision and 180 days for a three-member decision. 85 FR at 81653 (8 CFR 1003.1(e)(8)(i)). However, the AA96 Final Rule changed the 180-day time period for completion of a three-member decision to begin earlier, upon completion of the record, rather than beginning the clock after the case was assigned to a three-member panel, and added that the Chairman's determination as to whether exigent circumstances warranted extension of those deadlines would be subject to concurrence by the EOIR Director. *Id.*

The AA96 Final Rule also limited the ''rare circumstances'' under which the Chairman could place cases on hold to only those groups of cases that would be substantially impacted by an impending decision by the United States Supreme Court or the Board sitting *en banc* and removed the ability to hold cases to await an impending decision by a United States Court of Appeals or impending Department regulations. 8 CFR 1003.1(e)(8)(iii). The AA96 Final Rule also required the concurrence of the EOIR Director to hold cases under this provision. *Id.* at 81653 (8 CFR 1003.1(e)(8)(iii)). The AA96 Final Rule limited such holds to a maximum of 120 days. *Id.* The AA96 Final Rule also imposed additional reporting requirements on the Chairman for transcription processes and cases involving extensions, holds, or other delays. *Id.* at 81653 (8 CFR 1003.1(e)(8), (8)(v)).

Furthermore, the AA96 Final Rule required that all cases that remained pending for more than 335 days after receipt of a filed appeal or motion, or remand from a federal court, would be referred to the EOIR Director for a decision unless subject to an extension, hold, deferral, or remand. *Id.* at 81653 (8 CFR 1003.1(e)(8)(v)). The Director would then exercise delegated authority from the Attorney General identical to that of the Board, including the authority to issue precedential decisions or refer cases to the Attorney General. *Id.* However, the AA96 Final Rule limited further delegation of such authority from the EOIR Director to other individuals. *Id.*

K. Director's Authority To Issue Decisions

1. Before Promulgation of the AA96 Final Rule

Until 2019, the EOIR Director had no authority to adjudicate cases arising under the Act, including appeals before the Board. *See* 8 CFR 1003.0(c) (2018). Instead, the regulations simply provided that for cases not completed within the relevant time limits and not subject to any exceptions, the Chairman should self-refer them or refer them to the Vice Chairman for completion within 14 days. Alternatively, the Chairman could refer them to the Attorney General. 8 CFR 1003.1(e)(8)(ii) (2018).

In 2019, the Department established a narrow discretionary authority for the EOIR Director to decide appeals in certain circumstances. *See* Organization of the Executive Office for Immigration Review, 84 FR 44537, 44539–40 (Aug. 26, 2019) (issued as an interim final rule), 85 FR 69465, 69466 (Nov. 3, 2020) (final rule); *see also* 8 CFR 1003.1(e)(8)(ii) (authorizing the EOIR Director to decide an appeal that exceeded the 90- and 180-day regulatory time limits unless the Chairman self-referred the case or referred the case to the Vice Chairman); 8 CFR 1003.0(c) (providing that the EOIR Director may not adjudicate cases arising under the Act ''[e]xcept as provided by statute, regulation, or delegation of authority from the Attorney General, or when acting as a designee of the Attorney General''). The Department subsequently codified, at the final rule stage, language stating that the EOIR Director's authority to decide appeals in certain circumstances under 8 CFR 1003.1(e)(8)(ii) could not be further delegated. 85 FR at 69480–81; 8 CFR 1003.0(b)(2)(ii) (''The Director may not delegate the authority assigned to the Director in [8 CFR] 1003.1(e)(8)(ii) . . .'').

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule authorized the EOIR Director to decide cases in two distinct circumstances. First, the rule directed the Chairman to refer any case still pending 335 days after an appeal or motion was filed or a remand was received to the EOIR Director for adjudication. 85 FR at 81653 (8 CFR 1003.1(e)(8)(v)). Under the AA96 Final Rule, the following categories of cases were not subject to the EOIR Director's adjudication authority: (1) cases subject to a hold under 8 CFR 1003.1(d)(6)(ii); (2) cases subject to an extension under 8 CFR 1003.1(e)(8)(ii); (3) cases subject to a hold under 8 CFR 1003.1(e)(8)(iii); (4) cases whose adjudication had been deferred by the EOIR Director pursuant to 8 CFR 1003.0(b)(1)(ii); (5) cases that were remanded by the EOIR Director under 8 CFR 1003.1(k) in which 335 days had elapsed following remand; and (6) cases that were administratively closed prior to 335 days after the appeal was filed pursuant to a regulation promulgated by the Department or a previous judicially approved settlement that authorized such an action but for which the administrative closure caused the pendency of the appeal to exceed 335 days. *Id.* (8 CFR 1003.1(e)(8)(v)(A)–(F)).

Second, the rule established a procedure for an immigration judge to certify a Board decision to the EOIR Director when the immigration judge believed the Board made one or more enumerated errors. *Id.* (8 CFR 1003.1(k)). This authority is discussed in further detail in the section on the ''Quality Assurance Certification'' provision.

For cases referred to the EOIR Director, the EOIR Director would exercise delegated authority from the Attorney General identical to that of the Board, including the authority to issue precedential decisions and the authority to refer cases to the Attorney General for review. *Id.* (8 CFR 1003.1(e)(8)(v)). The AA96 Final Rule prohibited the EOIR Director from further delegating this authority. *Id.* Of note, the AA96 Final Rule did not amend the existing regulatory provision reiterating that 8

CFR 1003.1(e)(8) did not confer substantive or procedural rights enforceable before any immigration judge, the Board, or any court of law or equity, 8 CFR 1003.1(e)(8)(vi), which, under the AA96 Final Rule, included case referrals to the EOIR Director.

L. Quality Assurance Certification

1. Before Promulgation of the AA96 Final Rule

Prior to the AA96 Final Rule, various options were available to ensure quality case adjudications. If a party were dissatisfied with a Board decision, the party could file a motion to reconsider. 8 CFR 1003.2(a). Alternatively, the noncitizen could file a petition for review of a final order of removal with a federal court of appeals. INA 242(a)(1), 8 U.S.C. 1252(a)(1). In addition, DHS could seek to certify a Board decision to the Attorney General for review, 8 CFR 1003.1(h)(1)(iii), or the Attorney General could self-certify a Board decision for review, 8 CFR 1003.1(h)(1)(i). The Board could also reconsider or reopen a decision by exercising its *sua sponte* authority. 8 CFR 1003.2(a) (2019) (providing that ''[t]he Board may at any time reopen or reconsider on its own motion'' any Board decision). The process by which an immigration judge could certify a decision to the EOIR Director did not exist prior to the AA96 Final Rule. *See generally* 8 CFR 1003.23(b) (2019).

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule did not change some of the existing options to ensure quality case adjudications discussed above, including a party's ability to file a motion to reconsider with the Board, the ability to file a petition for review of a final order of removal with a federal court of appeals, and the case referral options outlined in 8 CFR 1003.1(h).[18] In addition to these options, the AA96 Final Rule implemented a quality assurance certification, wherein the immigration judge could forward a case by certification to the EOIR Director for further review if the Board decision: (1) contained a typographical or clerical error that affected the outcome of the case; (2) was clearly contrary to an immigration law or statute, applicable regulation, or published binding precedent; (3) was ''vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal''; or (4) did not consider a material factor pertinent to the issues before the immigration judge. 85 FR at 81653–54 (8 CFR 1003.1(k)(1)). To certify a decision, the immigration judge was required to issue an order of certification within 30 days of the Board decision, or within 15 days if the noncitizen was detained, specifying the regulatory basis for the certification, summarizing the underlying factual basis, and providing notice of the certification to both parties. *Id.* at 81653 (8 CFR 1003.1(k)(2)).

For such cases, the EOIR Director would exercise delegated authority from the Attorney General identical to that of the Board. *Id.* (8 CFR 1003.1(k)(3)). The Director could dismiss the certification and return the case to the immigration judge or remand the case back to the Board. *Id.* The Director could not, however, issue an order of removal, grant a request for voluntary departure, or grant or deny an application for relief or protection from removal. *Id.* The AA96 Final Rule further barred the quality assurance certification process from being used solely to express general disapproval or disagreement with the outcome of a Board decision. *Id.* at 81654 (8 CFR 1003.1(k)(4)).

M. Forwarding of Record on Appeal

1. Before Promulgation of the AA96 Final Rule

The pre-AA96 regulation provided that, when a transcript of an oral decision was required, an immigration judge would review the transcript and approve the decision within 14 days of receipt (or within seven days following an immigration judge's return from leave or a detail). 8 CFR 1003.5(a) (2019). Further, the regulation required the transcript to be forwarded to the Board upon its request or order. *Id.* The regulation instructed the Chairman and Chief Immigration Judge to determine the most effective and expeditious way to transcribe proceedings before immigration judges, including reducing the time necessary to produce transcripts and improving the quality of such transcripts. *Id.*

2. Changes Made by the AA96 Final Rule

The AA96 Final Rule amended 8 CFR 1003.5(a) so that immigration judges would not need to forward the record to the Board if the Board already had electronic access to the record. 85 FR at 81654 (8 CFR 1003.5(a)). The AA96 Final Rule also removed the requirement that immigration judges review transcripts of oral decisions, which included review of, potential revisions to, and approval of the transcript. *Compare* 8 CFR 1003.5(a) (2019) (''Where transcription of an oral decision is required, the immigration judge shall review the transcript and approve the decision . . .''), *with* 85 FR at 81654 (8 CFR 1003.5(a)) (omitting that requirement).

The AA96 Final Rule did not alter the requirement that the EOIR Director, in consultation with the Chairman and Chief Immigration Judge, determine the most effective and expeditious way to transcribe proceedings. 85 FR at 81654 (8 CFR 1003.5(a)). However, it directed the Chairman and Chief Immigration Judge to ''ensure,'' *id.* (8 CFR 1003.5(a)), rather than simply ''improve,'' 8 CFR 1003.5(a) (2019), the quality of such transcripts.

The AA96 Final Rule also amended 8 CFR 1003.5(b) by removing language describing procedures regarding appeals from DHS decisions that are within the BIA's appellate jurisdiction and stated that those procedures were not applicable to EOIR adjudicators. 85 FR at 81654 (8 CFR 1003.5(b)).

N. Centro Legal de la Raza Litigation

On March 10, 2021, the United States District Court for the Northern District of California granted a nationwide preliminary injunction barring the Department from implementing or enforcing the AA96 Final Rule or any portion thereof and staying the effectiveness of the rule under 5 U.S.C. 705. *Centro Legal de la Raza* v. *Exec. Off. for Immigr. Rev.,* 524 F. Supp. 3d 919 (N.D. Cal. 2021). The preliminary injunction and stay of the rule's effectiveness remain in effect.[19] In granting the preliminary injunction and stay under 5 U.S.C. 705, the court determined that plaintiffs were likely to ultimately succeed on several substantive and procedural challenges raised with respect to the AA96 Final Rule. *Id.* at 954–76.[20]

[18] The AA96 Final Rule limited the Board's *sua sponte* authority to reopen or reconsider a decision as discussed in Section III.D of this preamble.

[19] In addition to this preliminary injunction, the United States District Court of the District of Columbia granted a stay of the implementation of the AA96 Final Rule on April 3, 2021, determining that the 30-day comment period associated with the rulemaking was procedurally insufficient. *See Catholic Legal Immigration Network, Inc.* v. *Exec. Off. for Immigr. Rev.,* No. 21–00094, 2021 WL 3609986 (D.D.C. Apr. 4, 2021).

[20] Procedurally, the court stated that plaintiffs were likely to succeed on their claim that the Department's 30-day notice-and-comment period was insufficient under the Administrative Procedure Act (''APA'') due to the rule's complexity, the COVID–19 pandemic, and other concerns. *Centro Legal de la Raza,* 524 F. Supp. 3d at 954–58. The court also raised ''serious concerns'' with the Department's ''staggered rulemaking'' approach, explaining that because ''numerous intertwined proposed rules were promulgated at different times, including after the close of the comment period in this case, the true impact of the [AA96 Final Rule] was obscured and the public was deprived of a meaningful opportunity to comment.'' *Id.* at 958, 962.

1. ''Arbitrary and Capricious'' Challenges

Substantively, the court determined that the plaintiffs demonstrated a likelihood of success on the merits of their arguments that the AA96 Final Rule's changes to the briefing schedule for BIA appeals, administrative closure, and *sua sponte* reopening and reconsideration authority were arbitrary and capricious. *Id.* at 963–71. The court also made a generally applicable finding that EOIR's failure to adequately consider the Booz Allen Hamilton report that EOIR ''specifically commissioned to analyze the very concerns that purportedly animate'' the AA96 Final Rule raised significant APA concerns. *Id.* at 963.

i. Changes to BIA Briefing Schedule

The court found that there was a substantial likelihood that the AA96 Final Rule's changes to the briefing schedule for BIA appeals are arbitrary and capricious because the Department failed to adequately consider the impact on pro se individuals and how the changes would operate, in conjunction with existing BIA practices and procedures, to create difficulties for noncitizens and their attorneys in meeting briefing deadlines. *Id.* at 964–66. The court was not persuaded by the Department's position that noncitizens need not wait until the BIA briefing schedule had been issued to seek representation for an appeal because, the court stated, ''the vast majority of individuals appearing before immigration courts are pro se,'' [21] and many face language barriers. *Id.* at 965. Additionally, the court noted that, ''of critical importance[,]'' immigration judges often issue oral decisions; accordingly, noncitizens may not have the documents necessary to seek representation until after the Board issues and mails the briefing schedule, transcript, and a copy of the immigration judge's order. *Id.* The court stated that the Department failed to address how challenges to the compressed briefing schedule might be exacerbated by the Board's mail-based system, failure to follow the ''mailbox rule,'' and unpredictable briefing schedules.[22] *Id.* The court also found the Department's reliance on future implementation of an electronic filing system unpersuasive. *Id.* The court further stated that the Department failed to consider the challenges that the COVID–19 pandemic may present to compliance with the compressed briefing schedule. *Id.* at 966.

ii. Administrative Closure

The court also determined that plaintiffs were likely to succeed on their argument that the AA96 Final Rule's restrictions on administrative closure are arbitrary and capricious. First, the court found that, although the Department cited efficiency reasons for promulgating the rule, it failed to meaningfully address the existence of ''extensive contrary evidence showing that administrative closure enhances efficiency.'' *Id.* at 967. The court also noted that EOIR's consultants had previously recommended that EOIR work with DHS to explore developing policies regarding administrative closure, and yet EOIR did not discuss or consider that recommendation in its rulemaking. *Id.* The court further stated that the Department improperly dismissed and minimized commenter concerns that eliminating administrative closure could lead to the removal of noncitizens with meritorious claims for relief or protection, including removal in violation of the United States' non-refoulement obligations under international law. *Id.* at 968. The court explained that, although the Department cited the availability of administrative closure in some circumstances, it did not adequately address the issue that administrative closure would no longer be available for ''the vast majority of noncitizens in removal proceedings, including people for whom Congress has specifically crafted humanitarian relief.'' *Id.*

Additionally, the court determined that the Department did not adequately engage with commenter concerns that the AA96 Final Rule conflicted with section 212(a)(9)(B)(v) of the Act, 8 U.S.C. 1182(a)(9)(B)(v), as DHS has interpreted it. *Id.; see also* 8 CFR 212.7(e)(4)(iii) (rendering an individual in removal proceedings ineligible for an unlawful presence hardship waiver unless the proceedings are administratively closed); *see also Garcia-DeLeon,* 999 F.3d at 993 (''We conclude that immigration judges and the BIA retain the authority to grant administrative closure so that noncitizens may apply for a provisional unlawful presence waiver.'').

The court noted that, although DHS had previously determined that individuals who have been granted voluntary departure would not be eligible for such provisional waivers, *see* Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 FR 50244, 50256 (July 29, 2016), EOIR nevertheless asserted in the AA96 Final Rule that eliminating general authority to administratively close cases would have no bearing on a noncitizen's ''ability to obtain an order of voluntary departure and then a provisional waiver before departing to receive the final waiver abroad.'' 85 FR at 81601. The court determined that the Department did not provide a ''reasoned basis'' for this position. *Centro Legal de la Raza,* 524 F. Supp. 3d at 969.

iii. Sua Sponte Reopening and Reconsideration Authority

The court also determined that the Department's decision to eliminate adjudicators' *sua sponte* reopening and reconsideration authority was likely arbitrary and capricious. The court expressed that it was ''extremely troubled'' by the Department's contention that, because there is no right to *sua sponte* reopening, the Department was not required to assess commenter concerns about any reliance interests or weigh such interests against competing policy concerns. *Id.* at 970; *see also Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1913 (2020) (''When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'' (internal quotation marks omitted)).

The court similarly expressed concerns with the Department's justifications for eliminating *sua sponte* reopening and reconsideration in light of ''the reality that its elimination will foreclose the only avenue of relief for some noncitizens who would otherwise be eligible for relief from removal.'' *Centro Legal de la Raza,* 524 F. Supp. 3d at 971. For example, the Department asserted that the rule would promote fairness by withdrawing an authority that may be subject to inconsistent and potentially abusive usage and could undermine finality in proceedings. *Id.* However, the court found that the Department failed to provide examples of inconsistent application or abuse and did not adequately explain why ''it could not articulate or clarify a meaningful standard to govern'' when '' 'exceptional situations' would permit *sua sponte* reopening or reconsideration.'' *Id.; see also Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48–49 (1983) (''[A]n agency must cogently

[21] EOIR data reports an 86% representation rate for ''all completed appeals,'' a 90% representation rate for ''all pending appeals,'' and a 45% representation rate for ''overall pending'' adjudications. *See* EOIR, *Adjudication Statistics: Current Representation Rates, https://www.justice.gov/eoir/page/file/1062991/download* (data generated Apr. 21, 2023).

[22] The court noted that the ''U.S. Postal service is experiencing historic backlogs'' due to the COVID–19 pandemic. *Centro Legal de la Raza,* 524 F. Supp. 3d at 966.

explain why it has exercised its discretion in a given manner.'').

2. Regulatory Flexibility Act Challenge

The court determined that the plaintiffs raised serious questions that the AA96 Final Rule violated the Regulatory Flexibility Act (''RFA''), which requires federal agencies to analyze the impact of proposed rules on small entities. *Centro Legal de la Raza,* 524 F. Supp. 3d at 971–74; *see also* 5 U.S.C. 601–12. Specifically, the court determined that the plaintiff, Centro Legal de la Raza, was likely a small entity under the RFA and that the AA96 Final Rule would apply to it because it would be required to comply with the changes implemented by the rule. *Centro Legal de la Raza,* 524 F. Supp. 3d at 973. Further, the court expressed doubt that the AA96 Final Rule's ''cursory'' statement that the rule would not have a substantial impact on small entities was a sufficient factual basis to avoid engaging in an RFA analysis, particularly in light of the scope of the AA96 Final Rule and the numerous comments from organizations claiming that the AA96 Final Rule would economically impact them. *Id.* at 974.

3. Delegation of Rulemaking Authority to the EOIR Director

Lastly, the court determined that the plaintiffs had raised serious questions regarding whether the AA96 Final Rule's delegation of rulemaking authority to the EOIR Director, based on the specific facts of that case, violated the APA. *Centro Legal de la Raza,* 524 F. Supp. 3d at 976. The court was troubled by the manner by which the delegation occurred. *Id.* Specifically, the court stated that while the Attorney General signed the AA96 NPRM, the Attorney General did not delegate rulemaking authority until after the close of the NPRM's comment period and did so through a non-public order. *Id.* The court also expressed particular concern that the AA96 Final Rule, signed by the EOIR Director pursuant to the delegated rulemaking authority, significantly expanded the EOIR Director's authority to adjudicate Board appeals. *Id.* The court stated that although the AA96 NPRM—as signed by the Attorney General—proposed expanding the EOIR Director's authority in this manner, the NPRM did not disclose that the EOIR Director would issue the final rule and, thus, would ultimately be in charge of considering the public's comments about expanding the EOIR Director's own authority. *Id.*

IV. Description of Proposed Regulatory Changes

The Department has carefully reconsidered the AA96 Final Rule, the comments received on the AA96 Proposed Rule, the issues identified in the *Centro Legal de la Raza* decision, and other experience gained since that decision. The Department now proposes to restore the longstanding procedures in place prior to the AA96 Final Rule, subject to several changes. For the reasons described below, the Department believes that these amendments will promote the efficient and expeditious adjudication of cases, afford immigration judges and the BIA flexibility to efficiently allocate their limited resources, and protect due process for parties before immigration judges and the Board.

A. Briefing Schedule Changes

The Department proposes to rescind changes that the AA96 Final Rule made to briefing schedules before the Board.

Specifically, the Department proposes to restore regulatory language, in effect before the promulgation of the AA96 Final Rule, that would re-establish longstanding consecutive briefing schedules for non-detained noncitizens and simultaneous briefing schedules for detained noncitizens. 8 CFR 1003.3(c)(1) (proposed). The proposed language states that those subject to a simultaneous briefing schedule would have 21 days to submit simultaneous briefs unless the Board specifies a shorter period. *Id.* The proposed language also states that in appeals involving simultaneous briefing, the Board may permit parties to file reply briefs within 21 days of the deadline for the initial briefs. *Id.*

Those subject to a consecutive briefing schedule would again have 21 days to file initial briefs, unless the Board specifies a shorter period. *Id.* Parties would have the same amount of time to file reply briefs as was provided for filing the initial brief, including any extensions.[23] *Id.* The Board would also again be authorized to grant one or more extensions for filing briefs or reply briefs for up to 90 days for good cause shown. *Id.* The Board could also, in its discretion, request supplemental briefings from parties after the briefing deadline has expired. *Id.* The Board would remain authorized to consider untimely filed briefs. *Id.*

As stated in the AA96 Final Rule, there is ''no entitlement'' to a briefing schedule under the Act. *See* 85 FR at 81636. Indeed, the Act does not enumerate the procedures that apply to the Board's adjudication of appeals. Nevertheless, a noncitizen, with certain limited exceptions, is entitled to seek appellate review before the Board of an immigration judge's decision and, in some cases, a decision of a DHS officer.[24] 8 CFR 1003.3(a)(1)–(2). As part of that review, the noncitizen is entitled to certain rights under the Act, including the right to have legal representation before the Board (at no expense to the government). INA 292, 8 U.S.C. 1362. The Department believes that truncating the briefing schedule that had been in place for over 20 years, *see* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 54878, 54895 (Aug. 26, 2002) (discussing changes to 8 CFR 3.3(c)), could impact a noncitizen's ability to adequately prepare their case for appeal or secure legal representation to do so, and create undue confusion for pro se noncitizens and practitioners appearing before EOIR. Concerns about adequate preparation time are particularly relevant given the possibility of unique and unaccounted-for future issues, similar to the COVID–19 pandemic, which may present new obstacles to seeking and securing representation, as well as preparing and submitting briefs. *See Centro Legal de la Raza,* 524 F. Supp. 3d at 965–66 (''[T]he agency completely disregarded the fact that the challenges of briefing on a compressed timetable are compounded by the BIA's mail-based system, failure to follow the 'mailbox rule,' and unpredictable briefing schedules. . . Moreover, the agency entirely dismissed the impact of imposing the briefing schedule changes during the COVID–19 pandemic, a concern raised by numerous commenters.'').

The Department notes that it has now implemented electronic filing procedures for registered attorneys through the EOIR Courts & Appeals System, *see* ECAS Rule, 86 FR 70708, which may mitigate some concerns about mail service and its potential effect on briefing schedule timing

[23] In the ECAS Rule, the finalized regulatory language reverted 8 CFR 1003.3(c)(2) (Appeal from decision of a DHS officer) to pre-AA96 standards. *See* ECAS Rule, 86 FR at 70721. Specifically, the ECAS Rule removed the maximum 14-day period for the filing of a single permitted reply brief, the 14-day limitation on extensions, and procedures for filing supplemental briefs implemented by the AA96 Final Rule. *Id.* The ECAS Rule retained the AA96 Final Rule's technical edits to replace ''Service'' with ''DHS'' where appropriate, *id.,* and this NPRM proposes additional minor, technical changes, as discussed at Section IV.O of this preamble.

[24] Examples of DHS officer decisions subject to appellate review before the Board include denials of waivers under INA 212(d)(3), 8 U.S.C. 1182(d)(3), and denials of visa petitions made on a Form I–130.

because parties will be able to view and download documents for cases with electronic records of proceeding. However, the Department has not yet fully implemented electronic filing and case access for pro se noncitizens, *see* 86 FR at 70709–10, and therefore believes that the current availability of electronic filing in most, but not all, circumstances is insufficient to address concerns about the AA96 Final Rule's truncated briefing schedules. Indeed, briefing schedules that allow adjudicators the flexibility to establish deadlines as appropriate for a particular case, within given parameters, are a fixture of legal practice. For example, in the federal courts, Rule 31 of the Federal Rules of Appellate Procedure establishes a ''good cause'' exception to its specified time frame. Fed. R. App. P. 31(a)(1) (explaining that ''a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing''). Similarly, Rule 12 of the Federal Rules of Civil Procedure also builds flexibility into its established timeframes. Fed. R. Civ. P. 12(a)(1)(C) (''A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.'').

Upon reconsideration, the Department believes that the Board should have the discretion to manage briefing schedules and extensions. An inflexible rule that requires all briefs to be filed within 35 days would be unable to accommodate the continually changing landscape that may affect parties' ability to seek and retain counsel, as well as to prepare and submit briefs within a specified period of time. To the extent that shorter briefing schedules or, conversely, extensions for both initial and reply briefs, might be appropriate given the particular facts and circumstances of an individual case, the Board is optimally situated to make such determinations on a case-by-case basis to ensure that briefing schedules do not impede access to the appellate process and the right to counsel. *Cf. Meza Morales,* 973 F.3d at 665 (''[T]imeliness' is not a hard and fast deadline; some cases are more complex and simply take longer to resolve. Thus, not all mechanisms that lengthen the proceedings of a case prevent 'timely' resolution.''). Under the proposed rule, the Board would again have the discretion to specify shorter briefing schedules as it deems appropriate.

Numerous organizations and commenters on the AA96 Final Rule, including those who administer the Board Pro Bono Program, claimed that the policies set forth in the AA96 Final Rule would have (and in some cases already have had) an impact on their ability to provide appellate representation. *See* Complaint, *CLINIC* v. *EOIR,* No. 21–CV–094 (D.D.C. Jan. 11, 2021); Plaintiffs' Motion for a Preliminary Injunction, *Centro Legal de la Raza* v. *EOIR,* No. 21–CV–00463 (N.D. Cal. Jan. 22, 2021). This proposed rule is intended to remove the possibility that reducing the total amount of time that a noncitizen has to file an appeal brief would impede access to the appellate process and the fair and efficient adjudication of appeals for at least some pro se individuals and those seeking representation.

The Department also proposes to amend the briefing schedule, with respect to motions to reopen or reconsider before the BIA, to extend the deadline to submit a reply brief from 13 days to 21 days. 8 CFR 1003.2(g)(3) (proposed). The Department currently sees no reason to distinguish between applicable deadlines for reply briefs for appeals and for motions to reopen or reconsider.

B. Administrative Closure Authority—Immigration Judges and the Board

The Department proposes to remove the AA96 Final Rule's language that would, if effectuated, limit an EOIR adjudicator's authority to administratively close cases. Instead, this NPRM proposes to explicitly state that EOIR adjudicators have the general authority to administratively close, and to recalendar,[25] individual cases pursuant to a party's motion. The proposed rule would also set forth factors that adjudicators should consider, as the circumstances of the case warrant, in adjudicating such motions. The Department believes that the proposed changes will improve the efficiency and fairness of EOIR proceedings.

As described above, there is a long history of EOIR adjudicators utilizing administrative closure as a helpful tool for managing dockets at both the immigration courts and the Board. *See Garcia-DeLeon,* 999 F.3d at 989 (''For at least three decades, immigration judges and the BIA regularly administratively closed cases.''); *Matter of Avetisyan,* 25 I&N Dec. at 690 (''Administrative closure is a procedural tool created for the convenience of the Immigration Courts and the Board.''). Indeed, the Attorney General acknowledged this longstanding practice in overruling *Matter of Castro-Tum. See Matter of Cruz-Valdez,* 28 I&N Dec. at 329 (''Because *Castro-Tum* departed from long-standing practice, it is appropriate to overrule that opinion in its entirety . . .''). In *Matter of Cruz-Valdez,* the Attorney General restored administrative closure authority, specifically directing immigration judges and the Board to apply the standard for administrative closure set forth in *Matter of Avetisyan* and *Matter of W–Y–U–* while the Department reconsiders the AA96 Final Rule. *Id.*

Additionally, circuit court case law undercuts the AA96 Final Rule's assertion that administrative closure is unsupported by the law and that *Matter of Avetisyan* was wrongly decided. *See Romero,* 937 F.3d at 294–95 (holding that the regulations ''unambiguously confer upon [immigration judges] and the [Board] the general authority to administratively close cases''); *Meza Morales,* 973 F.3d at 667 (concluding that *Matter of Castro-Tum* was contrary to the unambiguous meaning of the regulations and that immigration judges and the Board are ''not precluded from administratively closing cases when appropriate''); *Arcos Sanchez,* 997 F.3d at 122 (holding that ''the plain language establishes that general administrative closure authority is unambiguously authorized by these regulations''); *see also Zelaya Diaz* v. *Rosen,* 986 F.3d 687, 691–92 (7th Cir. 2021) (applying *Meza Morales*).

Although two circuit courts have rejected challenges to *Matter of Castro-Tum,* both left open the possibility that the regulations could permissibly be interpreted to permit administrative closure in at least some circumstances. In *Garcia* v. *Garland,* 64 F.4th 62 (2d Cir. 2023), the Second Circuit held that the pre-AA96 regulations were ambiguous as to whether they authorized general administrative closure and deferred to the Attorney General's interpretation in *Matter of Castro-Tum.* In reaching that conclusion, the Second Circuit did not interpret 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) (2018) to foreclose general administrative closure authority. Rather, the Second Circuit focused narrowly on the text of those regulations and held that it was not unreasonable for the Attorney General in *Matter of Castro-Tum* to interpret them as not explicitly authorizing general administrative closure. *See id.* at 73–74. The Second Circuit acknowledged EOIR adjudicators' use of administrative closure since at least 1990, however, *id.* at 66, and recognized that before *Castro-Tum,* whether to allow administrative

[25] The Department notes that the term ''reinstate'' has been used interchangeably with ''recalendar'' before the Board. *See, e.g., Matter of Avetisyan,* 25 I&N Dec. at 692. However, consistent with longstanding practice and to avoid confusion, the Department is using ''recalendar'' for both the immigration courts and the Board in this regulation.

closure was ''a matter reserved to the discretion of the Immigration Judge or the Board.'' *Id.* at 76 n.13.

The Sixth Circuit agreed with *Matter of Castro-Tum* that the regulatory language prior to the AA96 Final Rule does not provide EOIR adjudicators a free-standing authority to administratively close cases. *See Hernandez-Serrano,* 981 F.3d at 466. However, it later clarified that immigration judges and the Board have the authority to grant administrative closure to permit a noncitizen to apply for a provisional unlawful presence waiver, even though this authority was not explicitly stated in the regulations. *See Garcia-DeLeon,* 999 F.3d at 992–93. As such, the AA96 Final Rule introduced novel restrictions on EOIR adjudicators' long-standing authority to manage the cases before them, including through the use of administrative closure when appropriate. *See Matter of Cruz-Valdez,* 28 I&N Dec. at 328–29 (stating that the AA96 Final Rule ''effectively codified *Castro-Tum*[,]'' which ''departed from long-standing practice . . .'').

Although several courts of appeals have determined that the authority to administratively close cases was clearly encompassed in the regulations prior to the AA96 Final Rule, that authority was not explicitly stated. As the decisions from the Second and Sixth Circuits make clear, this lack of explicit language has led to debate and confusion over the full scope of EOIR adjudicators' authority to manage cases before them. *See, e.g., Garcia* v. *Garland,* 64 F.4th 62 at 74 (concluding the pre-AA96 regulations ''do not unambiguously permit [general] administrative closure.''); *Hernandez-Serrano,* 981 F.3d at 466 (holding that the regulations prior to the AA96 Final Rule did not give adjudicators the general authority to administratively close cases); *see also Garcia-DeLeon,* 999 F.3d at 992–93 (concluding that an application for a provisional unlawful presence waiver ''is a limited circumstance where administrative closure is 'appropriate and necessary' under [8 CFR] 1003.10(b) and 1003.1(d)(1)(ii)''). It is in the interests of the Department and the public to have a clear understanding of the scope of an adjudicator's authority. Accordingly, the Department proposes to amend the regulations to make an EOIR adjudicator's long-standing authority to administratively close cases explicit in the regulations.

Additionally, the court in *Centro Legal de la Raza* identified a number of issues with the AA96 Final Rule's changes made with respect to administrative closure. 524 F. Supp. 3d at 966–69. Specifically, the court noted that the Department failed to adequately consider or meaningfully address: (1) the impact that the AA96 Final Rule would have on the vast majority of applicants for administrative closure or how it would affect noncitizens with meritorious claims for relief; (2) commenter concerns that the AA96 Final Rule's restriction on administrative closure conflicted with the inadmissibility waiver provision at section 212(a)(9)(B)(v) of the INA, 8 U.S.C. 1182(a)(9)(B)(v), as it has been interpreted by DHS; and (3) the existence of ''extensive contrary evidence showing that administrative closure enhances efficiency.'' *Id.* In this NPRM, the Department proposes further rulemaking on this topic to address these concerns.

The Department believes that codifying general administrative closure authority will serve the interests of the Department and the public in fairness and administrative efficiency. Immigration judges and the Board have used administrative closure as a safeguard to ensure fairness and to postpone cases in appropriate circumstances, such as cases involving certain juvenile noncitizens or those with mental competency issues. *See Matter of Avetisyan,* 25 I&N Dec. at 691 (stating that EOIR adjudicators may determine that it is ''necessary or, in the interests of justice and fairness to the parties, prudent to defer further action for some period of time''). Retaining the AA96 Final Rule's restrictions on administrative closure could limit the ability of noncitizens to pursue certain statutory immigration benefits and forms of discretionary relief, including: (1) Special Immigrant Juvenile status, INA 101(a)(27)(J), 8 U.S.C. 1101(a)(27)(J); (2) visas for victims of certain crimes who are cooperating with law enforcement (U visas), INA 101(a)(15)(U), 8 U.S.C. 1101(a)(15)(U); (3) visas for certain family-sponsored immigrants (*e.g.,* ''Petition for Alien Relative'' (Form I–130)), INA 203(a), 8 U.S.C. 1153(a); (4) adjustment of status as a VAWA self-petitioner, INA 204, 8 U.S.C. 1154; (5) Temporary Protected Status (''TPS''), INA 244, 8 U.S.C. 1254a; and (6) provisional unlawful presence waivers, 8 CFR 212.7(e)(4)(iii). USCIS approval of any of these benefits would generally eliminate the need for continued removal proceedings. Moreover, a removal order entered by an immigration judge and affirmed by the Board could cut off the noncitizen's ability to obtain such benefit or relief. Additionally, if EOIR moves forward with removal proceedings while a prima facie eligible application for relief is pending before DHS, the outcome of the case may ultimately depend upon which agency is the first to issue a final administrative decision. Administrative closure, therefore, allows for the full consideration of a noncitizen's application for relief without exposing the noncitizen to the risk of removal. *See Meza Morales,* 973 F.3d at 665 (acknowledging the Attorney General's efficiency justification in *Matter of Castro-Tum* but stating that cases must also be ''disposed of fairly, and granting a noncitizen the opportunity to pursue relief to which she is entitled may be appropriate and necessary for a fair disposition'').

Without administrative closure, by contrast, individuals are often unable to sufficiently postpone their proceedings before EOIR and, as a result, often are issued a removal order from EOIR that impedes the ability of USCIS to grant relief unless the individual files a motion to reopen with EOIR to have that order lifted. Requiring individuals to file motions to reopen and accompanying stay of removal requests, if necessary, creates additional procedural hurdles that increase the risk of removal while a potentially valid request for relief is pending with USCIS. Moreover, such procedural hurdles are significantly more challenging to overcome if the individual is physically removed from the United States and must pursue a motion to reopen from abroad.

In addition, upon reconsideration, the Department is now of the belief that the procedures set forth in the AA96 Final Rule would not improve efficient adjudication and may, in some cases, undermine the efficiency of certain adjudications. *See Centro Legal de la Raza,* 524 F. Supp. 3d at 968 (''Indeed, the Fourth Circuit found that the Attorney General's efficiency justification in *Matter of Castro Tum*—the same efficiency rationale cited in the NPRM and Final Rule—was 'internally inconsistent.' '').

In particular, speed in adjudicating an individual case is not the only factor that bears on administrative efficiency. *But see* AA96 Final Rule at 81598 (characterizing administrative closure as creating delays that conflict with EOIR's mission to expeditiously adjudicate cases before it). Efficiency also encompasses consideration of prioritization and allocation of resources among different cases. *Cf. Meza Morales,* 973 F.3d at 665 (''[T]he . . . requirement that cases be resolved in 'timely' fashion does not foreclose administrative closure. For one thing, 'timeliness' is not a hard and fast

deadline; some cases are more complex and simply take longer to resolve. Thus, not all mechanisms that lengthen the proceedings of a case prevent 'timely' resolution.''); *Arcos Sanchez,* 997 F.3d at 123 (''The authority to administratively close cases, within the appropriate and necessary context of each case, can and does permit [immigration judges] and the Board to answer the questions before them in a timely and impartial manner consistent with the Act and the regulations. Or in other words, delay in the case through administrative closure does not, by definition, prevent the timely disposition of the case and resolution of questions.''). Moreover, as pointed out in *Meza Morales,* the Department is tasked with the dual imperatives to adjudicate cases with both speed and fairness—the combination of which offers a better measure of administrative efficiency than speed alone. 973 F.3d at 665.

In addition, as observed by the Second Circuit, ''it is wasteful to commit judicial resources to immigration cases when circumstances suggest that, if the Government prevails, it is unlikely to promptly effect the petitioner's removal.'' *In re Immigr. Petitions,* 702 F.3d at 160. Relatedly, it would be wasteful to commit judicial resources to cases where there are pending alternative resolutions to the case that would obviate the need for, or significantly narrow the issues in, removal proceedings. *See Meza Morales,* 973 F.3d at 665 (''Unsurprisingly . . . an immigration judge might sometimes conclude, in exercising the discretion granted by [8 CFR 1003.10], that it is appropriate and necessary to dispose of a case through administrative closure.''); *Matter of Hashmi,* 24 I&N Dec. 785, 791 n.4 (BIA 2009) (noting that administrative closure could ''avoid the repeated rescheduling of a case that is clearly not ready to be concluded''). Given EOIR's overburdened dockets, as well as the growing backlog of pending cases, it is imperative that EOIR effectively allocate its limited resources—including docket time—to first adjudicate those cases where there are no pending alternative resolutions to removal. To do otherwise would expend precious judicial resources on a practically ''empty exercise tantamount to issuing an advisory opinion'' where such resources could instead be used to adjudicate those cases where no alternative resolutions may be possible. *See In re Immigr. Petitions,* 702 F.3d at 161 (internal quotations omitted).

Procedurally, administrative closure is often more efficient than repeatedly postponing proceedings through multiple continuances, which requires repeatedly reserving hearing time on the immigration court's docket. Notably, before *Matter of Avetisyan,* the Board had encouraged DHS to consider moving for administrative closure rather than multiple continuances in ''appropriate circumstances, such as where there is a pending prima facie approvable visa petition.'' *Matter of Hashmi,* 24 I&N Dec. at 791 n.4; *see also Matter of Rajah,* 25 I&N Dec. 127, 135 n.10 (BIA 2009). The Board described administrative closure as ''an attractive option in these situations, as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge.'' *Matter of Hashmi,* 24 I&N Dec. at 791 n.4. The Board also noted that administrative closure could ''avoid the repeated rescheduling of a case that is clearly not ready to be concluded.'' *Id.*

With respect to those cases that could result in motions to reopen being filed with EOIR because of insufficient time to postpone the conclusion of proceedings for noncitizens to pursue pending relief outside of EOIR, the AA96 Final Rule framework would also create significant inefficiencies, as the immigration courts and the Board must adjudicate both the initial removal proceedings and the subsequent motion to reopen, as well as any stay of removal requests. Administrative closure could put such cases on hold until any related matters pending outside of EOIR are adjudicated, which, in turn, would allow the immigration judge or the Board to put that adjudication time towards another case before EOIR.

Similarly, some statutes necessarily delay EOIR proceedings while noncitizens pursue collateral applications before USCIS. For example, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (''TVPRA''), Public Law 110–457, 122 Stat. 5044, mandates that USCIS has initial jurisdiction over any asylum applications filed by unaccompanied children in removal proceedings before EOIR. *See* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) (codifying the TVPRA's requirement). Under such circumstances, administrative closure of proceedings while USCIS considers any applications for asylum would likely be more efficient than repeatedly setting aside docket time for future hearings that are then continued. *Matter of Hashmi,* 24 I&N Dec. at 791 n.4 (noting that administrative closure could ''assist in ensuring that only those cases that are likely to be resolved are before the [i]mmigration [j]udge'' and prevent ''the repeated rescheduling of a case'' that is unready to be concluded).

The AA96 Final Rule asserted that administrative closure, and in particular administrative closure over a party's objection, ''failed as a policy'' because of an increased backlog of immigration cases after *Matter of Avetisyan* was decided. 85 FR at 81599 (quoting AA96 NPRM, 85 FR at 52504). However, to the extent that eliminating administrative closure was designed to control the backlog of cases, EOIR's pending case data does not support a conclusion that eliminating administrative closure led to such a result. Between May 17, 2018, when *Matter of Castro-Tum* was issued, and July 15, 2021, when *Matter of Cruz-Valdez* was issued, the backlog of pending cases at EOIR increased from 796,791 on September 30, 2018, to 1,408,669 on September 30, 2021.[26] Even accounting for the pandemic and looking only to the end of FY 2019, the number of pending cases at EOIR increased from 796,791 to 1,088,499.[27]

While no single factor alone was responsible for the increase in the backlog, numerous factors may have contributed, including: a general increase in the number of proceedings initiated by DHS; increasing complexity in immigration cases; fluctuating numbers of defensive asylum applications filed in and adjudicated by EOIR; external factors requiring court closures that generally result in cancellation of non-detained hearings, such as the COVID–19 pandemic-related closures and an appropriations lapse between December 2018 and January 2019; and the limited number of appropriated immigration judge positions. *See* Congressional Research Service, R47077, *U.S. Immigration Courts and the Pending Cases Backlog,* at 19–30 (Apr. 25, 2022); EOIR, Congressional Budget Submission for FY 2023 (Mar. 2022) (''Over the years, several factors have contributed to record growth in both the number of pending immigration cases and the time required to adjudicate them. . . Recently, this caseload increase has been exacerbated by the closures and reductions in service associated with the COVID–19 pandemic, as well as the consistent rise in the number of new NTAs that DHS has filed before the immigration court over the last five years, even with the reduction in filings over FY 2020 and FY 2021 (from a high of almost 550,000 in FY 2019).'').

[26] *See* EOIR, *Adjudication Statistics, Pending Cases, New Cases, and Total Completions, https://www.justice.gov/eoir/page/file/1242166/download* (data generated Apr. 21, 2023).

[27] *Id.*

Additionally, as discussed above, the growing backlog of cases is one significant reason it is important for EOIR adjudicators to be able to efficiently manage their dockets to first adjudicate those cases that are ripe for review, where removal is a priority, or where there are no pending alternative resolutions to removal. Administrative closure is a critical tool that helps EOIR adjudicators manage their dockets. *See Cruz-Valdez,* 28 I&N Dec. at 326 (noting that administrative closure has become ''a routine 'tool used to regulate proceedings' and 'manage an Immigration Judge's calendar (or the Board's docket)' '' (quoting *Avetisyan,* 25 I&N Dec. at 694)); *Arcos Sanchez,* 997 F.3d at 123 (''[D]elay in the case through administrative closure does not, by definition, prevent the timely disposition of the case and resolution of questions . . . Without the general authority to administratively close appropriate cases when necessary, the [immigration judges] and the Board . . . may be less effective in managing cases.''); *Romero,* 937 F.3d at 292–93 (''[D]ocket management actions such as administrative closure [ ] often facilitate . . . case resolution . . . As illustrated by *Matter of Avetisyan* and other BIA cases, administrative closure is 'appropriate and necessary' in a variety of circumstances.'').

Indeed, an outside consultant previously recommended that EOIR explore administrative closure as a potential tool that could enhance the efficiency for EOIR proceedings without compromising fairness. EOIR, Booz Allen Hamilton, *Legal Case Study: Summary Report* at 26 (Apr. 6, 2017). Specifically, the consultant, after engaging in a year-long study of EOIR operations, identified numerous external factors that contribute to delays in adjudications. *See generally id.* Among other things, the consultant recommended that the Department engage in discussions with DHS to explore the development of policies regarding administrative closure as one way to improve processing efficiency. *Id.* at 26.

Separately, while the AA96 Final Rule asserted that administrative closure would place the EOIR adjudicator in the position of the prosecutor, 85 FR at 81599, upon reconsideration, the Department now concurs with the reasoning in *Matter of Avetisyan,* which ''considered the respective roles and responsibilities of the DHS, the Immigration Judges, and the Board in removal proceedings'' and concluded that ''[a]lthough administrative closure impacts the course removal proceedings may take, it does not preclude the DHS from instituting or pursuing those proceedings and so does not infringe on the DHS's prosecutorial discretion.'' 25 I&N Dec. at 694.[28] Indeed, administrative closure is similar to the widespread practice of stays of proceedings in federal court, which are often utilized to avoid unnecessary litigation. *See, e.g., Ayanian* v. *Garland,* 64 F.4th 1074, 1078–79 (9th Cir. 2023) (explaining that the court previously granted a motion to stay appellate proceedings ''to allow time to examine grounds for a possible alternative to litigation'').

The AA96 NPRM stated that administrative closure precludes DHS from pursuing removal proceedings while the administrative closure order is in effect. 85 FR at 52503. However, either party can file a motion to recalendar a case at any time. Thus, if, for example, an individual's case has been administratively closed while the individual's prima facie eligible application for adjustment of status is pending before DHS and DHS has a strong interest in concluding proceedings, DHS need only complete adjudication of the application before it and file a motion to recalendar the case, actions well within its control. If the EOIR adjudicator grants the motion to recalendar, the case will proceed.

Therefore, for the reasons discussed above, the Department proposes regulatory language explicitly providing that immigration judges' and the Board's authority to take ''any action'' includes administratively closing cases. *See* 8 CFR 1003.1(d)(1)(ii) (proposed), 1003.10(b) (proposed).[29] The Department's proposed language emphasizes that the phrase ''any action'' is intended to be interpreted broadly to include the general authority to take actions regardless of whether they are explicitly described by regulation by stating that ''[s]uch actions include,'' but are not limited to, administrative closure, so long as such actions, are ''necessary or appropriate'' and are otherwise consistent with governing statutes and regulations. *Id.*

The Department does not believe that existing regulations that expressly authorize administrative closure in certain circumstances are sufficient to capture the numerous scenarios where it may be necessary or appropriate for EOIR adjudicators to administratively close proceedings based upon the particular facts of any given case. *See, e.g.,* 8 CFR 1214.2(a) (referencing administrative closure for T visa applicants); 1214.3 (referencing administrative closure for V visa applicants); 1240.62(b) (referencing administrative closure for certain *American Baptist Church* (ABC) class members); 1240.70(f)–(h) (referencing administrative closure for ABC class members, among others); 1245.13(d)(3)(i) (referencing administrative closure for certain nationals of Nicaragua and Cuba); 1245.15(p)(4)(i) (referencing administrative closure for Haitian Refugee Immigration Fairness Act of 1998 (''HRIFA'') applicants); 1245.21(c) (referencing administrative closure for certain nationals of Vietnam, Cambodia, and Laos). Limiting administrative closure to these discrete scenarios would not permit EOIR adjudicators to consider other important factors that may render a case ripe for administrative closure. Thus, using administrative closure only in these enumerated circumstances would limit

[28] The AA96 NPRM asserted that the Board, in *Matter of Avetisyan* departed, without explanation, from its prior precedent in *Matter of Chamizo,* 13 I&N Dec. 435 (BIA 1969), *Matter of Quintero,* 18 I&N Dec. 348 (BIA 1982), and *Matter of Roussis,* 18 I&N Dec. 256 (BIA 1982). 85 FR at 52503. However, upon further examination, the Department is now of the opinion that the AA96 NPRM's reliance on those cases for the proposition that administrative closure infringes upon DHS's prosecutorial discretion was inapposite. Notably, none of those cases involved administrative closure. Further, *Matter of Chamizo* cannot reasonably be read to implicate DHS's prosecutorial discretion authority, as that case was about the impropriety of an immigration judge granting voluntary departure without entering an alternative order of removal, as was required by the Act and pertinent regulations at the time. 13 I&N Dec. at 437. As to *Matter of Quintero* and *Matter of Roussis,* those cases are most logically read to stand for the proposition that an immigration judge is not permitted to take an action that is within the exclusive jurisdiction of or otherwise committed to the discretion of the former INS District Director. *Matter of Quintero,* 18 I&N Dec. at 350; *Matter of Roussis,* 18 I&N Dec. at 258. Accordingly, *Matter of Avetisyan* is not inconsistent with those cases because the administrative closure of a case does not usurp authority from DHS or require that DHS take or refrain from taking any specific action otherwise committed to its discretion.

[29] As discussed above, the Department finds persuasive the reasoning of several circuit courts that have determined that this authority was previously inherent but not explicitly stated in the regulations as they existed prior to the AA96 Final Rule. *See Romero,* 937 F.3d at 294–95 (holding that the regulations ''unambiguously confer upon [immigration judges] and the BIA the general authority to administratively close cases'' but stating that even if ambiguous, ''the Attorney General's reading of the regulations does not warrant deference because it amounts to an 'unfair surprise' ''); *Meza Morales,* 973 F.3d at 667 (concluding that *Matter of Castro-Tum* was contrary to the unambiguous meaning of the regulations and that immigration judges and the Board are ''not precluded from administratively closing cases when appropriate''); *Arcos Sanchez,* 997 F.3d at 122 (holding that ''the plain language establishes that general administrative closure authority is unambiguously authorized by these regulations''); *see also Zelaya Diaz* v. *Rosen,* 986 F.3d at 691–92 (applying *Meza Morales*).

administrative closure's efficacy as a docket-management tool. Nor do the regulations explicitly authorize administrative closure in common scenarios where administrative closure may be necessary or appropriate, such as where noncitizens may have pending applications for relief before DHS.

The Department proposes revising the phrase ''appropriate and necessary'' to read ''necessary or appropriate'' to emphasize that adjudicators may choose to administratively close cases, or take other actions, even if such action is not required.[30] For example, administrative closure may be appropriate even where other docket management tools, such as continuances, may be available. *See Meza Morales,* 973 F.3d at 665 (''Administrative closure is plainly an 'action.' . . . in cases in which two coordinate offices in the executive branch are simultaneously adjudicating collateral applications, closing one proceeding might help advance a case toward resolution.''); *Matter of Avetisyan,* 25 I&N Dec. at 691 (stating that adjudicators may determine that it is ''necessary or, in the interests of justice and fairness to the parties, prudent to defer further action for some period of time''); *Matter of Hashmi,* 24 I&N Dec. at 791 n.4 (noting that administrative closure could ''avoid the repeated rescheduling of a case that is clearly not ready to be concluded''). As another example, the Sixth Circuit recently determined that, although a noncitizen could theoretically apply for an unlawful presence waiver from outside of the United States if EOIR did not administratively close their case (a prerequisite for applying for a provisional unlawful presence waiver in the United States pursuant to 8 CFR 212.7(e)(4)(iii)), administrative closure was still appropriate because it ''increases the likelihood that noncitizens will obtain legal status and resolve their immigration proceedings.'' *Garcia-DeLeon,* 999 F.3d at 992; *see id.* (''True, a noncitizen in removal proceedings whose case[ ] is not administratively closed may still submit an I–601 Waiver of Inadmissibility after they complete their consular interview and are determined inadmissible. This old path, however, deterred noncitizens in removal proceedings from obtaining legal status as permanent residents.'').

The Department also proposes to amend the term ''disposition'' to read ''disposition or alternative resolution'' of a case. 8 CFR 1003.1(d)(1)(ii) (proposed), 1003.10(b) (proposed). The Department proposes this amendment to establish that actions other than those that lead to a final disposition in a case may still be necessary or appropriate for resolution of the case.[31] *See Arcos Sanchez,* 997 F.3d at 117 (''Administrative closure allows an [immigration judge] or the Board to 'temporarily pause removal proceedings' and place the case on hold because of a pending alternative resolution or because events outside the control of either party may affect the case.'').

Moreover, the Department proposes to amend 8 CFR 1003.1(d)(1)(ii) (proposed) and 1003.10(b) (proposed) to explain that the adjudicator should determine whether the use of administrative closure meets the relevant standard in accordance with 8 CFR 1003.1(*l*) (proposed) or 1003.18(c) (proposed), as applicable. The Department notes that some of the factors proposed for administrative closure may be similar to factors proposed for other authorities such as termination. *Compare* 8 CFR 1003.1(*l*) (proposed Board administrative closure provision), *and* 1003.18(c) (proposed immigration judge administrative closure provision), *with* 8 CFR 1003.1(m) (proposed Board termination provision), *and* 1003.18(d) (proposed immigration judge termination provision). Thus, an adjudicator should decide which of these tools, if any, to use based upon the specific facts of each particular case in an exercise of the adjudicator's independent judgment and discretion. 8 CFR 1003.1(d)(1)(ii), 1003.10(b). Furthermore, the Department also proposes to clarify that the administrative closure authority would not be limited by the existence of any other regulations authorizing or requiring administrative closure. *See, e.g.,* 8 CFR 1214.2(a), 1214.3, 1240.62(b), 1240.70(f)–(h), 1245.13, 1245.15(p)(4)(i), and 1245.21(c).

As discussed above, the Department proposes to add regulatory language that would define administrative closure and set forth guidance to assist adjudicators with determining whether administrative closure is necessary or appropriate for the disposition or alternative resolution of a case. 8 CFR 1003.1(*l*)(1), (3) (proposed), 1003.18(c)(1), (3) (proposed). Such guidance is consistent with established precedent prior to *Matter of Castro-Tum. See Matter of Avetisyan,* 25 I&N Dec. at 688. Additionally, the proposed language would also define recalendaring and set forth guidance for adjudicators to consider when determining whether it is appropriate to recalendar a case. 8 CFR 1003.1(*l*), (*l*)(2) (proposed), 1003.18(c), (c)(2) (proposed).

Specifically, the proposed rule would define administrative closure as ''the temporary suspension of a case.'' 8 CFR 1003.1(*l*) (proposed), 1003.18(c) (proposed); *see Matter of Avetisyan,* 25 I&N Dec. at 695 (stating that it is an ''undisputed fact that administrative closure does not result in a final order''). Accordingly, the regulations would describe administrative closure as an act that would remove a case from the Board's or immigration court's active docket or calendar until the case is recalendared. 8 CFR 1003.1(*l*) (proposed), 1003.18(c) (proposed).[32] The proposed rule would specify that an EOIR adjudicator ''shall grant a motion to administratively close or recalendar filed jointly by both parties, or filed by one party where the other party has affirmatively indicated its non-opposition, unless [the adjudicator] articulates unusual, clearly identified, and supported reasons for denying the motion.''[33] 8 CFR 1003.1(*l*)(3)

[30] The Department would like to make this distinction clear in light of *Hernandez-Serrano,* which stated that the *Romero* ''court's conclusion—that any action for the disposition of the case is read most naturally to encompass actions of whatever kind appropriate for the resolution of a case—reads out of the regulations the requirement of necessity.'' 981 F.3d at 464 (cleaned up).

[31] The Department would like to make this distinction clear in light of *Hernandez-Serrano,* which stated that ''the regulations expressly limit their delegation to actions 'necessary for the disposition' of the case . . . [a]nd that more restricted delegation cannot support a decision not to decide the case for reasons of administrative 'convenience' or the 'efficient management of the resources of the immigration courts and the BIA.' '' 981 F.3d at 464. *But see Meza Morales,* 973 F.3d at 665 (''Unsurprisingly, then, an immigration judge might sometimes conclude, in exercising the discretion granted by 8 CFR 1003.10, that it is appropriate and necessary to dispose of a case through administrative closure.'').

[32] The regulations also specify that immigration judges may manage their dockets through the use of continuances. 8 CFR 1003.29. Continuances keep the case on the immigration judge's active docket and are used ''to await additional action required of the parties'' to ready the case for final adjudication ''that will be, or is expected to be, completed within a reasonably certain and brief amount of time.'' *Matter of Avetisyan,* 25 I&N Dec. at 691. By comparison, administrative closure is a tool that removes a case from an immigration judge's active docket, normally to await some collateral event whose outcome is not yet known and may not be known within a definitive time period, that may impact the course of removal proceedings, and requires a party to move to recalendar in order to re-initiate adjudication. *Id.* at 692.

[33] In practice, immigration judges are encouraged to resolve administrative closure issues as early as possible in a case by affirmatively asking parties whether they wish for cases to be administratively closed. *See* EOIR, *Director's Memorandum 22–03, Administrative Closure* (Nov. 22, 2021) at 3–4. The Department notes that a motion to administratively

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(proposed), 1003.18(c)(3) (proposed). This language adopts the standard articulated in BIA precedent in the context of joint and affirmatively unopposed motions to continue. *See Matter of Hashmi,* 24 I&N Dec. at 791 (''The [motion to continue should be granted] by the Immigration Judge in the absence of unusual, clearly identified, and supported reasons for not doing so.''). The Department believes that it is appropriate to extend this standard to motions for administrative closure or recalendaring, as well as motions to terminate, as discussed in Section IV.C of this preamble, to help promote greater administrative efficiency and eliminate needless confusion for adjudicators and parties.

Moreover, the Department believes that where a motion to administratively close or recalendar a case either is filed jointly or is affirmatively unopposed, a denial of such a motion serves no adversarial interest and that, absent other very compelling reasons, the interests in administrative efficiency dictate granting the motion. *See Matter of Yewondwosen,* 21 I&N Dec. 1025, 1026 (BIA 1997) (stating that the parties' ''agreement on an issue or proper course of action should, in most instances, be determinative''); *see alsoBadwan* v. *Gonzales,* 494 F.3d 566, 568 (6th Cir. 2007) (noting that when the government expressed '''no objection to opposing counsel's request' . . . the government's position demonstrate[d] at a minimum that, as between the parties to the case, no adversarial interest was served by the denial'' of the noncitizen's motion); *Meza Morales*, 973 F.3d at 665 (discussing the interests served by the administrative closure of cases). By requiring the adjudicator to articulate on the record unusual, clearly identified, and supported reasons for denying a joint or affirmatively unopposed motion, the Department acknowledges that rare circumstances might arise when, in the adjudicator's judgment, administrative closure or recalendaring might be inappropriate. Thus, the standard provides adjudicators the flexibility to address the complexities of an individual case, while requiring the adjudicator to issue a reasoned explanation that provides the parties with due notice of the basis for a denial. 8 CFR 1003.1(l)(3) (proposed), 1003.18(c)(3) (proposed).

In the case of motions to administratively close or recalendar proceedings that are neither presented jointly nor affirmatively unopposed, the proposed rule would permit EOIR adjudicators, having considered the totality of the circumstances, to grant such a motion over any party's objection. 8 CFR 1003.1(*l*)(3) (proposed), 1003.18(c)(3) (proposed); *see Matter of Avetisyan,* 25 I&N Dec. at 694 (holding that EOIR adjudicators may administratively close proceedings over a party's objection). The proposed rule would specify that, though administrative closure may be appropriate where a petition, application, or other action is pending outside of EOIR proceedings, there is no requirement of a pending petition, application, or other action for a case to be administratively closed. 8 CFR 1003.1(*l*)(3) (proposed), 1003.18(c)(3) (proposed). The proposed rule would specify that any other regulations that separately authorize or require adjudicators to administratively close cases in specific circumstances do not impact the adjudicator's general authority to administratively close cases. 8 CFR 1003.1(*l*)(1) (proposed), 1003.18(c)(1) (proposed); *see Meza Morales,* 973 F.3d at 667 (construing the term ''any action'' broadly).

In all cases where only one party moves for administrative closure or recalendaring, and the motion is not affirmatively unopposed, the proposed rule would require adjudicators to weigh the totality of the circumstances, taking into consideration all relevant factors, including any relevant factors from a nonexhaustive list, before determining whether, in their discretion, administrative closure or recalendaring [34] is appropriate. The nonexhaustive list of factors relevant to administrative closure includes: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) any requirement that a case be administratively closed for a petition, application, or other action to be filed with, or granted by, DHS; (4) the likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of proceedings before the adjudicator; (5) the anticipated duration of the administrative closure; (6) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (7) the ultimate anticipated outcome of the case. 8 CFR 1003.1(*l*)(3)(i) (proposed), 1003.18(c)(3)(i) (proposed); *see Matter of Avetisyan,* 25 I&N Dec. at 696 (listing factors for consideration relevant to administrative closure).

When considering whether it would be appropriate to administratively close a case, the EOIR adjudicator must weigh the totality of the listed factors to the extent they are applicable. *See Matter of Avetisyan,* 25 I&N Dec. at 696 (''[I]t is appropriate for an Immigration Judge or the Board to weigh all *relevant* factors presented . . .'') (emphasis added). Accordingly, the existence or absence of any one factor is not dispositive of the immigration judge's determination. *Cf. Hernandez-Castillo* v. *Sessions,* 875 F.3d 199, 209 (5th Cir. 2017) (explaining that *Matter of Avetisyan* only required the BIA to evaluate the ''relevant factors presented in the case'' and did not require the BIA to ''evaluate every factor in detail''). For example, there is no requirement that the noncitizen must be pursuing, or must plan to pursue, a petition, application, or other action outside of proceedings as a prerequisite for an immigration judge to administratively close a case. Instead, the immigration judge in such a case would consider the other factors that are applicable to the particular facts and circumstances of the case in order to determine whether to grant or deny administrative closure. Ultimately, the immigration judge's or the Board's determination whether to grant administrative closure is a discretionary decision. The Department notes that the proposed administrative closure factors differ from those set forth in *Matter of Avetisyan* by adding a factor for consideration: whether the need for administrative closure is a prerequisite to a petition, application, or other action being filed with, or granted by, DHS. The Department is proposing this factor in light of the fairness and efficiency interests that would be served by allowing a noncitizen to pursue relief that may be available, and that may resolve a case, without expending unnecessary EOIR and party resources on litigation.

With respect to the second factor for consideration, the Department proposes to make it clear that adjudicators should consider whether there is any opposition to administrative closure, in addition to the basis for any such opposition. An EOIR adjudicator may administratively close a case based on a joint motion, a motion that is unopposed, or over any party's opposition. The principle that an adjudicator, having considered the totality of the circumstances, may administratively close a case over a party's objection is consistent with

close a case before the immigration court may be made in writing or, alternatively, orally in court.

[34] *See Matter of W–Y–U–,* 27 I&N Dec. 17, 18 n.4 (BIA 2017) (stating that the same factors should be considered for recalendaring as for administrative closure).

Matter of Avetisyan. See 25 I&N Dec. at 694 (stating that ''neither an Immigration Judge nor the Board may abdicate the responsibility to exercise independent judgment and discretion in a case by permitting a party's opposition to act as an absolute bar to administrative closure of that case when circumstances otherwise warrant such action'').

The Department notes that one reason administrative closure is sought could be a representation by DHS that it wishes for a particular case to be administratively closed based on an exercise of prosecutorial discretion. As described above, administrative closure has long been used to facilitate DHS's exercise of prosecutorial discretion, *see* Section III.B.1 of this preamble, and it generally would be inefficient for EOIR to otherwise press forward with proceedings in such cases. *See, e.g., United States* v. *Texas,* 143 S. Ct. 1964, 1972 (2023) (''In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution strategies.''). The Department believes that an EOIR adjudicator's role as a neutral arbiter is better served by devoting resources to those cases where DHS has expressed a continued interest in effectuating an order of removal. In other words, an EOIR adjudicator may grant administrative closure solely for equitable considerations in order to suspend the proceedings before EOIR, such as DHS's determination that it will not use its limited resources to proceed with removal proceedings against a particular noncitizen at that time.

On the other hand, the Department notes that a noncitizen may, at times, oppose a motion for administrative closure due to the noncitizen's desire to seek immigration relief available in proceedings before EOIR. *See Matter of W–Y–U–,* 27 I&N Dec. at 20 (''The respondent is opposed to the continuation of administrative closure and has requested recalendaring of the proceedings. He has explained that he wants to pursue his application for asylum to its resolution.''). As set out in the proposed rule, the noncitizen's objection to administrative closure in such a situation would be considered as a factor in the analysis but would not by itself be dispositive. The Department notes that DHS may also have valid reasons for objecting to administrative closure where, for example, it is clearly unlikely that an individual will obtain relief in other proceedings. *See, e.g.,* Jesus Garcia-Garcia, A092–286–960 (BIA May 28, 2009) (non-precedential) (''DHS has continued to oppose administrative closure by reason of the respondent's failure to meet the eligibility requirements [for a 212(c) waiver].'').

The Department seeks comments regarding whether the proposed rule should include any further protections for noncitizens who wish to have their cases adjudicated despite DHS's desire to seek administrative closure, including whether the rule, if finalized, should provide that, where one party opposes administrative closure, the primary consideration for the adjudicator is whether the party opposing closure has provided a persuasive reason for the case to proceed. *See Matter of W–Y–U–,* 27 I&N Dec. at 20, n.5 (holding that ''the primary consideration for an Immigration Judge in determining whether to administratively close . . . proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits,'' but ''continu[ing] to hold that neither party has absolute veto power over administrative closure requests'' (quotation omitted)). As noted above, there may be situations where DHS opposes administrative closure.

With respect to the fifth and sixth factors for consideration—the anticipated duration of the closure and the responsibility of either party, if any, in contributing to any current, anticipated, or continuing need for delay—the Department notes that adjudicators should consider both the noncitizen's and DHS's responsibility for any delay. DHS's responsibility for any delay may include DHS's failure to resolve the noncitizen's pending applications or requests for relief that, if granted, may obviate the need for removal proceedings or significantly narrow the issues before EOIR. Moreover, the potential duration of the administrative closure while awaiting DHS adjudication, for example, of a pending application before USCIS, should not weigh against the decision to administratively close proceedings.

Although the Department generally agrees with *Matter of W–Y–U–*'s determination that the factors for administrative closure and recalendaring should be similar, recalendaring requires slightly different considerations than the initial decision to administratively close a case because, at the time an EOIR adjudicator may be considering recalendaring, there may be more available information regarding developments in the case that have happened during the administrative closure. Such information could aid adjudicators in their decisions. For example, while considering administrative closure, EOIR adjudicators can only anticipate the duration of the requested administrative closure; however, for recalendaring, adjudicators will have more definitive knowledge about the length of time that the case has actually been administratively closed. As another example, when considering recalendaring, EOIR adjudicators would have the benefit of knowing whether parties have taken important steps towards achieving the purpose of the administrative closure—such as filing for relief with another agency—or knowing whether another agency has completed adjudication of alternative forms of relief. In addition, EOIR adjudicators would have additional information about any new positive or negative factors, such as subsequent criminal history, that would weigh for or against recalendaring a case. Therefore, the proposed rule sets out a separate list of relevant factors that adjudicators should consider, as the circumstances of the case warrant, when evaluating a motion to recalendar.

The nonexhaustive list of factors for recalendaring includes: (1) the reason recalendaring is sought; (2) the basis for any opposition to recalendaring; (3) the length of time elapsed since the case was administratively closed; (4) if the case was administratively closed to allow the noncitizen to file a petition, application, or other action outside of proceedings before the adjudicator, whether the noncitizen filed the petition, application, or other action and, if so, the length of time that elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action; (5) if a petition, application, or other action that was pending outside of proceedings has been adjudicated, the result of that adjudication; (6) if a petition, application, or other action remains pending outside of proceedings, the likelihood the noncitizen will succeed on that petition, application, or other action; and (7) the ultimate anticipated outcome if the case is recalendared. 8 CFR 1003.1(*l*)(3)(ii) (proposed), 1003.18(c)(3)(ii) (proposed). Additionally, the proposed rule would permit EOIR adjudicators, having considered the totality of the circumstances, to recalendar a case over any party's objection. 8 CFR 1003.1(*l*)(3) (proposed), 1003.18(c)(3) (proposed).

The Department emphasizes that the proposed list of factors for recalendaring is non-exhaustive, with no single factor necessarily dispositive. For example, with respect to the fourth factor—

measuring the duration between the administrative closure of the case and the time when the noncitizen filed a petition, application, or other action with DHS—the Department notes that the length of time is not, on its face, determinative. The Department is aware that some petitions, applications, or other actions are more complex or require more time, and that the passage of time is not necessarily a reflection of a lack of diligence or an intent to unnecessarily delay proceedings. Rather, the adjudicator may consider this as one of many factors, including whether the noncitizen has not exercised diligence in applying for collateral relief with DHS or is seeking to unnecessarily delay proceedings.

Given the complexity of these issues, the Department specifically requests public comment on whether the specified factors for adjudicators to consider in adjudicating motions to administratively close and motions to recalendar cases are appropriate and whether the proposed factors should be revised in any way. Specifically, the Department seeks public input on whether the proposed rule should specify that a request for administrative closure to allow for the adjudication of a petition, application, or other action should generally be granted as long as the noncitizen demonstrates a reasonable likelihood of success on the merits, and that the noncitizen has been reasonably diligent in pursuing such relief. The Department also seeks comment on whether the proposed rule should set out specific scenarios in which administrative closure may be appropriate where there is no petition, application, or other action pending outside EOIR proceedings. Moreover, the Department seeks comment on whether administrative closure should be upon the motion of a party or whether it might be necessary or appropriate in certain situations for an immigration judge or a Board member to administratively close a case without having received a written motion and, if on appeal, in situations in which parties do not generally have the opportunity to make an oral motion before the Board.

C. Termination and Dismissal

The Department proposes to amend its regulations at 8 CFR 1003.1(d)(1)(ii) (pertaining to Appellate Immigration Judges) and 8 CFR 1003.10(b) (pertaining to immigration judges) to make clear that EOIR adjudicators' authority to ''take any action consistent with their authorities under the Act and the regulations that is necessary or appropriate for the disposition or alternative resolution of such cases'' includes the authority to terminate or dismiss proceedings.[35] The Department believes that the termination or dismissal of proceedings in appropriate situations is consistent with immigration judges' and Appellate Immigration Judges' statutory authority and duties. *See Matter of Coronado Acevedo,* 28 I&N Dec at 651–52; *Gonzalez,* 16 F.4th at 141 (''[W]e fail to see how the general power to terminate proceedings is inconsistent with the authorities bestowed by the INA.'') (cleaned up); *see also* 8 CFR 1240.12(c) (indicating that an immigration judge's order ''shall direct the respondent's removal from the United States, or the termination of proceedings, or other such disposition of the case as may be appropriate'').

As an initial matter, while the terms ''dismissal'' and ''termination'' have been used interchangeably in case law in some instances, *see, e.g., Matter of Coronado Acevedo,* 28 I&N Dec. at 648 n.1; *Matter of G–N–C–,* 22 I&N Dec. 281, 284 (BIA 1998), the Department proposes to more clearly delineate the circumstances in which the immigration judge's order disposing of a case should be an order of dismissal as compared with circumstances in which the immigration judge's order disposing of a case should be an order of termination. *See* 8 CFR 1239.2(b) (proposed).

The proposed rule would specify that EOIR adjudicators may only enter an order to dismiss proceedings upon a motion by DHS seeking dismissal pursuant to 8 CFR 1239.2(c) for the reasons specified in 8 CFR 239.2(a). *See* 8 CFR 1239.2(b) (proposed). The Department proposes that a motion to dismiss proceedings for a reason other than those authorized by paragraph (c) should be deemed a motion to terminate and adjudicated pursuant to 8 CFR 1003.1(m) (proposed) or 1003.18(d) (proposed). *Id.*

The Department further proposes to amend 8 CFR 1003.1(d)(1)(ii) and 1003.10(b) to explain that an adjudicator should determine whether the use of termination or dismissal meets the appropriate standard in accordance with the provisions in 8 CFR 1003.1(m) (proposed), 1003.18(d) (proposed), or 1239.2(c) (dismissal provision). The Department reiterates that some of the factors proposed for termination may be similar to factors proposed for administrative closure; however, as previously stated, the adjudicator will exercise their independent judgment and discretion to decide which of these tools to use, if any, based upon the specific facts of each particular case. 8 CFR 1003.1(d)(ii), 1003.10(b).

Substantively, the Department does not propose to modify the dismissal grounds referenced by 8 CFR 1239.2(c). However, the Department believes that it is important for immigration judges and Appellate Immigration Judges to have the authority to terminate proceedings in circumstances outside of those explicitly identified in existing regulations, which do not expressly capture all situations where EOIR adjudicators' exercise of that authority may be necessary or appropriate for the disposition of a case. *See Matter of Coronado Acevedo,* 28 I&N Dec. at 651–52 (noting situations not explicitly enumerated in the regulations in which EOIR adjudicators have commonly deemed termination of proceedings to be an appropriate disposition of the case). In such circumstances, these proposed termination grounds can promote efficiency and fairness and help immigration judges and Appellate Immigration Judges better manage their calendars and dockets. *See id.* at 651 (indicating that precluding termination of proceedings in certain common situations not accounted for in the regulations ''would undermine the fair and efficient adjudication'' of cases in some instances) (citing *Matter of A–C–A–A–,* 28 I&N Dec. 351, 351 (A.G. 2021)).

Accordingly, the Department proposes to codify EOIR adjudicators' termination authority as detailed below. The proposed rule distinguishes between EOIR adjudicators' authority to terminate removal, deportation, and exclusion proceedings and their authority to terminate all other types of proceedings. *See* 8 CFR 1003.1(m) (proposed), 1003.18(d) (proposed). Although the issue of termination is likely to occur most frequently in the context of removal, deportation, and exclusion proceedings, the Department is cognizant that issues related to termination may also arise in other types of proceedings, including asylum-only proceedings (8 CFR 1208.2(c)(1)) and withholding-only proceedings (8 CFR 1241.8(e)).[36] However, because the

[35] The Department notes that termination is a case ''disposition'' under 8 CFR 1003.1(d)(1)(ii) and 1003.10(b), not an ''alternative resolution,'' and is only referred to as such throughout this NPRM. *Gonzalez,* 16 F.4th at 141 (''Termination of proceedings certainly falls within this court's reading of 'any action'; indeed, termination actually ends a proceeding rather than merely facilitating its end.'') (cleaned up).

[36] The Department identifies these types of proceedings as examples only. The proposed rule's framework for termination of other proceedings in 8 CFR 1003.1(m)(2) (proposed) and 8 CFR 1003.18(d)(2) (proposed) applies to all proceedings other than removal, deportation, and exclusion proceedings, though the Department anticipates

scope of these proceedings is more limited than the scope of removal, deportation, and exclusion proceedings, many of the grounds for termination of removal, deportation, and exclusion proceedings will be inapplicable to or inappropriate for other types of proceedings.[37] The Department thus believes it is appropriate to provide separate and distinct termination authority for other types of proceedings.

The proposed rule categorizes EOIR adjudicators' termination authority as follows: (1) mandatory termination in removal, deportation, or exclusion proceedings, 8 CFR 1003.1(m)(1)(i) (proposed), 1003.18(d)(1)(i) (proposed); (2) discretionary termination in removal, deportation, or exclusion proceedings, 8 CFR 1003.1(m)(1)(ii) (proposed), 1003.18(d)(1)(ii) (proposed); and (3) mandatory and discretionary termination in other proceedings, 8 CFR 1003.1(m)(2) (proposed), 1003.18(d)(2) (proposed).

The proposed rule identifies specific circumstances where termination would be required, and others where termination would be discretionary. The proposed rule would require termination in removal, deportation, or exclusion proceedings where: (1) no charge of deportability, inadmissibility, or excludability can be sustained; (2) fundamentally fair proceedings are not possible because the noncitizen is not mentally competent and adequate safeguards are unavailable; (3) the noncitizen has, since the initiation of proceedings, obtained United States citizenship; (4) the noncitizen has, since the initiation of proceedings, obtained lawful permanent resident status, refugee status, asylee status, or nonimmigrant status under INA 101(a)(15)(S), (T), or (U), 8 U.S.C. 1101(a)(15)(S), (T), or (U), that has not been revoked or terminated, and the noncitizen would not have been deportable, inadmissible, or excludable as charged if the noncitizen had obtained such status before the initiation of proceedings; [38] (5) termination is required as provided in 8 CFR 1245.13(*l*); (6) termination is otherwise required by law; or (7) the parties jointly filed a motion to terminate, or one party filed a motion to terminate and the other party affirmatively indicated its non-opposition, unless the adjudicator articulates unusual, clearly identified, and supported reasons for denying the motion. 8 CFR 1003.1(m)(1)(i) (proposed), 1003.18(d)(1)(i) (proposed).

Regarding the mandatory grounds for termination of removal, deportation, or exclusion proceedings, the Board has held that termination of removal, deportation, or exclusion proceedings is appropriate where DHS cannot sustain the charges of removability. *Matter of Sanchez-Herbert,* 26 I&N Dec. at 44; *see Matter of Ortega-Quezada,* 28 I&N Dec. 598, 604 (BIA 2022) (''Because the respondent is not removable as charged, we will sustain the appeal and terminate the proceedings.''). Furthermore, if the noncitizen has obtained one of the statuses enumerated above, and the noncitizen would not have been deportable, inadmissible, or excludable as charged if the status had been obtained prior to the initiation of proceedings, there would be no need to continue with the proceedings based upon charges that would not have been sustainable. Moreover, the Department proposes to make clear that termination is required where fundamentally fair removal, deportation, or exclusion proceedings are not possible because the noncitizen lacks mental competency and adequate safeguards are unavailable. 8 CFR 1003.1(m)(1)(i)(B) (proposed), 1003.18(d)(1)(i)(B) (proposed); *cf. Matter of M–A–M–,* 25 I&N Dec. 474, 483 (BIA 2011) (''In some cases, even where the court and the parties undertake their best efforts to ensure appropriate safeguards, concerns may remain. In these cases, the Immigration Judge may pursue alternatives with the parties.''). In addition, the Department further proposes to make clear that it is not limiting termination authority, as specified in the existing regulations or as otherwise required by constitutional, statutory, or binding case law. 8 CFR 1003.1(m)(1)(i)(E)–(F) (proposed), 1003.18(d)(1)(i)(E)–(F) (proposed).

Finally, the proposed rule would mandate that EOIR adjudicators grant joint motions to terminate removal, deportation, or exclusion proceedings, or motions to terminate such proceedings by one party to which the other party has affirmatively indicated its non-opposition, unless the adjudicator articulates unusual, clearly identified, and supported reasons for denying the motion. 8 CFR 1003.1(m)(1)(i)(G) (proposed), 1003.18(d)(1)(i)(G) (proposed); *cf. Matter of Hashmi,* 24 I&N Dec. at 791 (stating that in considering a noncitizen's motion to continue, ''[i]f the DHS affirmatively expresses a lack of opposition, the [motion should be granted] by the Immigration Judge in the absence of unusual, clearly identified, and supported reasons for not doing so''); *see also Matter of Yewondwosen,* 21 I&N Dec. at 1026 (stating that the parties' ''agreement on an issue or proper course of action should, in most instances, be determinative''); Badwan, 494 F.3d at 568 (noting that when the government expressed '' 'no objection to opposing counsel's request' . . . the government's position demonstrate[d] at a minimum that, as between the parties to the case, no adversarial interest was served by the denial'' of the noncitizen's motion). However, the Department notes that either party retains the ability to timely rescind its participation in a joint termination motion or its affirmative non-opposition to termination should circumstances change, such as the discovery of new relevant evidence.

The proposed ''unusual, clearly identified, and supported'' language is based on the *Hashmi* standard for joint and affirmatively unopposed motions to continue, and also matches the proposed language in this rule for joint or affirmatively unopposed motions for administrative closure. *See* Section IV.B of this preamble. The Department believes that it is appropriate to extend this standard to motions for termination, which will help promote greater administrative efficiency and eliminate needless confusion for adjudicators and parties.

In requiring that the adjudicator articulate on the record unusual, clearly identified, and supported reasons for denying a joint or affirmatively unopposed motion to terminate, the Department acknowledges that rare

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that grounds for termination in other types of proceedings will be less common.

[37] As an illustrative example, withholding-only proceedings involve noncitizens subject to reinstatement of prior removal orders under INA241(a)(5), 8 U.S.C. 1231(a)(5), and noncitizens subject to expedited removal under INA238(b), 8 U.S.C. 1228(b). *See* 8 CFR1208.2(c)(2). The scope of review in withholding-only proceedings is limited to adjudication of whether the noncitizen is eligible for withholding of removal or protection under the Convention Against Torture pursuant to INA 241(b)(3), 8 U.S.C. 1231(b)(3). *See* 8 CFR 1208.2(c)(3)(i). Indeed, during withholding-only proceedings, ''all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.'' *Id.* Because of this explicit limitation in the scope of the proceedings, many of the grounds for termination of removal, deportation, and exclusion proceedings do not apply to withholding-only proceedings. *See also id.* (discussing limited scope of review in asylum-only proceedings); *cf. Matter of D–M–C–P–,* 26 I&N Dec. 644, 647 (BIA 2015) (stating that EOIR adjudicators lack the ''jurisdiction to consider whether [asylum-only] proceedings were improvidently instituted pursuant to a referral under the [Visa Waiver Program]'').

[38] This proposed provision is not intended to amend an EOIR adjudicator's discretion to reopen cases. Where such lawful immigration status is obtained after the conclusion of removal proceedings, reopening and termination may well be appropriate; however, this proposed authority relates solely to termination, and the Department is not suggesting that reopening would be required.

circumstances might arise where, in the adjudicator's judgment, termination might be inappropriate, even when the motion is presented jointly or is affirmatively unopposed. Thus, the standard provides adjudicators needed flexibility to address the complexities of an individual case, while also requiring due notice to the parties of the reasons for the denial. 8 CFR 1003.1(m)(1)(i)(G) (proposed), 1003.18(d)(1)(i)(G) (proposed).

Additionally, the proposed rule would allow for discretionary termination of removal, deportation, or exclusion proceedings in the following specific circumstances: (1) where an unaccompanied child, as defined in proposed 8 CFR 1001.1(hh), states an intent, either in writing or on the record at a hearing, to seek asylum with USCIS, and USCIS has initial jurisdiction over the application pursuant to section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C); (2) where the noncitizen demonstrates prima facie eligibility for relief from removal or lawful status based on a petition, application, or other action that USCIS has jurisdiction to adjudicate, including naturalization or adjustment of status; (3) where the noncitizen is a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforced Departure; [39] (4) where USCIS has granted a provisional unlawful presence waiver pursuant to 8 CFR 212.7(e); (5) where termination is otherwise authorized by 8 CFR 1216.4(a)(6) or 1238.1(e); (6) where the parties have filed a motion to terminate as described in 8 CFR 214.14(c)(1)(i) or 214.11(d)(1)(i); or (7) under other comparable circumstances, as discussed in further detail below. Termination is up to the adjudicator's discretion in these circumstances, and the adjudicator may consider any basis for opposition to termination in making their determination.

The Department proposes these discretionary grounds for termination of removal, deportation, or exclusion proceedings for the following reasons. A number of these grounds focus on circumstances where alternative relief may be available to the noncitizen that would end the need for continued proceedings, thereby saving EOIR adjudicatory resources for other cases. These include: (1) a noncitizen demonstrating prima facie eligibility for relief from removal or for a lawful status based on a petition, application, or other action that USCIS has jurisdiction to adjudicate; (2) an unaccompanied child, as defined in proposed 8 CFR 1001.1(hh), intending to apply for asylum with USCIS; and (3) a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforced Departure. *See Matter of Coronado Acevedo,* 28 I&N Dec. at 651–52 (explaining that EOIR adjudicators commonly exercised termination authority when termination was necessary for noncitizens ''to be eligible to seek immigration relief before USCIS''). With respect to termination where a noncitizen has demonstrated prima facie eligibility for relief from removal or for a lawful status based on a petition, application, or other action that USCIS has jurisdiction to adjudicate, the Department notes that EOIR adjudicators must make such determinations based on the particular facts of a given case and the Department does not intend this proposed ground for discretionary termination to authorize a general practice of terminating proceedings involving prima facie eligibility for asylum. Rather, consistent with 8 CFR 1208.2(b), the default rule that EOIR adjudicators continue to exercise authority over asylum applications filed by noncitizens in removal proceedings would continue to apply.

In addition, where an immigrant visa is immediately available to a noncitizen and USCIS has granted a provisional unlawful presence waiver after the noncitizen filed a Form I–601A, *Application for Provisional Unlawful Presence Waiver,* it may be appropriate to terminate proceedings so the noncitizen can depart the United States to obtain a visa through consular processing without becoming inadmissible on another basis. *See* 78 FR at 544 (stating that ''[i]f the Form I–601A is approved for [a noncitizen] whose proceedings have been administratively closed, the [noncitizen] should seek termination or dismissal of the proceedings, without prejudice, by EOIR . . . or risk becoming ineligible for the immigrant visa based on another ground of inadmissibility''); *see also Matter of Coronado Acevedo,* 28 I&N Dec. at 651 (suggesting that termination of proceedings may be appropriate where ''the pendency of removal proceedings [could] cause[ ] adverse immigration consequences for a respondent who must travel abroad to obtain a visa'').

The proposed rule would also authorize immigration judges and Appellate Immigration Judges to terminate removal, deportation, or exclusion proceedings in the exercise of discretion in other comparable circumstances when similarly necessary or appropriate for the disposition or alternative resolution of the case. 8 CFR 1003.1(m)(1)(ii)(G) (proposed), 1003.18(d)(1)(ii)(G) (proposed). The Department recognizes that there may be other circumstances not explicitly stated in the proposed rule in which termination may also be appropriate that are similar in nature to the explicit grounds in the proposed rule authorizing termination. Moreover, similar to the mandatory grounds for termination of removal, deportation, or exclusion proceedings, the Department proposes to clarify that this proposed rule is not intended to limit any pre-existing regulations authorizing termination under certain circumstances. *See* 8 CFR 1003.1(m)(1)(ii)(E)–(F) (proposed), 1003.18(d)(1)(ii)(E)–(F) (proposed). This proposed standard would provide sufficient flexibility such that EOIR adjudicators may terminate a case if it presents similar circumstances to the enumerated grounds for termination and is otherwise necessary or appropriate.

At the same time, this provision would implement important guardrails to limit adjudicators' termination authority. *See* 8 CFR 1003.1(m)(1)(ii)(G) (proposed) (precluding termination by the Board for purely humanitarian reasons unless DHS expressly consents to termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion), 1003.18(d)(1)(ii)(G) (proposed) (same for immigration judges); *see also* 8 CFR 1003.1(m)(2)(iii) (proposed) (providing that in proceedings other than removal, deportation, or exclusion proceedings, nothing in the proposed regulatory provisions authorizes the Board to terminate proceedings where prohibited by another regulatory provision), 1003.18(d)(2)(iii) (proposed) (same for immigration judges). The Department acknowledges that termination of removal, deportation, or exclusion proceedings is inappropriate in certain circumstances. The proposed rule would not change the longstanding principle that immigration judges and Appellate Immigration Judges have no authority to review or second-guess DHS's exercise of prosecutorial discretion, including its decision whether to commence removal proceedings. *See, e.g., Matter of E–R–M– & L–R–M–*, 25 I&N Dec. 520 (BIA 2011)

[39] The President may authorize Deferred Enforced Departure pursuant to the President's constitutional authority to conduct the foreign relations of the United States. *See Deferred Enforced Departure,* USCIS, *https://www.uscis.gov/humanitarian/deferred-enforced-departure.* The Department notes that Deferred Enforced Departure ''is not a specific immigration status,'' but noncitizens who are covered by Deferred Enforced Departure ''are not subject to removal from the United States for a designated period of time.'' *See id.*

(holding that an immigration judge could not second-guess DHS exercise of prosecutorial discretion to place an arriving noncitizen directly in removal proceedings rather than the expedited removal process); *Matter of J–A–B– & I–J–V–A–,* 27 I&N Dec. 168, 170 (BIA 2017) (explaining that immigration judges and the Board do not have the authority to review a DHS decision to initiate removal proceedings in a particular case); *Matter of G–N–C–,* 22 I&N Dec. at 284 (stating that the decision to institute deportation proceedings is not a decision that the immigration judge or Board may review because it is an exercise of prosecutorial discretion); *see also Cortez-Felipe* v. *INS,* 245 F.3d 1054, 1057 (9th Cir. 2001) (observing that neither immigration judges nor the Board possess the authority to review DHS's ''discretion regarding when and whether to initiate [removal] proceedings'' (citing authorities)). Similarly, an adjudicator may not terminate removal, deportation, or exclusion proceedings for purely humanitarian reasons unless DHS expressly consents to such termination, joins in a motion for termination, or affirmatively states its non-opposition to a motion for termination on such a basis. *See Lopez-Telles* v. *INS,* 564 F.2d 1302, 1303 (9th Cir. 1977) (holding that immigration judges have no statutory or inherent power to terminate deportation proceedings over the objection of INS to provide humanitarian relief not authorized by the statute to a deportable noncitizen).

Moreover, in light of these proposed standards governing termination of proceedings, the Department proposes to remove and reserve 8 CFR 1239.2(f) as newly proposed language would cover the circumstances currently addressed in that subsection. *Compare* 8 CFR 1003.1(m)(1)(ii)(B) (proposed) (authorizing termination by the Board where a noncitizen demonstrates prima facie eligibility for relief from removal or for a lawful status based on a petition, application, or other action that USCIS has jurisdiction to adjudicate, including naturalization or adjustment of status), *and* 1003.18(d)(1)(ii)(B) (proposed) (same authorization for immigration judges), *with* 8 CFR 1239.2(f) (authorizing an immigration judge to terminate a noncitizen's removal proceedings in order to pursue a pending application or petition for naturalization).

Finally, although such scenarios may be rare, the proposed rule also explicitly provides for termination in proceedings other than removal, deportation, or exclusion. *See* 8 CFR 1003.1(m)(2) (proposed), 1003.18(d)(2) (proposed). Such proceeding types include, among others, withholding-only, asylum-only, credible fear, reasonable fear, rescission, and claimed status. The Department believes that providing immigration judges and the Board with termination authority in these limited proceedings will ensure that adjudicators are not limited from reaching a proper resolution, as determined by the specific facts of each case.

Substantively, as with removal, deportation, and exclusion proceedings, the proposed rule requires immigration judges and the Board to terminate these other proceedings where the parties have jointly filed a motion to terminate, or one party has filed a motion to terminate and the other party has affirmatively indicated its non-opposition, unless the adjudicator articulates unusual, clearly identified, and supported reasons for denying the motion. *See* 8 CFR 1003.1(m)(2)(i) (proposed), 1003.18(d)(2)(i) (proposed). The proposed rule further requires immigration judges and the Board to terminate these other proceedings when required by law, including by statute, regulation, or binding Board or court decision. *Id.* In all other circumstances, the proposed rule provides adjudicators with the general discretionary authority to terminate these proceedings where necessary or appropriate for the disposition or alternate resolution of the case, subject to the same limitations as in removal proceedings. 8 CFR 1003.1(m)(2)(ii) (proposed), 1003.18(d)(2)(ii) (proposed). Finally, the proposed rule specifies that nothing in the new provision allows adjudicators to terminate proceedings where prohibited by another regulatory provision; in other words, this new provision is not intended to trump other regulatory provisions governing these proceedings. 8 CFR 1003.1(m)(2)(iii) (proposed), 1003.18(d)(2)(iii) (proposed).

The Department notes that, in some scenarios in these other proceedings, alternative options to termination are available. For example, it may be that an applicant in withholding-only proceedings is mentally incompetent and adequate safeguards are unavailable, but the adjudicator believes it would be inappropriate to terminate the proceedings because doing so would leave the applicant without any protection from removal, such as when, for example, a noncitizen is subject to reinstatement of a prior removal order under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), and eligible only for withholding of removal. In such a situation, administrative closure would be available and would allow for the case to be recalendared in the future if appropriate.

The Department seeks public comment on whether the proposed termination standards are warranted and whether these standards should be broadened, narrowed, or altered. Additionally, the Department seeks comment on the evidence that would best support certain proposed grounds for termination, for example, whether evidence of filings with USCIS should be required in some cases. The Department also seeks comment on the proposed framework in 8 CFR 1239.2(b) that would distinguish between the exercise of dismissal authority, which applies to a decision on a DHS motion to dismiss for the reasons specified in 8 CFR 239.2(a), and termination authority, which applies when an EOIR adjudicator terminates proceedings for the reasons specified in proposed 8 CFR 1003.1(m) and 1003.18(d).

Further, the Department seeks public comment on whether the regulations should impose additional constraints on the termination authority. Finally, the Department seeks comment on whether the regulations should specify that termination should generally be without prejudice to DHS's ability to recommence removal proceedings if circumstances change except where the termination was based on DHS's failure to sustain the removal charges. Similarly, the Department seeks comment on whether immigration judges or Appellate Immigration Judges may terminate a case only on a party's motion or whether there are situations where EOIR adjudicators may exercise termination authority *sua sponte.*

D. Sua Sponte Reopening or Reconsideration and Self-Certification

The Department proposes to amend its regulations at 8 CFR 1003.2(a) and 1003.23(b), respectively, governing the ability of immigration judges and the Board to *sua sponte* reopen or reconsider a case by restoring the regulatory standard in effect before the promulgation of the AA96 Final Rule.[40] The restored standard provides that an immigration judge and the Board may

[40] The Department recognizes that an action is not, by its literal definition, ''*sua sponte*'' when the action is undertaken pursuant to a request made by a party to the proceedings. *See Sua sponte,* Black's Law Dictionary (11th ed. 2019) (''Without prompting or suggestion; on its own motion.''). Nonetheless, immigration judges and the Board have long entertained motions for *sua sponte* reopening, *Djie* v. *Garland,* 39 F.4th 280, 282 n.1 (5th Cir. 2022), and the Department will continue to use this term for motions that may be granted in ''exceptional situations,'' *Matter of G–D–,* 22 I&N Dec. 1132, 1133 (BIA 1999); *Matter of J–J–,* 21 I&N Dec. 976, 985 (BIA 1997).

reopen or reconsider a case upon their own motion at any time after they have rendered a decision if they have jurisdiction.

Prior to the AA96 Final Rule, the original regulation conferring authority to *sua sponte* reopen or reconsider cases had been in effect since 1958, *see Dada,* 554 U.S. at 12–13, and had served as a vital tool to prevent injustices in the immigration system. *See, e.g., Matter of X–G–W–,* 22 I&N Dec. 71 (BIA 1998) (holding that, in a specific circumstance, a fundamental change in asylum law that made the noncitizen eligible for relief warranted *sua sponte* reopening); *see also P–O–J–,* No.: AXXX–XXI–700, 2016 WL 1084517, at *1 (BIA Feb. 24, 2016) (non-precedential) (*sua sponte* reopening and terminating because noncitizen obtained asylee status). For example, without the availability of such a tool, noncitizens who would otherwise be eligible for an initial grant of, or return to, lawful status may be removed from the United States. *See Centro Legal de la Raza,* 524 F. Supp. 3d at 971 (stating that ''elimination [of *sua sponte* authority] will foreclose the only avenue of relief for some noncitizens who would otherwise be eligible for relief from removal'').

The strong need for *sua sponte* authority in certain limited circumstances is underscored by the fact that, in promulgating prior regulations implementing statutory motions to reopen and reconsider, the Department specifically declined to add a good cause exception to the statutory time and number limits on such motions due to the availability of *sua sponte* reopening and reconsideration. *See* 61 FR at 18902. Removing *sua sponte* authority without creating a similar safety valve would prevent EOIR adjudicators from remedying the types of exceptional circumstances described above.

Moreover, the longstanding availability of *sua sponte* reopening and reconsideration operated under a workable scheme. For example, the Board has published decisions applying the ''exceptional circumstances'' standard in specific situations and has the ability to publish further decisions clarifying the standard as necessary. *See, e.g., Matter of Yauri,* 25 I&N Dec. 103, 110–11 (BIA 2009) (applying standard to case involving a pending application before DHS); *Matter of G–D–,* 22 I&N Dec. 1132 (BIA 1999) (applying standard to request based on a change in law). Maintaining the exceptional circumstances standard allows adjudicators sufficient discretion to reopen in meritorious circumstances.

Similarly, the Department is aware of no evidence that immigration judges or the Board routinely used *sua sponte* authority to reopen cases in which a motion to reopen would have been time- or number-barred without considering whether the ''exceptional circumstances'' standard was met. *See, e.g.,* AA96 Final Rule, 85 FR at 81631 (raising concerns that *sua sponte* reopening could be used to cure filing defects or circumvent regulations). Additionally, at the immigration court level, an immigration judge's exercise of *sua sponte* authority is subject to appellate review by the Board, and the Board can remand where such authority has been used improperly. *See* 8 CFR 1003.2(a); *see also Matter of G–D–,* 22 I&N Dec. at 1132.

The Department finds that the need for *sua sponte* authority in certain cases outweighs any finality concerns in this context. *See, e.g.,* AA96 Final Rule, 85 FR at 81632 (raising finality concerns regarding *sua sponte* motions). *Sua sponte* reopening and reconsideration are reserved for truly exceptional cases and, with limited exceptions, are fully committed to agency discretion. *See Menendez-Gonzalez* v. *Barr,* 929 F.3d 1113, 1116 (9th Cir. 2019) (explaining that *sua sponte* reopening authority is committed to agency discretion and that the court may only review for legal or constitutional error). As noncitizens are not entitled to *sua sponte* reopening or reconsideration, immigration judges and the Board can ensure that such authority only disturbs the finality of proceedings in the limited number of meritorious cases involving exceptional circumstances.

For similar reasons as those described above, the Department proposes to reinstate the authority of the Board to accept untimely or defective appeals through self-certification. 8 CFR 1003.1(c) (proposed).

E. Board Findings of Fact—Administrative Notice

The Department proposes to rescind all of the changes that the AA96 Final Rule made to 8 CFR 1003.1(d)(3)(iv) regarding administrative notice at the Board. The Board, like federal courts, has long had the power to take administrative notice of facts not reasonably subject to dispute. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 54877 (Aug. 26, 2002) (implementing regulations that codified administrative notice authority). The AA96 Final Rule expanded the Board's administrative notice authority to allow it to resolve certain factual disputes in the first instance and to rely on those determinations to overturn a grant of relief or protection. *See* 8 CFR 1003.1(d)(3)(i) (''The Board will not engage in *de novo* review of findings of fact determined by an immigration judge.''). The Department recognizes that it would be unnecessary and inefficient for the Board to remand a case to the immigration judge for facts that are not truly in dispute and would not be disputed once they are called to the parties' attention. However, upon review, the Department believes that the AA96 Final Rule's provisions could invite impermissible factfinding in practice, in contravention of the Department's longstanding regulatory approach. Accordingly, the Department proposes changes regarding administrative notice procedures. *See* 8 CFR 1003.1(d)(3)(iv) (proposed).

In addition, the Department proposes to rescind the AA96 Final Rule's restrictions on the Board's authority to remand to the immigration court for further findings of fact, as discussed in further detail below. Accordingly, the Department finds it unnecessary to retain broad and possibly confusing standards for administrative notice that may prejudice noncitizens, particularly pro se noncitizens, as the Board will have the discretion to either take administrative notice or remand for further fact-finding, as appropriate. *See* 8 CFR 1003.1(d)(3)(iv) (proposed) (''If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to DHS.'').

Additionally, the AA96 Final Rule, if made operative, would permit the Board to rely on any ''undisputed fact[ ] in the record'' to overturn a grant of relief even if the parties did not have a meaningful opportunity to address that fact in the proceedings at the immigration-judge level because, for example, neither the parties nor the immigration judge found it necessary to dispute or probe further about the fact because it appeared irrelevant or tangential. *See* 85 FR at 81651 (8 CFR 1003.1(d)(3)(iv)(A)(4)). Relatedly, the AA96 Final Rule added a new provision that would allow the Board to affirm the underlying decision ''on any basis supported by the record'' including by relying on ''facts that are not reasonably subject to dispute.'' *See id.* (8 CFR 1003.1(d)(3)(v)).

Although the AA96 Final Rule, if enforced, would afford the parties an opportunity to respond to administratively noticed facts if those facts were used to overturn a grant of relief or protection, 85 FR at 81603 (8 CFR 1003.1(d)(3)(iv)(B)), in practice this could be confusing to noncitizens, particularly those who are pro se.

Accordingly, the Department does not believe the AA96 Final Rule's opportunity-to-respond provision provides adequate procedural protections to noncitizens, such as allowing sufficient opportunity to be heard, to present testimony, and to develop the record on disputed facts. *Cf. Quintero* v. *Garland,* 998 F.3d 612, 626 (4th Cir. 2021) (''Today, we join the broad consensus among our sister circuits by holding that immigration judges have a legal duty to fully develop the record in the cases that come before them. Like the [Board] and the other circuits to have considered this issue, we are persuaded that such a duty necessarily arises from the dictates of [INA 240(b)(1),] 8 U.S.C. 1229a(b)(1) . . .'').

The Department is also concerned that the AA96 Final Rule, if effectuated, would permit the Board to affirm a denial of relief or protection on the basis of facts that may not have been developed by the parties or even considered by the immigration judge during removal proceedings, and which did not factor into the immigration judge's denial. Indeed, the AA96 Final Rule does not provide any requirement of notice or opportunity to respond if the Board relies on administratively noticed facts to affirm an immigration judge's decision to deny relief, even if those facts were not relied on by the immigration judge or developed at the hearing.

F. Board Findings of Fact—Voluntary Departure

Generally, the proposed rule would retain the voluntary departure-related changes adopted by the AA96 Final Rule, which prohibited the Board from remanding to the immigration judge for consideration of voluntary departure, as described at Section III.F.2 of this preamble. The Department believes that the changes adopted by the AA96 Final Rule with respect to voluntary departure created a workable framework that improved adjudicatory efficiency. *See* Section III.F.2 of this preamble (''Prior to the AA96 Final Rule, the regulations described an immigration judge's authority to grant voluntary departure but did not articulate the Board's authority to do so.'' (citation omitted)). However, the Department proposes to amend 8 CFR 1003.1(d)(7) and 1240.26(k)(1) to allow the Board to remand cases to the immigration court for the consideration of voluntary departure in the limited circumstances where further fact-finding is needed.

Specifically, the Department proposes to remove the AA96 Final Rule's mandate that ''[i]f the Board does not grant the request for voluntary departure, it must deny the request.'' 85 FR at 81652 (8 CFR 1003.1(d)(7)(iv)). In cases where the Board has a complete record and the immigration judge has made sufficient findings of fact, it is generally inefficient and unnecessary for the Board to remand to the immigration judge solely for consideration of the issue of voluntary departure. However, where the voluntary departure record is incomplete or otherwise requires further fact-finding to adjudicate the request, the Board should be permitted to remand the case to the immigration judge to consider the voluntary departure request.

One such example is when a noncitizen makes multiple applications for relief or protection, including voluntary departure. In that case, the immigration judge may choose to grant at least one application but not address other applications, including voluntary departure. If DHS appeals the immigration judge's decision and the Board determines that the noncitizen is not eligible for the relief granted, the voluntary departure record is likely to be incomplete or additional fact-finding may be required to adjudicate the voluntary departure request. *See* 85 FR at 81639–40 (describing commenter concerns with respect to this example).

The AA96 Final Rule, if effectuated, would not allow the Board the option to remand. 8 CFR 1003.1(d)(7)(iv) (''If the Board [did] not grant the request for voluntary departure, it must deny the request.''). However, under the circumstances described above, the Board should be permitted to remand the case to the immigration court to consider the voluntary departure request rather than mandate denial of a potentially eligible request or invite the possibility of improper fact-finding, in violation of 8 CFR 1003.1(d)(3)(iv) (proposed). Accordingly, to make this remand authority clear, the Department also proposes to add a sentence to the end of 8 CFR 1003.1(d)(7)(ii) (proposed), stating that ''[if] the record does not contain sufficient factual findings regarding eligibility for voluntary departure, the Board may remand the decision to the immigration judge for further factfinding.''

Additionally, the Department proposes to remove the AA96 Final Rule's prohibition on remands to the immigration judge to consider voluntary departure and to amend the regulations to state that the Board ''may,'' rather than ''shall,'' consider a request for voluntary departure de novo. 8 CFR 1240.26(k)(1) (proposed). As described above, in cases where the Board has a complete record and the immigration judge has made sufficient findings of fact, it is generally inefficient and unnecessary for the Board to remand to the immigration judge solely to consider the issue of eligibility for voluntary departure. However, where the voluntary departure record is incomplete or otherwise requires further fact-finding to adjudicate the request, the Board should be permitted to remand the case to the immigration judge to consider the voluntary departure request.

Except as described above, this proposed rule would not make further amendments to the voluntary departure provisions enacted by the AA96 Final Rule.

When the Board grants voluntary departure in the first instance, written voluntary departure advisals served electronically or by mail in conjunction with the Board's order will provide adequate notice to noncitizens for purposes of voluntary departure. *See* 8 CFR 1003.3(g)(6)(i)–(ii) (providing for electronic service in eligible cases). In making this decision, the Department considered that the Act authorizes service of the Notice to Appear by mail, including advisals of the consequences for failure to comply with certain requirements described in the Notice to Appear and the consequences for failure to appear. *See* INA 239(a)(1)(F)(iii), 8 U.S.C. 1229(a)(1)(F)(iii) (consequences for failure to provide updated address and telephone information), INA 239(a)(1)(G)(ii), 8 U.S.C. 1229(a)(1)(G)(ii) (consequences for failure to appear). The Department believes that given Congress's authorization of service by mail of such advisals, notwithstanding the significant consequences associated with failure to comply with such requirements, electronic or mail service is also sufficient for voluntary departure advisals.

G. Board Remand Authority—Additional Findings of Fact

The Department proposes to rescind all changes that the AA96 Final Rule made to 8 CFR 1003.1(d)(3)(iv) and proposes to remove the AA96 Final Rule's addition of 8 CFR 1003.1(d)(3)(v)[41]—the provisions of the AA96 Final Rule that eliminated the Board's authority to grant a motion to remand based on new evidence that arises while a noncitizen's case is on appeal before the Board. Rescinding these changes would reinstate the

[41] As discussed above in Section IV.E of this preamble, the proposed rule would retain some of the administrative notice language at 8 CFR 1003.1(d)(3)(iv)(A) but would move it to 8 CFR 1003.1(d)(3)(iv) and remove paragraph (A).

Board's previous authority to remand based on new evidence (in addition to intervening changes in law) that could impact the basis for the immigration judge's removability determination or that could provide the noncitizen with a form of relief or protection, or other immigration benefit, that would obviate the need for continued removal proceedings or the Board's adjudication of the appeal. 8 CFR 1003.1(d)(3) (proposed). Similar to the provisions of the AA96 Final Rule that eliminated the authority of immigration judges and the Board to grant *sua sponte* reopening or administrative closure, the AA96 Final Rule's provisions that eliminated the Board's authority to remand *sua sponte* based on new evidence could impede certain noncitizens from obtaining an immigration benefit or relief from removal for which they have become prima facie eligible.

Upon review, the Department believes that the AA96 Final Rule's limitations on the Board's remand authority raise fairness concerns and would create inefficiencies that contravene the rule's stated justification. For example, although the AA96 Final Rule would permit remands based on new evidence pertaining to grounds of removability, such as to allow DHS to present new facts regarding a noncitizen's removability, *see* 8 CFR 1003.1(d)(3)(iv)(D) (barring remands except as provided in 8 CFR(d)(7)(v)(B)), 1003.1(d)(7)(v)(B) (not precluding remands for further fact-finding related to ''a question regarding a ground or grounds of removability specified in section 212 or 237 of the Act''), it would preclude the Board from remanding a case at the noncitizen's request for further fact-finding where the noncitizen became prima facie eligible for relief or protection, or other immigration benefit.

This limitation is overly restrictive and raises fairness concerns due to the imbalance between the parties. First, it would not be fair to permit DHS to seek remand based on new evidence discovered during background or security checks that could render an individual *ineligible* for relief, 8 CFR 1003.1(d)(7)(v)(B), but not on the basis of new evidence that could render an individual *eligible* for relief. Second, the AA96 Final Rule ignored that new evidence can relate not just to a ground of removability, but also to grounds for relief. If new evidence indicates that noncitizens have become eligible for new forms of relief from removal, protection, or other immigration benefit, the Board should be able to remand for consideration of that evidence. Such forms of relief from removal, protection, or other immigration benefit may include: special immigrant juvenile status, adjustment of status, cancellation of removal for certain lawful permanent residents (for example if the noncitizen is successful in obtaining vacatur of a criminal conviction that otherwise precluded applying for that relief before the immigration judge), or asylum or similar protection based on new evidence that only came to light during the appeal process.

Additionally, the AA96 Final Rule suggested that an individual who wishes to obtain relief based on new evidence must file a motion to reopen in accordance with the standard procedures for such motions. *See* 85 FR at 81589. While this is technically an available option, substantive and procedural limitations on motions to reopen might make this option more difficult or unavailable for many noncitizens, which raises fairness concerns for noncitizens in proceedings, as well as questions of efficiency, given that additional motions practice invites further litigation that could draw out the resolution of a proceeding. *See, e.g.,* 8 CFR 1003.2(c)(2) (time and number bar on motions to reopen), 1103.7(b)(2) (filing fee for motions to reopen, but not motions to remand); *cf. Garcia-DeLeon,* 999 F.3d at 992 (''True, a noncitizen in removal proceedings whose case is not administratively closed may still submit an I–601 Waiver of Inadmissibility after they complete their consular interview and are determined inadmissible. This old path, however, deterred noncitizens in removal proceedings from obtaining legal status as permanent residents . . . Thus, administrative closure for the limited purpose of permitting noncitizens to apply for provisional unlawful presence waivers increases the likelihood that noncitizens will obtain legal status and resolve their immigration proceedings.'').

In addition to fairness and efficiency concerns, the AA96 Final Rule's limitations on remands for new evidence also conflict with a permanent injunction to which the agency is subject in some circumstances. The permanent injunction requires the Board to accept new evidence related to mental health and to order a limited remand to assess an unrepresented, detained noncitizen's competency to represent themselves in proceedings before EOIR. *See Franco-Gonzalez* v. *Holder,* No. 10–02211, 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013); *Franco-Gonzalez* v. *Holder,* No. 10–02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014). In addition, since the issuance of that injunction, EOIR has adopted similar procedures pursuant to its nationwide policy to provide enhanced procedural protections to unrepresented immigration detainees with serious mental disorders or conditions[42] (''Nationwide Policy'') for similarly situated individuals detained outside of the three states covered by the *Franco-Gonzalez* injunction. Thus, adherence to the AA96 Final Rule would be irreconcilable with adherence to court-ordered permanent injunctions in effect in three States and irreconcilable with EOIR's Nationwide Policy. The Department notes that the AA96 Final Rule would still preclude the Board from remanding proceedings to the immigration judge for the requisite factual findings required by the Nationwide Policy and permanent injunction even if the Board would have been permitted to accept new evidence related to mental competency.

The Department believes that Appellate Immigration Judges have the expertise, knowledge, and training to determine when further fact-finding might be needed given the variables to consider on a case-by-case basis when adjudicating an appeal and that it is in the interest of justice to charge Appellate Immigration Judges with doing so, rather than burdening litigants, many of whom are pro se, with strictly complying with the numerous, inflexible requirements that the AA96 Final Rule set forth at 8 CFR 1003.1(d)(3)(iv)(D)(*1*)–(*5*).[43] As discussed below, the Department also proposes to reinstate the Board's authority to remand cases based upon a ''totality of the circumstances'' analysis.

Accordingly, given the fairness and efficiency concerns implicated in the AA96 Final Rule's limitation on the Board's ability to remand cases, the Department proposes to rescind the AA96 Final Rule's changes to section 1003.1(d)(3)(iv). Rescinding these

[42] *See* Press Release, EOIR, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013), *https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented.*

[43] For example, if enforced, the Board would only be permitted to remand a case based on a change in the law if the change were to render the initial decision legally erroneous or where the immigration judge's factual findings were ''clearly erroneous.'' Thus, the AA96 Final Rule would not have permitted remands for a change in circumstances, or in a case where the immigration judge failed to make any finding of fact that the Board might consider important to the case. There are undoubtedly other examples of scenarios where it might be appropriate to remand for further fact-finding but that would not have been captured by the AA96 Final Rule. That concern supports leaving the Board the flexibility to make case-by-case determinations.

provisions would allow the Board to retain its prior authority to remand in cases involving new evidence that could impact a noncitizen's removability or render the individual prima facie eligible for relief.

The AA96 Final Rule also precluded immigration judges from considering, on remand, any issues outside of the scope of the Board's remand order, unless pertaining to a question of the immigration judge's continuing jurisdiction over the case. But developments related to a noncitizen's removability or eligibility for protection or relief from removal could arise after a remand. In the Department's view, the better policy is to avoid inefficiencies that result from limiting the scope of a remand, which can lengthen proceedings by precluding immigration judges from addressing all relevant issues in the remanded proceedings. While the Department is cognizant that ''[b]oth the public and the Board have significant . . . interests in the finality of immigration proceedings,'' *Hernandez-Rodriguez* v. *Pasquarell,* 118 F.3d 1034, 1042 (5th Cir. 1997) (citing *Abudu* v. *INS,* 485 U.S. 94, 106–08 (1988)), the Department does not believe that finality interests outweigh the fairness and efficiency concerns that the AA96 Final Rule's inflexible approach creates. Hence, for similar reasons to those described above, the Department proposes to remove this restriction on the immigration judge's authority when considering a case on remand.

The proposed rule would also add to 8 CFR 1003.1(d)(3)(iv) a statement that ''[i]f new evidence is submitted on appeal, that submission may be deemed a motion to remand and considered accordingly.'' This addition would make clear that new evidence submitted on appeal need not be dismissed solely because the party did not file a pleading entitled a ''motion to remand.'' This is in keeping with pre-AA96 Final Rule guidance pertaining to motions to reopen, which the Department also proposes to republish as part of this rulemaking. *See* 8 CFR 1003.2(c)(4) (2019); 8 CFR 1003.2(c)(4) (proposed). These amendments would clarify that the Board has discretion to consider new facts presented on appeal as a motion to remand. This parallels the pre-AA96 Final Rule treatment of new facts presented as part of a motion to reopen prior to the conclusion of proceedings.

H. Board Remand Authority—Errors in Fact or Law

The Department proposes to rescind all of the AA96 Final Rule's restrictions on the Board's authority to remand decisions based upon errors of fact or law, specifically, all changes made to 8 CFR 1003.1(d)(7)(i), and proposes to remove 8 CFR 1003.1(d)(7)(ii), (iii), and (v). As discussed above in Section IV.F of this preamble, the Department proposes to retain, with modifications, 8 CFR 1003.1(d)(7)(iv) (addressing voluntary departure), and to renumber that paragraph as 8 CFR 1003.1(d)(7)(ii). These proposed changes would restore the Board's broad authority to remand decisions to the immigration judge or DHS for ''further action as may be appropriate.'' 8 CFR 1003.1(d)(7)(i) (proposed).

As previously noted in Section III.H.2 of this preamble, the AA96 Final Rule restricted the Board from remanding a decision due to an error of law or fact in the immigration judge's decision if it did not identify the standard of review it applied and the specific error or errors made by the adjudicator. 8 CFR 1003.1(d)(7)(ii)(A). The Department believes that, because the Board's standards of review are expressly delineated by regulation, it is unnecessary to require the Board to explicitly include them in every remand order. *See* 8 CFR 1003.1(d)(3) (requiring factual findings to be reviewed for clear error and legal determinations to be reviewed de novo).

Additionally, as explained in Section III.H.2 of this preamble, the AA96 Final Rule prohibited the Board from remanding a case: (1) based upon a ''totality of the circumstances,'' 8 CFR 1003.1(d)(7)(ii)(B); (2) based on new arguments or evidence, except where the new argument or evidence pertained to a material change in fact or law and substantial evidence supported the change vitiated all grounds of removal, 8 CFR 1003.1(d)(7)(ii)(C); or (3) sua sponte, subject to limited exceptions, 8 CFR 1003.1(d)(7)(ii)(D).

The Department is now proposing to rescind these provisions, thus recodifying the longstanding, more flexible standard that allows the Board to return the case ''to DHS or an immigration judge for such further action as may be appropriate.'' 8 CFR 1003.1(d)(7)(i) (proposed). The Department now believes that this longstanding standard is workable and sufficiently flexible to allow for remands in situations where an error of fact or law warrants remand, or where fairness or efficiency concerns may otherwise be implicated. Given the numerous variables that each case may present, the Department believes the Board requires the flexibility to conduct appellate review, including remanding proceedings when necessary, rather than being limited by the rigid restrictions that the AA96 Final Rule set forth at 8 CFR 1003.1(d)(7)(ii).

Specifically, the Department believes that Appellate Immigration Judges have the expertise, knowledge, and training to determine when an error of fact or law warrants remand to the immigration judge without the need for significant restrictions on such determinations. In addition, providing the Board with maximum flexibility to remand due to errors of fact or law ensures that the immigration court, which is most familiar with the record as the court tasked with receiving evidence, is able to correct any errors and issue revised orders based on those corrections in the first instance.

Moreover, the Board may determine, under the totality of the circumstances, that remand is warranted in other situations, including based on fairness or efficiency concerns. For example, under the AA96 Final Rule, the Board would arguably be unable to remand—as it has, for example, pursuant to *Matter of S–H–,* 23 I&N Dec. at 462–63—in situations where an immigration judge decision contains only a brief summary of the testimony and an ultimate pronouncement on the merits, without thorough discussion of each of the elements of the application for relief or protection. *See Matter of Rodriguez-Carillo,* 22 I&N Dec. 1031, 1033 (BIA 1999) (discussing fairness concerns implicated by cursory decisions).[44] The Department thus believes that rescinding the AA96 Final Rule's provision prohibiting a remand based upon a totality of the circumstances will return the longstanding flexibility to the Board to remand cases for further action as appropriate based on the circumstances presented in each case.

Similarly, under the AA96 Final Rule, the Board would be prohibited from

[44] The Department also acknowledges that commenters previously raised concerns, in conjunction with the AA96 rulemaking, that the AA96 Final Rule does not provide an independent ground to remand based on superseding or intervening case law—including litigation surrounding regulations or precedential decisions that were the basis for denying relief—to the extent that such changes do not raise a question of jurisdiction, vitiate all grounds of removability, or relate to an error of law. *See* 85 FR at 81611 (listing commenter concerns); *see also* (8 CFR 1003.1(d)(7) (discussing remand authority). The Department also now believes that this omission unduly restricts appellate review, particularly in light of the increasing number of significant litigation developments pertaining to immigration law in recent years. In some circumstances, for example, Appellate Immigration Judges may deem it appropriate to remand for immigration judges to consider in the first instance the effect of intervening case law, without determining whether the decision under review contains an error of law under this intervening case law. The Department's proposal to restore the Board's broad authority to remand decisions would correct such limitations.

remanding based upon the availability of new evidence where the new evidence did not vitiate all grounds of removability applicable to the noncitizen, even where it might impact the noncitizen's eligibility for relief from removal. Accordingly, as discussed in Section IV.G of this preamble, this prohibition on remands would result in inefficiencies given that such a prohibition would invite additional motions practice and further litigation that could unnecessarily prolong the ultimate resolution of a proceeding. Thus, for the foregoing reasons, the Department proposes to largely rescind these restrictions that the AA96 Final Rule placed on the Board's remand authority so as to restore the Board's flexibility to remand decisions to the immigration judge or DHS for ''further action as may be appropriate.'' 8 CFR 1003.1(d)(7)(i) (proposed).

I. Background Check

The Department proposes to amend 8 CFR 1003.1(d)(6) regarding the completion or updating of background checks when a case is pending before the Board. Generally, the proposed rule would retain the background check-related changes from the AA96 Final Rule, which were intended to reduce the availability of Board remands to the immigration court due to background check concerns. The Department believes that the pre-AA96 Final Rule practice of remanding to the immigration court solely for a background check to be completed is an unnecessary procedural action that creates inefficiencies in case processing.[45]

Similar to the AA96 Final Rule, this NPRM proposes that, when completing or updating a background check is necessary to adjudicate an appeal or motion at the Board, the Board will issue a notice to the parties holding the case until such a check is completed and the results are reported to the Board. *See* 8 CFR 1003.1(d)(6)(ii) (proposed). The Board's notice to the parties will explain that DHS will contact the noncitizen with instructions for completing or updating any necessary checks if DHS is otherwise unable to independently update them. *Id.* The Board's notice will also advise the noncitizen of the consequences of failing to comply with these requirements. *Id.*

However, this proposed rule includes a number of changes from the AA96 Final Rule's background check language. First, the Department is removing language that the AA96 Final Rule added to 8 CFR 1003.1(d)(6)(iii) that would deem a noncitizen's failure to comply with these background check requirements at the Board as an automatic abandonment of their underlying relief application absent a showing of good cause. Instead, the Department proposes to revert to the pre-AA96 Final Rule language, which provides that the Board retains the discretion to, on DHS's motion, remand to the immigration judge to consider such noncompliance in determining whether the underlying relief should be denied. *See* 8 CFR 1003.1(d)(6)(iii) (2019).

Second, the Department proposes to allow the Board the option of further holding a case where DHS has failed to report the results of background checks within 180 days from the date of the Board's notice, rather than requiring the Board to remand to the immigration judge. 8 CFR 1003.1(d)(6)(iii) (proposed). This would account for cases where 180 days may not be a sufficient reporting period or where the case was placed on hold for other reasons. *See* 8 CFR 1003.1(e)(8)(iii) (proposed) (specifying when cases may be placed on hold). This change will help ensure that cases are not unnecessarily remanded to an immigration judge when the Board determines that further holding the case would more efficiently contribute to the completion of the case.

Lastly, the Department proposes to add a minor clarification to 8 CFR 1003.1(d)(6)(v) that this background check section applies to applications for withholding of removal under the Act and applications for protection under the Convention Against Torture, by referencing ''immigration relief *or protection.*'' *See Matter of M–D–,* 24 I&N Dec. 138, 140 n.1 (BIA 2007) (''When referenced in connection with the background check regulations, the term 'relief' includes any form of relief that permits [a noncitizen] to reside in the United States, including withholding of removal and protection under the Convention Against Torture . . .'').

J. Adjudication Timelines

The Department proposes to retain the 90- and 180-day processing timelines for single-member and three-member Board decisions but amend 8 CFR 1003.1(e)(1) and (e)(8), regarding internal processing timelines at the Board. The AA96 Final Rule added or modified a number of Board internal processing timelines, requiring: (1) screening panel review within 14 days of filing or receipt; (2) transcript ordering within seven days after the screening panel completes its review; (3) issuance of briefing schedules within seven days after receiving the transcript or, if no transcript is required, within seven days after the screening panel completes its review; (4) review by a single Appellate Immigration Judge within 14 days of assignment to determine whether a single- or a three-member panel should adjudicate the appeal; (5) summary dismissal of qualifying cases within 30 days of the appeal's filing date; (6) adjudication of interlocutory appeals within 30 days of the appeal's filing date; and (7) completion of three-member decisions within 180 days of the record being complete, rather than 180 days from assignment to the three-member panel. *See* 8 CFR 1003.1(e)(1), (8). The AA96 Final Rule also added tracking and accountability requirements for the Chairman at 8 CFR 1003.1(e)(8)(v).

After further review, the Department has determined that these internal timelines are overly rigid and concern internal Board operations and processes that are not suitable for regulatory action. Given the wide variety of cases before the Board, the varying circumstances of different parties, and possible changes to EOIR's dockets, codifying strict internal timelines in regulatory text does not afford the Board adequate flexibility to process cases efficiently and fairly. Furthermore, processing timelines may be accomplished through internal guidance as necessary. *See* 5 U.S.C. 553(b)(3)(A) (exempting ''rules of agency organization, procedure, or practice'' from the APA's notice and comment requirements); *see also* 8 CFR 1003.1(a)(2)(i)(C) (providing the Chairman with the authority to ''set priorities or time frames for the resolution of cases''). As a result, the proposed rule would remove the specific processing timelines from EOIR's regulations, retaining only the more general 90- and 180-day processing timelines for single-member and three-member Board decisions. This will ensure that the Board continues to resolve cases expeditiously, while giving the Board appropriate flexibility to set internal case management deadlines based on the particular circumstances of the cases at issue and possible changes to EOIR's dockets.

To calculate the 180-day adjudication deadline for three-member panels, the Department believes that starting the

[45] The Department recognizes that such procedures necessitate service of notices and advisals electronically or by mail, as opposed to in-person service, and the Department believes that such service is sufficient for the same reasons as those described above with respect to advisals related to voluntary departure. *See* Section IV.F of this preamble.

adjudication period at the time of panel assignment is most appropriate. *See* 8 CFR 1003.1(e)(8)(i) (proposed). Three-member decisions require robust discussion among members of the panel, as well as detailed, thorough decisions, given that three-member decisions are intended to address significant legal issues. *See* 8 CFR 1003.1(e)(6) (explaining that three-member panel decisions are intended to address, among other issues, the need to establish precedent construing the meaning of laws, regulations, or procedures, or cases or controversies of national import). Thus, upon reconsideration, the Department is now of the belief that providing less time for the Board to consider and issue three-member panel decisions would be inefficient, as this truncated timeline could negatively affect the Board's ability to: (1) settle inconsistencies at the immigration court; (2) establish precedent that would clarify significant legal issues; (3) review decisions that may not be in conformity with the law or applicable precedent; (4) resolve cases or controversies of major national import; (5) review clearly erroneous factual determinations; (6) reverse decisions if appropriate to do so; or (7) resolve complex, novel, unusual, or recurring issues of law or fact. *See* 8 CFR 1003.1(e)(6) (2018). This, in turn, could have a cascading negative impact on all EOIR adjudications due to a resultant lack of clarity, consistency, or meaningful review and resolution of important issues that come before EOIR. Conversely, given that single-member Board decisions, historically, have been appropriate for the disposition of unopposed motions, 8 CFR 1003.1(e)(2), affirmances without opinion, 8 CFR 1003.1(e)(4), or ''brief orders,'' 8 CFR 1003.1(e)(5), the Department continues to believe that calculating the 90-day adjudication period from the time of completion of the record on appeal is appropriate. *See* 8 CFR 1003.1(e)(8)(i) (proposed). Returning the adjudicatory processing timelines to the pre-AA96 Final Rule standards would ensure that there is sufficient time for the Board to fully consider and address important issues requiring three-member panel decisions, while still allowing for flexibility and expediency in issuing single-member decisions.

Additionally, the Department proposes to include all ''rare circumstances'' listed in the regulatory text prior to the AA96 Final Rule under which the Chairman was permitted to hold adjudication of a case or cases. Specifically, the Department proposes that the Board may hold a case or group of cases where an impending decision by the United States Supreme Court or the relevant United States Court of Appeals, impending Department regulatory amendments, or an impending *en banc* Board decision might substantially determine the outcome of the case or group of cases. 8 CFR 1003.1(e)(8)(iii) (proposed). The Department also proposes to amend the pre-AA96 Final Rule language to account for the potential of ''rare circumstances'' other than those explicitly described by the regulation in which a hold may be appropriate. *Id.* Accordingly, the Department proposes to add the term ''such as'' before describing the rare circumstances to make clear that these circumstances are non-exhaustive. *Id.*

K. Director's Authority To Issue Decisions

The Department proposes to amend 8 CFR 1003.1(e)(8) to remove the EOIR Director's authority to adjudicate cases that are pending beyond the Board's regulatory adjudication timelines. As a result, the Department also proposes to remove the cross-reference prohibiting delegation of the Director's authority—as was set forth in 8 CFR 1003.1(e)(8)—from the regulations at 8 CFR 1003.0(b)(2)(ii). The Department is proposing this change for clarity, as that cross-reference to the Director's authority in 8 CFR 1003.0(b)(2)(ii) would be rendered nonsensical if the changes to proposed 8 CFR 1003.1(e)(8) are finalized.

As a general rule, the EOIR Director does not have the authority to adjudicate, or direct the adjudication of, cases before EOIR. *See* 8 CFR 1003.0(c) (''Except as provided by statute, regulation, or delegation of authority from the Attorney General, or when acting as a designee of the Attorney General, the Director shall have no authority to adjudicate cases arising under the Act or regulations or to direct the result of an adjudication assigned to the Board, an immigration judge, the Chief Administrative Hearing Officer, or an Administrative Law Judge.''). Two recent Department rulemakings, however, provided exceptions by allowing the EOIR Director to adjudicate Board cases that are not completed within their regulatory adjudication timelines.

In general, the regulations require single-member appeals to be completed within 90 days of completion of the record, and three-member appeals to be completed within 180 days. *See* 8 CFR 1003.1(e)(8)(i). An August 26, 2019, interim final rule amended this section to require that if a case is not completed within the time limit and any extension, the Chairman must either assign the case to themselves or a Board Vice Chairman or refer the case to EOIR's Director for adjudication. *See* 84 FR at 44539–40; 8 CFR 1003.1(e)(8)(ii); Organization of the Executive Office for Immigration Review, 85 FR 69465, 69481 (Nov. 3, 2020) (adopting as final). Subsequently, the separate AA96 Final Rule further amended this section to require the Chairman to refer any case to the EOIR Director that is pending adjudication for more than 335 days after the appeal, motion, or remand was filed or received by the Board, subject to certain exceptions. *See* 85 FR at 81591. Taken together, these rulemakings significantly expanded the EOIR Director's authority to adjudicate cases before EOIR.

After further review, the Department has determined that providing the EOIR Director with such expansive adjudicatory authority is unnecessary. The Department proposes to remove the amendments made to 8 CFR 1003.1(e)(8) by both the August 2019 interim final rule and the related final rule, as well as the AA96 Final Rule, and revert the language back to instructing the Board to refer cases that are not adjudicated in the time required to the Attorney General for decision. 8 CFR 1003.1(e)(8)(ii) (proposed). Further, consistent with the Department's longstanding understanding of the EOIR Director's authorities and limitations, this proposed rule ''highlight[s] the Director's role as EOIR's manager,'' as opposed to an adjudicator, which is more properly the function of the immigration courts and the Board. *See* 65 FR at 81434 (detailing the EOIR Director's broad authority to direct and supervise EOIR's components).

In the event that a Board case passes its regulatory deadline without adjudication, the Department believes that such cases are better addressed internally at the Board, including through the Chairman and Vice Chairman referrals included in this proposed rule, as well as any modified internal procedures, training, and hiring, as necessary. Therefore, the Department proposes to amend 8 CFR 1003.1(e)(8) to remove the EOIR Director's authority to adjudicate Board cases that remain pending past regulatory deadlines.

L. Quality Assurance Certification

The Department proposes to remove and reserve 8 CFR 1003.1(k), which was added by the AA96 Final Rule to create a procedure for immigration judges to certify cases remanded to them by the Board and allegedly involving Board

error to the EOIR Director. In addition, the Department proposes to remove language added by the AA96 Final Rule that references the EOIR Director's authority to remand cases as part of the quality assurance certification process. *See* 8 CFR 1003.1(e) (proposed).

After further review, the Department believes that the pre-AA96 Final Rule procedures are sufficient to address potential Board errors. As explained above, a party dissatisfied with a Board decision may file a motion to reconsider, 8 CFR 1003.2(a), the noncitizen may pursue a petition for review of a final order of removal in the federal courts of appeals, INA 242(a)(1), 8 U.S.C. 1252(a)(1), and DHS may also seek to refer a Board decision to the Attorney General for further review, 8 CFR 1003.1(h). Within the Department, the Attorney General may certify a decision on the Attorney General's own initiative; an immigration judge may certify to the Board any case that is appealable to the Board; and the Board may reconsider a decision involving an error using the Board's *sua sponte* authority as described elsewhere in this proposed rule. *See* 8 CFR 1003.1(c), (h), 1003.2(a). All of these options that are already available to immigration judges, the Board, the Attorney General, and the parties to the case permit addressing alleged Board errors without the need for a lengthy ancillary process outside of the normal adjudicatory case flow.

The AA96 Final Rule unnecessarily inserted the EOIR Director into the adjudication process. As previously explained, the EOIR Director has historically not possessed the authority to adjudicate, or direct the adjudication of, cases before EOIR, with limited exceptions. *See* 8 CFR 1003.0(c). The AA96 Final Rule created a substantial exception to that general limitation on the Director's authority by allowing the EOIR Director to ''exercise delegated authority from the Attorney General identical to that of the Board . . . [including] the authority to issue a precedent decision, and the authority to refer the case to the Attorney General for review'' after certification from an immigration judge. 85 FR at 81653; 8 CFR 1003.1(k)(3). In effect, the AA96 Final Rule granted the EOIR Director broad authority to issue precedential decisions if an immigration judge certified a case to the EOIR Director alleging, for example, that the Board decision on remand was contrary to law or was vague, ambiguous, or internally inconsistent, among other reasons. 8 CFR 1003.1(k)(1)(iii). However, given the myriad other responsibilities of the EOIR Director, *see* 8 CFR 1003.0(b)(1), and because other existing agency procedures are sufficient to address potential errors, the Department believes this broadening of the EOIR Director's adjudicative authority is unnecessary and unwarranted at this time.

M. Forwarding of Record on Appeal

The Department proposes to amend the regulations at 8 CFR 1003.5 regarding the forwarding of the record on appeal by largely returning to the regulatory text in effect prior to the AA96 Final Rule. First, the proposed rule would reinstate the requirements for immigration judges to review their oral decision transcripts and approve them within specified timeframes. 8 CFR 1003.5(a) (proposed). Second, the proposed rule would remove a reference to the EOIR Director when discussing the authority to manage the transcription process. *Id.*[46]

The Department originally instituted timelines for immigration judges to review oral decision transcripts in order to ''expedite the handling of cases by the Board.'' Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 7309, 7311 (Feb. 19, 2002) (proposed rule); 67 FR 54878, 54895 (Aug. 26, 2002) (final rule). Subsequently, the AA96 Final Rule completely removed the immigration judge transcript review process to further expedite the appeal process, stating that such review was no longer needed. 85 FR at 81639. However, after further consideration, the Department proposes to reinstate the prior review procedures as necessary to ensure that accurate transcripts are produced. As the source of the oral decision, the immigration judge is in the best position to review the transcript to ensure it is an accurate written version of their oral decision. Moreover, the Department believes that the 14-day review period does not lengthen the appeal process sufficiently to justify completely removing the immigration judge review process. In retaining the immigration judge transcript review process, the Department notes that the process is not intended to allow immigration judges to change their decision after the fact but rather to ensure that the written transcript accurately captures the immigration judge's oral decision, particularly because minor transcription errors have the potential to cause outsized issues.

The AA96 Final Rule also inserted a reference to the EOIR Director into 8 CFR 1003.5(a), regarding the management of the transcription process, but did not provide an explanation for the addition. On further review, the Department proposes to remove the reference to the EOIR Director in the management of the transcription process as unnecessary. The Chairman and the Chief Immigration Judge will continue to manage the transcription process.

The Department also proposes to retain pre-AA96 Final Rule language at 8 CFR 1003.5(b) regarding procedures for appeals from DHS officer decisions to provide clarity to parties about how to manage the record of proceeding in cases where DHS, upon reconsideration, decides to grant a benefit that has been requested in the appeal to the Board.

N. Definitional Changes

The Department proposes adding two definitions to 8 CFR 1001.1. Specifically, the Department proposes to define the terms ''noncitizen'' and ''unaccompanied child.'' *See* 8 CFR 1001.1(gg)–(hh) (proposed).

First, the proposed rule would define ''noncitizen'' to be synonymous with the term ''alien,'' which is defined by statute to mean ''any person not a citizen or national of the United States.'' INA 101(a)(3), 8 U.S.C. 1101(a)(3). This change would be consistent with recent terminology usage changes at EOIR. *See* EOIR PM 21–27, *Terminology* (July 26, 2021), *https://www.justice.gov/eoir/book/file/1415216/download; see also Barton* v. *Barr,* 140 S. Ct. 1442, 1446 n.2 (2020) (noting that the opinion ''uses the term 'noncitizen' as equivalent to the statutory term 'alien' ''). The Department notes that a person may claim United States citizenship or nationality during immigration court proceedings or may obtain United States citizenship or nationality after immigration court proceedings have commenced. The Department proposes to use the term ''noncitizen'' as equivalent to the term ''alien'' as used in the regulations to denote a person who is in immigration proceedings before EOIR, including those that claim or later obtain United States citizenship or nationality. The Department requests comments on whether there is an alternative term or terms that would better capture this concept.[47]

[46] The proposed rule retains, however, changes made by the AA96 Final Rule to delete references to DHS procedures in paragraph (b) that are not relevant to EOIR and to change the phrase ''improve [transcript] quality'' to ''ensure [transcript] quality.'' 8 CFR 1003.5(a), (b) (proposed). Due to the high quality of EOIR's digital audio recording system, the role of the Chairman and Chief Immigration Judge in the transcription process is more accurately defined as ensuring the continued quality of transcription, rather than improving it.

[47] The term ''respondent'' as defined in 8 CFR 1001.1(r) does not cover all persons appearing for proceedings before EOIR but instead describes

Second, the proposed rule would define ''unaccompanied child'' to be synonymous with ''unaccompanied alien child'' and its statutory definition at 6 U.S.C. 279(g)(2). Similar to the proposed ''noncitizen'' definitional change, this change is more consistent with current terminology usage.

O. Technical Changes

The Department proposes technical changes in paragraphs amended as noted in this section. Specifically, the Department proposes to replace gendered language with gender-neutral language at 8 CFR 1003.1(e)(8)(ii), 1003.2(c)(1), 1003.23(b)(1), 1003.23(b)(1)(iii), and 1240.26. The Department also proposes to decapitalize the term ''Immigration Judge'' where appropriate. Lastly, the Department proposes to replace references to ''the Service'' with ''DHS'' and references to ''alien'' with ''noncitizen'' where appropriate.

P. Request for Comment

In *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003), the Board of Immigration Appeals held that court orders that vacate a noncitizen's conviction will be given effect for immigration purposes only when they are based on a substantive or procedural defect in the underlying criminal proceeding. In *Matter of Thomas & Thompson,* 27 I&N Dec. 674 (A.G. 2019), Attorney General Barr overruled three prior Board decisions—*Matter of Cota-Vargas,* 37 I&N Dec. 849 (BIA 2005), *Matter of Song,* 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada,* 26 I&N Dec. 749 (BIA 2016)—and held that state-court orders that modify, clarify, or otherwise alter a noncitizen's criminal sentence will similarly be given effect for immigration purposes only when they are based on a substantive or procedural defect in the underlying criminal proceeding, and not when based on reasons unrelated to the merits, such as rehabilitation or avoiding immigration consequences.

Recently, a circuit split has emerged on whether *Matter of Thomas & Thompson* may be applied retroactively in immigration proceedings to orders or criminal proceedings that predated the Attorney General's decision. *Compare Zaragoza* v. *Garland,* 52 F.4th 1006, 1010 (7th Cir. 2022) (holding that applying *Matter of Thomas & Thompson* to a preexisting sentence-modification order ''is an impermissibly retroactive application of a new rule''), *with Edwards* v. *U.S. Attorney General,* 56 F.4th 951, 962 (11th Cir. 2022) (finding ''no retroactivity problem'' in similar circumstances). Questions have also arisen over how *Matter of Thomas & Thompson* and *Pickering* apply to particular types of orders. *See, e.g., Matter of Sotelo,* 2019 WL 8197756, at *2 (BIA Dec. 23, 2019) (giving effect to a vacatur order issued under Cal. Penal Code § 1473.7); *Khatkarh* v. *Becerra,* 442 F. Supp. 3d 1277, 1285–86 (E.D. Cal. 2020) (discussing Board decision denying effect to a vacatur order issued under Cal. Penal Code § 1473.7); *Talamantes-Enriquez* v. *U.S. Attorney General,* 12 F.4th 1340, 1354–55 (11th Cir. 2021) (denying effect to a clarification order where the original sentence was not ambiguous, but distinguishing a ''sentence order [that] was ambiguous and needed clarification'').

The Department invites comment on whether—and if so, to what extent—*Matter of Thomas & Thompson* should be given retroactive effect. In particular, the Department seeks comment and information on the appropriate reference point for the retroactivity inquiry; the extent to which individuals reasonably relied on the Board decisions overturned by *Matter of Thomas & Thompson* (*e.g.,* in entering guilty pleas, in going to trial, in pursuing state-court modifications, clarifications, or alterations, or otherwise); the burden that retroactive application would impose (*e.g.,* the consequence of removal and obstacles individuals may now face to obtaining relief that would satisfy *Thomas & Thompson* or in demonstrating case-specific reliance); and the interests, if any, in applying *Matter of Thomas & Thompson* retroactively. *See, e.g., Zaragoza,* 52 F.4th at 1023; *Retail, Wholesale & Dep't Store Union, AFL–CIO* v. *NLRB,* 466 F.2d 380, 390 (D.C. Cir. 1972); *see also INS* v. *St. Cyr,* 533 U.S. 289, 314–21 (2001). The Department also seeks comment on how *Matter of Thomas & Thompson* and *Pickering* apply to particular types of orders, such as those referenced in *Matter of Sotelo, Katkarh,* and *Talamantes-Enriquez.* Reconsideration of the approach of *Matter of Thomas & Thompson* or *Pickering* is beyond the scope of this rulemaking, which focuses on the application of those decisions without reaffirming or reconsidering their approach.

Q. Reliance Interests

The Department perceives no reliance interest on the part of any party or entity in any existing policies implicated or effected by the proposed rule, apart from those discussed in the request for comment in Section IV.P of this preamble. Nonetheless, the Department invites commenters to identify any serious reliance interests that may be implicated by the provisions of this proposed rule. *See FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (requiring agencies to consider cognizable ''serious reliance interests'' when changing policies).

V. Regulatory Requirements

A. Administrative Procedure Act

The Department is providing a 60-day comment period for this proposed rule to provide the public with ''an opportunity to participate in the rule making'' as required by the Administrative Procedure Act and in accordance with the guidance provided by Executive Order 12866 and Executive Order 13563. *See* APA, 5 U.S.C. 553(c); E.O. 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993) (stating that rulemakings ''in most cases should include a comment period of not less than 60 days''); E.O. 13563, Improving Regulation and Regulatory Review, 76 FR 3821, 3821–22 (Jan. 18, 2011) (''To the extent feasible and permitted by law, each agency shall afford the public . . . a comment period that should generally be at least 60 days.'').

The Department reiterates that it proposes discrete changes to the appellate process, decisional finality, and administrative closure. Should rulemakings arise prior to finalization of this proposed rule that impact the changes proposed herein, the Department intends to identify and explain the projected impact that this proposed rule, if finalized, would have on EOIR's operations in conjunction with those future rules in order to give the public notice of the projected intersection between related rulemaking efforts and the opportunity to comment, where appropriate.

The Department does not anticipate that the comment period for this proposed rule will overlap or coincide with other rules, Attorney General decisions, or Board decisions that would affect the effect of the regulatory changes proposed by this NPRM. The Department invites the public to submit comments during the 60-day comment

noncitizens in removal or deportation proceedings. *See* 8 CFR 1001.1(r) (defining respondent ''as a person named in a notice to appear or an order to show cause''); INA 239(a)(1), 8 U.S.C. 1229(a)(1) (defining a notice to appear as the charging document that initiates removal proceedings). EOIR conducts other proceedings including ''withholding-only'' proceedings and ''asylum-only'' proceedings. *See, e.g.,* 8 CFR 1208.30(g)(2)(iv)(C) (asylum-only proceedings), 1208.2(c)(2) (withholding-only proceedings).

period regarding anticipated interaction with related rules.[48] For further information, the Department notes the most recent publication of the Unified Agenda outlining the Department's anticipated rulemaking activity through spring 2024. *See* Office of Information and Regulatory Affairs, *Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions, https://www.reginfo.gov/public/do/eAgendaMain.*

B. Regulatory Flexibility Act

The Department has reviewed this NPRM in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and certifies that this NPRM will not have a significant economic impact on a substantial number of small entities. The proposed rule will not regulate ''small entities,'' as that term is defined in 5 U.S.C. 601(6). In the main, this proposed rule reverses the amendments made by the AA96 Final Rule and restores and expands on previously existing authorities exercised by EOIR adjudicators and processes governing appeals filed with the Board. Accordingly, this proposed rule regulates the conduct of immigration proceedings before EOIR and therefore may have a direct impact on noncitizens in such proceedings. The proposed rule may indirectly affect resources or business operations for legal providers representing noncitizens in proceedings before EOIR, but the proposed rule imposes no mandates or requirements on such entities and, therefore, the Department believes that the proposed rule will not have a significant economic impact on a substantial number of small entities. Moreover, the Department believes it is unlikely that small entities, including legal service providers, have changed their practices since the AA96 Final Rule was enjoined, thus further minimizing the proposed rule's impact on small entities. The AA96 Final Rule was enjoined soon after becoming effective. Thus, the pre-AA96 Final Rule status quo has been in effect since the injunction. Given that the proposed rule generally adopts the pre-AA96 Final Rule status quo—the framework that is currently in place—with only a few alterations, the Department does not expect the changes proposed by this NPRM to have a significant impact on any small entities, as it is unlikely to require any significant change in operations to accommodate the changes proposed herein.

C. Unfunded Mandates Reform Act of 1995

This proposed rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation), and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1532(a).

D. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)

The Department has determined that this proposed rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as amended. Accordingly, this proposed rule has been submitted to the Office of Management and Budget for review.

The Department certifies that this proposed rule has been drafted in accordance with the principles of Executive Order 12866, Executive Order 13563, and Executive Order 14094, Modernizing Regulatory Review, 88 FR 21879 (Apr. 6, 2023). 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, reducing costs, harmonizing rules, and promoting flexibility.

Overall, the Department believes that the changes proposed in this NPRM will provide significant benefits to adjudicators, the parties, and the broader public, which outweigh the potential costs.

For example, the proposed rule's provisions for the exercise of administrative closure, termination, and dismissal authority strike a balance between providing sufficient guidance for adjudicators and regulated parties while, at the same time, preserving flexibility that will promote fairer, more efficient, and more uniform case processing and adjudication. Likewise, eliminating projected inefficiencies that could have resulted from implementation of the AA96 standards, including rescinding restrictions on *sua sponte* authority for adjudicators to reopen or reconsider cases, would codify additional flexibility for adjudicators, which could provide significant benefits to noncitizens in certain cases with exceptional circumstances, as discussed above. Further, reinstating Board remand authority will also codify similar flexibility for adjudicators, and is expected to have efficiency benefits as noted in the preamble above. The Department believes that the costs of these provisions mainly relate to any necessary familiarization with the rule, but such costs should be *de minimis,* given that the AA96 Final Rule has never been implemented and this NPRM is proposing to codify the operative status quo. Further, the NPRM is largely either proposing to codify prior longstanding regulatory provisions (*sua sponte* authority, Board remand authority) or longstanding case law (administrative closure). On balance, overall, the Department believes that the fairness and efficiency benefits gained by the aforementioned proposed changes outweigh the potential *de minimis* costs.

Similarly, many of the other proposed changes, including to briefing schedules, background check procedures, Board adjudication timelines, quality assurance certification, forwarding of the record on appeal, and the EOIR Director's case adjudication authority are largely internal case-processing measures with no measurable costs to the public. Moreover, many of these provisions will revert in large part to longstanding pre-AA96 Final Rule regulatory language, with which adjudicators and the parties should already be familiar. Additionally, to the extent that any provisions of the AA96 Final Rule are retained, such as the background check procedures allowing a case to be held at

[48] The Department recognizes that litigation is pending for many of the rules noted by the court in *Centro Legal de la Raza.* 524 F. Supp. 3d at 959–62. As provided in the Department's Unified Agenda submission, the Department anticipates modifying or rescinding the following rules identified by the court: Executive Office for Immigration Review; Fee Review, 85 FR 82750 (Dec. 18, 2020); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020); and Procedures for Asylum and Withholding of Removal, 85 FR 81698 (Dec. 16, 2020). Further, rescission of the AA96 Final Rule addresses the court's concerns with the interactions of two other proposed rules—Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 FR 75942 (Nov. 27, 2020), and Good Cause for a Continuance in Immigration Proceedings, 85 FR 75925 (Nov. 27, 2020). Specifically, the court was concerned that the Department's responses in the AA96 Final Rule to various comments relied on regulatory provisions that it later proposed to amend. *Centro Legal de la Raza,* 524 F. Supp. 3d at 959–62. Publishing this new NPRM, which proposes to rescind the AA96 Final Rule, containing the responses causing concern, thereby eliminates such concerns.

the Board pending a background check, rather than remanded to the immigration court, the Department believes that such provisions will provide efficiencies to the immigration system, which will in turn benefit adjudicators and the parties.

In sum, any changes contemplated by the NPRM would not impact on the public in a way that would render the proposed rule in conflict with the principles of Executive Orders 12866, 13563, and 14094.

E. Executive Order 13132—Federalism

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

F. Executive Order 12988—Civil Justice Reform

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

G. Paperwork Reduction Act

This NPRM does not propose new or revisions to existing ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163, 44 U.S.C. chapter 35), and its implementing regulations, 5 CFR part 1320.

H. Congressional Review Act

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

List of Subjects

8 CFR Part 1001

Administrative practice and procedure, Immigration.

8 CFR Part 1003

Administrative practice and procedure, Immigration.

8 CFR Part 1239

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, the Department proposes to amend 8 CFR parts 1001, 1003, 1239, and 1240 as follows:

PART 1001—DEFINITIONS

■ 1. The authority citation for part 1001 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101, 1103; Pub. L. 107–296, 116 Stat. 2135; Title VII of Pub. L. 110–229.

■ 2. Amend § 1001.1 by adding paragraphs (gg) and (hh) to read as follows:

§ 1001.1 Definitions.

* * * * *

(gg) The term *noncitizen* means any person not a citizen or national of the United States.

(hh) The term *unaccompanied child* means, and is synonymous with, the term ''unaccompanied alien child,'' as defined in 6 U.S.C. 279(g)(2).

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 3. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 4. Amend § 1003.0 by revising paragraph (b)(2)(ii) to read as follows:

§ 1003.0 Executive Office for Immigration Review.

* * * * *

(b) * * *

(2) * * *

(ii) The Director may not delegate the authority assigned to the Director in § 1292.18 of this chapter and may not delegate any other authority to adjudicate cases arising under the Act or regulations of this chapter unless expressly authorized to do so.

* * * * *

■ 5. Amend § 1003.1 by:

■ a. Revising paragraphs (a)(2)(i)(E), (c), (d)(1) introductory text, (d)(1)(ii), (d)(3)(iii) and (iv);

■ b. Removing paragraph (d)(3)(v);

■ c. Revising paragraphs (d)(6)(ii) and (iii), (d)(6)(v), (d)(7), (e) introductory text, (e)(1) through (3), (e)(4)(i) introductory text, (e)(4)(ii), (e)(7), (e)(8) introductory text, (e)(8)(i) through (iii), and (v), and (f);

■ d. Removing and reserving paragraph (k); and

■ e. Adding paragraphs (l) and (m).

The additions and revisions read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a) * * *

(2) * * *

(i) * * *

(E) Adjudicate cases as a Board member, including the authority to administratively close and recalendar cases in accordance with paragraph (l) of this section; and

* * * * *

(c) *Jurisdiction by certification.* The Secretary, or any other duly authorized officer of DHS, an immigration judge, or the Board may in any case arising under paragraph (b) of this section certify such case to the Board for adjudication. The Board, in its discretion, may review any such case by certification without regard to the provisions of § 1003.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity to request oral argument and to submit a brief.

(d) * * *

(1) *Generally.* The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

* * * * *

(ii) Subject to the governing standards set forth in paragraph (d)(1)(i) of this section, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as necessary or appropriate for the disposition or alternative resolution of the case. Such actions include administrative closure, termination of proceedings, and dismissal of proceedings. The standards for the administrative closure, dismissal, and termination of cases are set forth in paragraph (l) of this section, 8 CFR

1239.2(c), and paragraph (m) of this section, respectively.

* * * * *

(3) * * *

(iii) The Board may review de novo all questions arising in appeals from decisions issued by DHS officers.

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding cases. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If new evidence is submitted on appeal, that submission may be deemed a motion to remand and considered accordingly. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to DHS.

* * * * *

(6) * * *

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations are necessary in order to adjudicate the appeal or motion, the Board will provide notice to both parties that the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board. The Board's notice will notify the noncitizen that DHS will contact the noncitizen with instructions, consistent with § 1003.47(d), to take any additional steps necessary to complete or update the identity, law enforcement, or security investigations or examinations only if DHS is unable to independently update the necessary identity, law enforcement, or security investigations or examinations. The Board's notice will also advise the noncitizen of the consequences for failing to comply with the requirements of this section. DHS is responsible for obtaining biometrics and other biographical information to complete or update the identity, law enforcement, or security investigations or examinations with respect to any noncitizen in detention.

(iii) In any case placed on hold under paragraph (d)(6)(ii) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the noncitizen fails to comply with the necessary procedures for collecting biometrics or other biographical information after receiving instructions from DHS under paragraph (d)(6)(ii) of this section, DHS may move the Board to remand the record to the immigration judge for consideration of whether, in view of the new information, or the noncitizen's failure to comply with the necessary procedures for collecting biometrics or other biographical information after receiving instructions from DHS under paragraph (d)(6)(ii) of this section, immigration relief or protection should be denied, either on grounds of ineligibility as a matter of law or as a matter of discretion. If DHS fails to report the results of timely completed or updated identity, law enforcement or security investigations or examinations within 180 days from the date of the Board's notice under paragraph (d)(6)(ii) of this section, the Board may continue to hold the case under paragraph (d)(6)(ii) of this section, as needed, or remand the case to the immigration judge for further proceedings under § 1003.47(h).

* * * * *

(v) The immigration relief or protection described in § 1003.47(b) and granted by the Board shall take effect as provided in § 1003.47(i).

(7) * * *

(i) The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to DHS or an immigration judge for such further action as may be appropriate without entering a final decision on the merits of the case.

(ii) In cases involving voluntary departure, the Board may issue an order of voluntary departure under section 240B of the Act, with an alternate order of removal, if the noncitizen requested voluntary departure before an immigration judge, the noncitizen's notice of appeal specified that the noncitizen is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the noncitizen is challenging, and the Board finds that the noncitizen is otherwise eligible for voluntary departure, as provided in 8 CFR 1240.26(k). In order to grant voluntary departure, the Board must find that all applicable statutory and regulatory criteria have been met, based on the record and within the scope of its review authority on appeal, and that the noncitizen merits voluntary departure as a matter of discretion. If the record does not contain sufficient factual findings regarding eligibility for voluntary departure, the Board may remand the decision to the immigration judge for further factfinding.

(e) *Case management system.* The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph (e). The provisions of this paragraph (e) shall apply to all cases before the Board, regardless of whether they were initiated by filing a Notice of Appeal, filing a motion, or receipt of a remand from Federal court or the Attorney General.

(1) *Initial screening.* All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section should be promptly dismissed.

(2) *Miscellaneous dispositions.* A single Board member may grant an unopposed motion or a motion to withdraw an appeal pending before the Board. In addition, a single Board member may adjudicate a DHS motion to remand any appeal from the decision of a DHS officer where DHS requests that the matter be remanded to DHS for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the case management plan.

(3) *Merits review.* In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceeding and transcript, and the issuance of a briefing schedule, as appropriate. A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) * * *

(i) The Board member to whom a case is assigned shall affirm the decision of

the DHS officer or the immigration judge without opinion if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

* * * * *

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: ''The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 1003.1(e)(4).'' An order affirming without opinion issued under authority of this provision shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision but does signify the Board's conclusion that any errors in the decision of the immigration judge or DHS were harmless or nonmaterial.

* * * * *

(7) *Oral argument.* When an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal. A three-member panel or the Board en banc may hear oral argument, as a matter of discretion, at such date and time as is established under the Board's case management plan. Oral argument shall be held at the offices of the Board unless the Deputy Attorney General or the Attorney General's designee authorizes oral argument to be held elsewhere. DHS may be represented before the Board by an officer or counsel of DHS designated by DHS. No oral argument will be allowed in a case that is assigned for disposition by a single Board member.

(8) *Timeliness.* As provided under the case management system, the Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases consistent with paragraph (e)(1) of this section. In all other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained noncitizens.

(i) Except in exigent circumstances as determined by the Chairman, or as provided in paragraph (d)(6) of this section, the Board shall dispose of all cases assigned to a single Board member within 90 days of completion of the record, or within 180 days after a case is assigned to a three-member panel (including any additional opinion by a member of the panel).

(ii) In exigent circumstances, the Chairman may grant an extension in particular cases of up to 60 days as a matter of discretion. Except as provided in paragraph (e)(8)(iii) or (iv) of this section, in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either self-assign the case or assign the case to a Vice Chairman for final decision within 14 days or shall refer the case to the Attorney General for decision. If a dissenting or concurring panel member fails to complete the member's opinion by the end of the extension period, the decision of the majority will be issued without the separate opinion.

(iii) In rare circumstances, such as when an impending decision by the United States Supreme Court or a United States Court of Appeals, or impending Department regulatory amendments, or an impending en banc Board decision may substantially determine the outcome of a case or group of cases pending before the Board, the Chairman may hold the case or cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8).

* * * * *

(v) The Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the timeliness of the disposition of cases by each Board member on an annual basis.

* * * * *

(f) *Service of Board decisions.* The decision of the Board shall be in writing. The Board shall transmit a copy to DHS and serve a copy upon the noncitizen or the noncitizen's representative, as provided in 8 CFR part 1292.

* * * * *

(l) *Administrative closure and recalendaring.* Administrative closure is the temporary suspension of a case. Administrative closure removes a case from the Board's docket until the case is recalendared. Recalendaring places a case back on the Board's docket.

(1) *Administrative closure before the Board.* Board members may, in the exercise of discretion, administratively close a case upon the motion of a party, after applying the standard set forth at paragraph (l)(3) of this section. The administrative closure authority described in this section is not limited by the authority provided in any other provisions in this chapter V that separately authorize or require administrative closure in certain circumstances, including 8 CFR 214.15(l) and (p)(4), 1214.2(a), 1214.3, 1240.62(b), 1240.70(f) through(h), 1245.13, 1245.15(p)(4)(i), and 1245.21(c).

(2) *Recalendaring before the Board.* At any time after a case has been administratively closed under paragraph (l)(1) of this section, the Board may, in the exercise of discretion, recalendar the case pursuant to a party's motion to recalendar. In deciding whether to grant such a motion, the Board shall apply the standard set forth at paragraph (l)(3) of this section.

(3) *Standard for administrative closure and recalendaring.* The Board shall grant a motion to administratively close or recalendar filed jointly by both parties, or filed by one party where the other party has affirmatively indicated its non-opposition, unless the Board articulates unusual, clearly identified, and supported reasons for denying the motion. In all other cases, in deciding whether to administratively close or to recalendar a case, the Board shall consider the totality of the circumstances, including as many of the factors listed under paragraphs (l)(3)(i) and (ii) of this section as are relevant to the particular case. The Board may also consider other factors where appropriate. No single factor is dispositive. Accordingly, the Board, having considered the totality of the circumstances, may grant a motion to administratively close or to recalendar a particular case over the objection of a party. Although administrative closure may be appropriate where a petition, application, or other action is pending outside of proceedings before the Board, such a pending petition, application, or other action is not required for a case to be administratively closed.

(i) As the circumstances of the case warrant, the factors relevant to a decision to administratively close a case include:

(A) The reason administrative closure is sought;

(B) The basis for any opposition to administrative closure;

(C) Any requirement that a case be administratively closed in order for a petition, application, or other action to be filed with, or granted by, DHS;

(D) The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that

they plan to pursue, outside of proceedings before the Board;

(E) The anticipated duration of the administrative closure;

(F) The responsibility of either party, if any, in contributing to any current or anticipated delay; and

(G) The ultimate anticipated outcome of the case.

(ii) As the circumstances of the case warrant, the factors relevant to a decision to recalendar a case include:

(A) The reason recalendaring is sought;

(B) The basis for any opposition to recalendaring;

(C) The length of time elapsed since the case was administratively closed;

(D) If the case was administratively closed to allow the noncitizen to file a petition, application, or other action outside of proceedings before the Board, whether the noncitizen filed the petition, application, or other action and, if so, the length of time that elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action;

(E) If a petition, application, or other action that was pending outside of proceedings before the Board has been adjudicated, the result of that adjudication;

(F) If a petition, application, or other action remains pending outside of proceedings before the Board, the likelihood the noncitizen will succeed on that petition, application, or other action; and

(G) The ultimate anticipated outcome if the case is recalendared.

(m) *Termination.* The Board shall have the authority to terminate cases before it as set forth in paragraphs (m)(1) and (2) of this section. A motion to dismiss a case in removal proceedings before the Board for a reason other than authorized by 8 CFR 1239.2(c) shall be deemed a motion to terminate under paragraph (m)(1) of this section.

(1) *Removal, deportation, and exclusion proceedings*—(i) *Mandatory termination.* In removal, deportation, and exclusion proceedings, the Board shall terminate the case where at least one of the requirements in paragraphs (m)(1)(i)(A) through (G) of this section is met.

(A) No charge of deportability, inadmissibility, or excludability can be sustained.

(B) Fundamentally fair proceedings are not possible because the noncitizen is mentally incompetent and adequate safeguards are unavailable.

(C) The noncitizen has, since the initiation of proceedings, obtained United States citizenship.

(D) The noncitizen has, since the initiation of proceedings, obtained at least one status listed in paragraphs (m)(1)(i)(D)(*1*) through (*4*) of this section, provided that the status has not been revoked or terminated, and the noncitizen would not have been deportable, inadmissible, or excludable as charged if the noncitizen had obtained such status before the initiation of proceedings.

(*1*) Lawful permanent resident status.

(*2*) Refugee status.

(*3*) Asylee status.

(*4*) Nonimmigrant status as defined in section 101(a)(15)(S), (T), or (U) of the Act.

(E) Termination is required under 8 CFR 1245.13(l).

(F) Termination is otherwise required by law.

(G) The parties jointly filed a motion to terminate, or one party filed a motion to terminate and the other party affirmatively indicated its non-opposition, unless the Board articulates unusual, clearly identified, and supported reasons for denying the motion.

(ii) *Discretionary termination.* In removal, deportation, or exclusion proceedings, the Board may, in the exercise of discretion, terminate the case where at least one of the requirements listed in paragraphs (m)(1)(ii) (A) through (G) of this section is met.

(A) An unaccompanied child, as defined in 8 CFR 1001.1(hh), states an intent in writing or on the record at a hearing to seek asylum with USCIS, and USCIS has initial jurisdiction over the application pursuant to section 208(b)(3)(C) of the Act.

(B) The noncitizen demonstrates prima facie eligibility for relief from removal or for a lawful status based on a petition, application, or other action that USCIS has jurisdiction to adjudicate, including naturalization or adjustment of status.

(C) The noncitizen is a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforced Departure.

(D) USCIS has granted the noncitizen's application for a provisional unlawful presence waiver pursuant to 8 CFR 212.7(e).

(E) Termination is authorized by 8 CFR 1216.4(a)(6) or 1238.1(e).

(F) The parties have filed a motion to terminate under 8 CFR 214.11(d)(1)(i) or 214.14(c)(1)(i).

(G) Due to circumstances comparable to those described in paragraphs (m)(1)(ii)(A) through (F) of this section, termination is similarly necessary or appropriate for the disposition or alternative resolution of the case. However, the Board may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion.

(2) *Other proceedings*—(i) *Mandatory termination.* In proceedings other than removal, deportation, or exclusion proceedings, the Board shall terminate the case where the parties have jointly filed a motion to terminate, or one party has filed a motion to terminate and the other party has affirmatively indicated its non-opposition, unless the Board articulates unusual, clearly identified, and supported reasons for denying the motion. In addition, the Board shall terminate such a case where required by law.

(ii) *Discretionary termination.* In proceedings other than removal, deportation, or exclusion proceedings, the Board may, in the exercise of discretion, terminate the case where one party has requested termination, and terminating the case is necessary or appropriate for the disposition or alternative resolution of the case. However, the Board may not terminate the case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion.

(iii) *Limitation on Termination.* Nothing in paragraphs (m)(2)(i) and (ii) of this section authorizes the Board to terminate a case where prohibited by another regulatory provision.

■ 6. Amend § 1003.2 by:

■ a. Revising paragraphs (a) and (b)(1);

■ b. Removing the words ''Immigration Judge'' and adding in their place ''immigration judge'' in paragraph (c)(2);

■ c. Revising paragraphs (c)(3)(iii) and (iv);

■ d. Removing paragraphs (c)(3)(v) through (vii);

■ e. Adding paragraph (c)(4); and

■ f. Revising paragraphs (f), (g)(3), and (i).

The revisions and addition read as follows:

§ 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request by DHS or by the party affected by the decision to reopen or reconsider a case the Board has decided must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the

restrictions of this section. The Board has discretion to deny a motion to reopen even if the moving party has made out a prima facie case for relief.

(b) * * *

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. When a motion to reconsider the decision of an immigration judge or of a DHS officer is pending at the time an appeal is filed with the Board, or when such motion is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, the motion may be deemed a motion to remand the decision for further proceedings before the immigration judge or the DHS officer from whose decision the appeal was taken. Such motion may be consolidated with and considered by the Board in connection with the appeal to the Board.

* * * * *

(c) * * *

(3) * * *

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by DHS in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with 8 CFR 1208.24.

(4) A motion to reopen a decision rendered by an immigration judge or DHS officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the immigration judge or the DHS officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

* * * * *

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of § 1003.23(b)(4)(ii) and (b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the immigration judge, or an authorized DHS officer.

(g) * * *

(3) *Briefs and response.* The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 21 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with a DHS office pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 21 days from the date of filing of the motion to file a brief in opposition to the motion directly with DHS. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

* * * * *

(i) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of § 1003.1(e)(6). If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the DHS officer having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

■ 7. Amend § 1003.3 by revising paragraphs (c)(1) and (2) to read as follows:

§ 1003.3 Notice of appeal.

* * * * *

(c) * * *

(1) *Appeal from decision of an immigration judge.* Briefs in support of or in opposition to an appeal from a decision of an immigration judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. In cases involving noncitizens in custody, the parties shall be provided 21 days in which to file simultaneous briefs unless a shorter period is specified by the Board. Reply briefs shall be permitted only by leave of the Board and only if filed within 21 days of the deadline for the initial briefs. In cases involving noncitizens who are not in custody, the appellant shall be provided 21 days in which to file a brief, unless a shorter period is specified by the Board. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file their brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. In its discretion, the Board may request supplemental briefing from the parties after the expiration of the briefing deadline. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a DHS officer.* Briefs in support of or in opposition to an appeal from a decision of a DHS officer shall be filed directly with DHS in accordance with the instructions in the decision of the DHS officer. The applicant or petitioner and DHS shall be provided 21 days in which to file a brief, unless a shorter period is specified by the DHS officer from whose decision the appeal is taken, and reply briefs shall be permitted only by leave of the Board. Upon written request of the noncitizen, the DHS officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by a noncitizen directly with a DHS office, shall include proof of service on the opposing party.

* * * * *

■ 8. Revise § 1003.5 to read as follows:

§ 1003.5 Forwarding of record on appeal.

(a) *Appeal from decision of an immigration judge.* If an appeal is taken from a decision of an immigration judge, the record of proceeding shall be promptly forwarded to the Board upon the request or the order of the Board. Where transcription of an oral decision is required, the immigration judge shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the immigration judge returns to their duty station if the immigration judge was on leave or detailed to another location. The Chairman and the Chief Immigration

Judge shall determine the most effective and expeditious way to transcribe proceedings before the immigration judges, and shall take such steps as necessary to reduce the time required to produce transcripts of those proceedings and to ensure their quality.

(b) *Appeal from decision of a DHS officer.* If an appeal is taken from a decision of a DHS officer, the record of proceeding shall be forwarded to the Board by the DHS officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs. A DHS officer need not forward such an appeal to the Board, but may reopen and reconsider any decision made by the officer if the new decision will grant the benefit that has been requested in the appeal. The new decision must be served on the appealing party within 45 days of receipt of any briefs or upon expiration of the time allowed for the submission of any briefs. If the new decision is not served within these time limits or the appealing party does not agree that the new decision disposes of the matter, the record of proceeding shall be immediately forwarded to the Board.

§ 1003.7 [Amended].

■ 9. Amend § 1003.7 by:

■ a. Removing the words ''Immigration Judge'' and adding in their place the words ''immigration judge'' wherever they appear; and

■ b. Removing the word ''Service'' and the words ''the Service'' and adding in their place the word ''DHS'' wherever they appear.

■ 10. Amend § 1003.9 by revising paragraph (b)(5) to read as follows:

§ 1003.9 Office of the Chief Immigration Judge.

* * * * *

(b) * * *

(5) Adjudicate cases as an immigration judge, including the authority to administratively close and recalendar cases in accordance with § 1003.18(c); and

* * * * *

■ 11. Amend § 1003.10 in paragraph (b) by:

■ a. Revising the second sentence;

■ b. Adding two sentences following the second sentence;

■ c. Revising the newly redesignated fifth sentence; and

■ d. Removing the newly redesignated eight and ninth sentences.

The revisions and additions read as follows:

§ 1003.10 Immigration judges.

* * * * *

(b) * * * In deciding the individual cases before them, and subject to the applicable governing standards set forth in paragraph (d) of this section, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is necessary or appropriate for the disposition or alternative resolution of such cases. Such actions include administrative closure, termination of proceedings, and dismissal of proceedings. The standards for the administrative closure, dismissal, and termination of cases are set forth in § 1003.18(c), 8 CFR 1239.2(c), and § 1003.18(d), respectively. Immigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine noncitizens and any witnesses. * * *

* * * * *

■ 12. Amend § 1003.18 by revising the section heading, adding paragraph headings to paragraphs (a) and (b), and adding paragraphs (c) and (d) to read as follows:

§ 1003.18 Docket management.

(a) *Scheduling.* * * *

(b) *Notice.* * * *

(c) *Administrative closure and recalendaring.* Administrative closure is the temporary suspension of a case. Administrative closure removes a case from the immigration court's active calendar until the case is recalendared. Recalendaring places a case back on the immigration court's active calendar.

(1) *Administrative closure before immigration judges.* An immigration judge may, in the exercise of discretion, administratively close a case upon the motion of a party, after applying the standard set forth at paragraph (c)(3) of this section. The administrative closure authority described in this section is not limited by the authority provided in any other provisions in this chapter that separately authorize or require administrative closure in certain circumstances, including 8 CFR 214.15(l), and (p)(4), 1214.2(a), 1214.3, 1240.62(b), 1240.70(f) through (h), 1245.13, 1245.15(p)(4)(i), and 1245.21(c).

(2) *Recalendaring before immigration judges.* At any time after a case has been administratively closed under paragraph (c)(1) of this section, an immigration judge may, in the exercise of discretion, recalendar the case pursuant to a party's motion to recalendar. In deciding whether to grant such a motion, the immigration judge shall apply the standard set forth at paragraph (c)(3) of this section.

(3) *Standard for administrative closure and recalendaring.* An immigration judge shall grant a motion to administratively close or recalendar filed jointly by both parties, or filed by one party where the other party has affirmatively indicated its non-opposition, unless the immigration judge articulates unusual, clearly identified, and supported reasons for denying the motion. In all other cases, in deciding whether to administratively close or to recalendar a case, an immigration judge shall consider the totality of the circumstances, including as many of the factors listed under paragraphs (c)(3)(i) and (ii) of this section as are relevant to the particular case. The immigration judge may also consider other factors where appropriate. No single factor is dispositive. Accordingly, the immigration judge, having considered the totality of the circumstances, may grant a motion to administratively close or to recalendar a particular case over the objection of a party. Although administrative closure may be appropriate where a petition, application, or other action is pending outside of proceedings before the immigration judge, such a pending petition, application, or other action is not required for a case to be administratively closed.

(i) As the circumstances of the case warrant, the factors relevant to a decision to administratively close a case include:

(A) The reason administrative closure is sought;

(B) The basis for any opposition to administrative closure;

(C) Any requirement that a case be administratively closed in order for a petition, application, or other action to be filed with, or granted by, DHS;

(D) The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of proceedings before the immigration judge;

(E) The anticipated duration of the administrative closure;

(F) The responsibility of either party, if any, in contributing to any current or anticipated delay; and

(G) The ultimate anticipated outcome of the case.

(ii) As the circumstances of the case warrant, the factors relevant to a decision to recalendar a case include:

(A) The reason recalendaring is sought;

(B) The basis for any opposition to recalendaring;

(C) The length of time elapsed since the case was administratively closed;

(D) If the case was administratively closed to allow the noncitizen to file a petition, application, or other action outside of proceedings before the immigration judge, whether the noncitizen filed the petition, application, or other action and, if so, the length of time that elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action;

(E) If a petition, application, or other action that was pending outside of proceedings before the immigration judge has been adjudicated, the result of that adjudication;

(F) If a petition, application, or other action remains pending outside of proceedings before the immigration judge, the likelihood the noncitizen will succeed on that petition, application, or other action; and

(G) The ultimate anticipated outcome if the case is recalendared.

(d) *Termination.* Immigration judges shall have the authority to terminate cases before them as set forth in paragraphs (d)(1) and (2) of this section. A motion to dismiss a case in removal proceedings before an immigration judge for a reason other than authorized by 8 CFR 1239.2(c) shall be deemed a motion to terminate under paragraph (d)(1) of this section.

(1) *Removal, deportation, and exclusion proceedings*—(i) *Mandatory termination.* In removal, deportation, and exclusion proceedings, immigration judges shall terminate the case where at least one of the requirements in paragraphs (d)(1)(i)(A) through (G) of this section is met.

(A) No charge of deportability, inadmissibility, or excludability can be sustained.

(B) Fundamentally fair proceedings are not possible because the noncitizen is mentally incompetent and adequate safeguards are unavailable.

(C) The noncitizen has, since the initiation of proceedings, obtained United States citizenship.

(D) The noncitizen has, since the initiation of proceedings, obtained at least one status listed in paragraphs (d)(1)(i)(D)(*1*) through (*4*) of this section, provided that the status has not been revoked or terminated, and the noncitizen would not have been deportable, inadmissible, or excludable as charged if the noncitizen had obtained such status before the initiation of proceedings.

(*1*) Lawful permanent resident status.

(*2*) Refugee status.

(*3*) Asylee status.

(*4*) Nonimmigrant status as defined in section 101(a)(15)(S), (T), or (U) of the Act.

(E) Termination is required under 8 CFR 1245.13(l).

(F) Termination is otherwise required by law.

(G) The parties jointly filed a motion to terminate, or one party filed a motion to terminate and the other party affirmatively indicated its non-opposition, unless the immigration judge articulates unusual, clearly identified, and supported reasons for denying the motion.

(ii) *Discretionary termination.* In removal, deportation, or exclusion proceedings, immigration judges may, in the exercise of discretion, terminate the case where at least one of the requirements listed in paragraphs (d)(1)(ii)(A) through (G) of this section is met.

(A) An unaccompanied child, as defined in 8 CFR 1001.1(hh), states an intent in writing or on the record at a hearing to seek asylum with USCIS, and USCIS has initial jurisdiction over the application pursuant to section 208(b)(3)(C) of the Act.

(B) The noncitizen demonstrates prima facie eligibility for relief from removal or for a lawful status based on a petition, application, or other action that USCIS has jurisdiction to adjudicate, including naturalization or adjustment of status.

(C) The noncitizen is a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforced Departure.

(D) USCIS has granted the noncitizen's application for a provisional unlawful presence waiver pursuant to 8 CFR 212.7(e).

(E) Termination is authorized by 8 CFR 1216.4(a)(6) or 1238.1(e).

(F) The parties have filed a motion to terminate under 8 CFR 214.11(d)(1)(i) or 214.14(c)(1)(i).

(G) Due to circumstances comparable to those described in paragraphs (d)(1)(ii)(A) through (F) of this section, termination is similarly necessary or appropriate for the disposition or alternative resolution of the case. However, immigration judges may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion.

(2) *Other proceedings*—(i) *Mandatory termination.* In proceedings other than removal, deportation, or exclusion proceedings, immigration judges shall terminate the case where the parties have jointly filed a motion to terminate, or one party has filed a motion to terminate and the other party has affirmatively indicated its non-opposition, unless the immigration judge articulates unusual, clearly identified, and supported reasons for denying the motion. In addition, immigration judges shall terminate such a case where required by law.

(ii) *Discretionary termination.* In proceedings other than removal, deportation, or exclusion proceedings, immigration judges may, in the exercise of discretion, terminate the case where one party has requested termination, and terminating the case is necessary or appropriate for the disposition or alternative resolution of the case. However, immigration judges may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition to a noncitizen's motion.

(iii) *Limitation on termination.* Nothing in paragraphs (d)(2)(i) and (ii) of this section authorizes immigration judges to terminate a case where prohibited by another regulatory provision.

■ 13. Amend § 1003.23 by:

■ a. Revising paragraph (a);

■ b. Revising the first sentence and removing the second sentence of paragraph (b)(1) introductory text;

■ c. In paragraph (b)(1), removing the words ''the Service'' and adding in their place the word ''DHS'', wherever they appear;

■ d. Revising paragraphs (b)(1)(iii) through (v), (b)(2) and (3), and (b)(4)(i) and (ii);

■ e. In paragraph (b)(4)(iii)(B), removing the words ''Immigration Judge'' and adding in their place the words ''immigration judge''; and

■ f. Removing paragraphs (b)(4)(v) and (vi).

The revisions read as follows:

§ 1003.23 Reopening or reconsideration before the Immigration Court.

(a) *Pre-decision motions.* Unless otherwise permitted by the immigration judge, motions submitted prior to the final order of an immigration judge shall be in writing and shall state, with particularity the grounds therefor, the relief sought, and the jurisdiction. The immigration judge may set and extend time limits for the making of motions and replies thereto. A motion shall be deemed unopposed unless timely response is made.

(b) * * *

(1) *In general.* An immigration judge may upon the immigration judge's own motion at any time, or upon motion of DHS or the noncitizen, reopen or

reconsider any case in which the judge has rendered a decision, unless jurisdiction is vested with the Board of Immigration Appeals. * * *

* * * * *

(iii) *Assignment to an immigration judge.* If the immigration judge is unavailable or unable to adjudicate the motion to reopen or reconsider, the Chief Immigration Judge or a delegate of the Chief Immigration Judge shall reassign such motion to another immigration judge.

(iv) *Replies to motions; decision.* The immigration judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. The decision to grant or deny a motion to reopen or a motion to reconsider is within the discretion of the immigration judge.

(v) *Stays.* Except in cases involving in absentia orders, the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the immigration judge, the Board, or an authorized DHS officer.

(2) *Motion to reconsider.* A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the immigration judge's prior decision and shall be supported by pertinent authority. Such motion may not seek reconsideration of a decision denying a previous motion to reconsider.

(3) *Motion to reopen.* A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the noncitizen an opportunity to apply for any form of discretionary relief will not be granted if it appears that the noncitizen's right to apply for such relief was fully explained to them by the immigration judge and an opportunity to apply therefor was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) of the Act (cancellation of removal for certain permanent residents) or 240A(b) of the Act (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only upon demonstration that the noncitizen was statutorily eligible for such relief prior to the service of a Notice to Appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the noncitizen inadmissible or removable under sections 237(a)(2) or (a)(4) of the Act, whichever is earliest. The immigration judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

(4) * * *

(i) *Asylum and withholding of removal.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the noncitizen. However, the noncitizen may request a stay and, if granted by the immigration judge, the noncitizen shall not be removed pending disposition of the motion by the immigration judge. If the original asylum application was denied based upon a finding that it was frivolous, then the noncitizen is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(ii) *Order entered in absentia or in removal proceedings.* An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the noncitizen demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time upon the noncitizen's demonstration of lack of notice in accordance with section 239(a)(1) or (2) of the Act, or upon the noncitizen's demonstration of the noncitizen's Federal or State custody and the failure to appear was through no fault of the noncitizen. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding shall be required if the noncitizen has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion under this paragraph shall stay the removal of the noncitizen pending disposition of the motion by the immigration judge. A noncitizen may file only one motion pursuant to this paragraph (b)(4)(ii).

* * * * *

PART 1239—INITIATION OF REMOVAL PROCEEDINGS

■ 14. The authority citation for part 1239 continues to read as follows:

Authority: 8 U.S.C. 1103, 1221, 1229.

■ 15. Amend § 1239.2 by:
■ a. Revising paragraph (b); and
■ b. Removing and reserving paragraph (f).

The revisions read as follows:

§ 1239.2 Cancellation of notice to appear.

* * * * *

(b) *Ordering termination or dismissal.* After commencement of proceedings, an immigration judge or Board member shall have authority to resolve or dispose of a case through an order of dismissal or an order of termination. An immigration judge or Board member may enter an order of dismissal in cases where DHS moves for dismissal pursuant to paragraph (c) of this section. A motion to dismiss removal proceedings for a reason other than those authorized by paragraph (c) of this section shall be deemed a motion to terminate and adjudicated pursuant to 8 CFR 1003.1(m), pertaining to cases before the Board, or 8 CFR 1003.18(d), pertaining to cases before the immigration court, as applicable.

* * * * *

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF NONCITIZENS IN THE UNITED STATES

■ 16. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

■ 17. The heading for part 1240 is revised to read as set forth above.

■ 18. Amend § 1240.26 by:
■ a. As shown in the following table, removing the words in the left column and adding in their place the words in the right column wherever they appear:

An alien	A noncitizen.
an alien	a noncitizen.
the alien	the noncitizen.
alien's	noncitizen's.

■ b. By removing the words ''his or her'' and adding in their place the words ''the noncitizen's'' in paragraphs (b)(3)(i) introductory text, (b)(3)(i)(A), (b)(4)(ii), and (i);
■ c. By removing the words ''his or her'' and adding in their place the words ''the ICE Field Office Director's'' in paragraph (c)(4); and
■ d. revising paragraphs (k)(1), (k)(2) introductory text, (k)(3) introductory text, (k)(4), and (*l*).

The revisions read as follows:

§ 1240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

* * * * *

(k) * * *

(1) If the Board finds that an immigration judge incorrectly denied a noncitizen's request for voluntary departure or failed to provide appropriate advisals, the Board may consider the noncitizen's request for voluntary departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) In cases in which a noncitizen has appealed an immigration judge's decision or in which DHS and the noncitizen have both appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B(a) of the Act unless:

* * * * *

(3) In cases in which DHS has appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B(b) of the Act unless:

* * * * *

(4) The Board may impose such conditions as it deems necessary to ensure the noncitizen's timely departure from the United States, if supported by the record on appeal and within the scope of the Board's authority on appeal. Unless otherwise indicated in this section, the Board shall advise the noncitizen in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (b), (c), (d), (e), (h), and (i) of this section (other than paragraph (c)(3)(ii) of this section), except that the Board shall advise the noncitizen of the duty to post the bond with the ICE Field Office Director within 10 business days of the Board's order granting voluntary departure. If documentation sufficient to assure lawful entry into the country to which the noncitizen is departing is not contained in the record, but the noncitizen continues to assert a request for voluntary departure under section 240B of the Act and the Board finds that the noncitizen is otherwise eligible for voluntary departure under the Act, the Board may grant voluntary departure for a period not to exceed 120 days, subject to the condition that the noncitizen within 60 days must secure such documentation and present it to DHS and the Board. If the Board imposes conditions beyond those specifically enumerated, the Board shall advise the noncitizen in writing of such conditions. The noncitizen may accept or decline the grant of voluntary departure and may manifest a declination either by written notice to the Board, by failing to timely post any required bond, or by otherwise failing to comply with the Board's order. The grant of voluntary departure shall automatically terminate upon a filing by the noncitizen of a motion to reopen or reconsider the Board's decision, or by filing a timely petition for review of the Board's decision. The noncitizen may decline voluntary departure when unwilling to accept the amount of the bond or other conditions.

(l) *Penalty for failure to depart.* There shall be a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the Act, shall be set at $3,000 unless the immigration judge or the Board specifically orders a higher or lower amount at the time of granting voluntary departure within the permissible range allowed by law. The immigration judge or the Board shall advise the noncitizen of the amount of this civil penalty at the time of granting voluntary departure.

Dated: August 18, 2023.

Merrick B. Garland,

Attorney General.

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