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Presidential Documents

Title 3—

The President

Proclamation 10624 of September 14, 2023

National POW/MIA Recognition Day, 2023

By the President of the United States of America

A Proclamation

Unbreaking and unbending in their devotion to duty, our service members have sacrificed everything to keep our people and our democracy safe. While more than 81,000 of these brave service members still remain missing and unaccounted for, they are not—and will never be—forgotten. On National POW/MIA Recognition Day, we honor the devotion and courage of all those missing and unaccounted for, renew our commitments to their families, and promise to never cease in our efforts to bring them home.

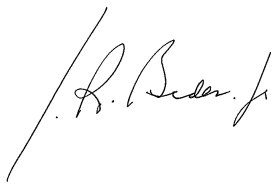
Above the White House and the United States Capitol—and at military bases, memorials, cemeteries, and homes across America—we fly the POW/MIA flag, and we remember what it represents: the thousands of spouses, parents, sons, daughters, and loved ones who served and sacrificed for our freedom and future; loved ones who mourn with unanswered questions still in their hearts; and the debt of gratitude we owe them that we can never fully repay. We cannot and must not forget our obligation to our unreturned heroes—no matter how long it takes.

Earlier this year, I had the honor of announcing that after over seven decades of being unaccounted for, United States Army Corporal Luther H. Story—a Medal of Honor recipient who gave his life fighting in the Korean War—was no longer missing. His remains were identified, returned to his family, and laid to rest near his Georgia hometown with the highest honor he deserves. His story is just one powerful reminder that, just as our service members have kept ultimate faith to our country, we must do everything we can to keep faith for them.

On this day, may we recommit to our search efforts for all those missing and unaccounted for, as well as our support for their families. May we honor the remarkable bravery, sacrifice, and commitment to service of former prisoners of war. And may we continue to keep the flame of liberty burning bright and continue working toward a more perfect Union for which our service members sacrifice so much.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim September 15, 2023, as National POW/MIA Recognition Day. Let all who read this know that America remains grateful to our heroes held in the worst imaginable conditions as prisoners of war. Additionally, I encourage my fellow citizens across the Nation to reflect on today and let us not forget those heroes who never returned home from the battlefields around the world or their families who are still waiting for answers. I call upon Federal, State, and local government officials and private organizations to observe this day with appropriate ceremonies and activities.

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



[FR Doc. 2023–20486
Filed 9–19–23; 8:45 am]
Billing code 3395–F3–P

Rules and Regulations

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 93

Staffing-Related Relief Concerning Operations at Ronald Reagan Washington National Airport, John F. Kennedy International Airport, LaGuardia Airport, and Newark Liberty International Airport, October 29, 2023, Through March 30, 2024 (Winter 2023/2024) and March 31, 2024, Through October 26, 2024 (Summer 2024)

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

ACTION: Limited waiver of the slot usage requirement.

SUMMARY: The FAA announces a limited, conditional waiver of the minimum usage requirement that applies to Operating Authorizations or ''slots'' at John F. Kennedy International Airport (JFK), New York LaGuardia Airport (LGA), and Ronald Reagan Washington National Airport (DCA) due to post-pandemic effects on Air Traffic Controller (ATC) staffing at the New York Terminal Radar Approach Control (TRACON) facility (N90). In addition, the FAA is announcing a limited policy for prioritizing returned operations at Newark Liberty International Airport (EWR) due to post-pandemic effects on ATC staffing at N90 for purposes of establishing a carrier's operational baseline in the next corresponding season.

DATES: This action is effective September 20, 2023.

ADDRESSES: Requests may be submitted by mail to the Slot Administration Office, System Operations Services, AJR–0, Room 300W, 800 Independence Avenue SW, Washington, DC 20591, or by email to: *7-awa-slotadmin@faa.gov.*

FOR FURTHER INFORMATION CONTACT: For questions concerning this notice contact: Al Meilus, Capacity and Slot Analysis, FAA ATO System Operations Services, AJR–G5, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone 202–267–2822; email *al.meilus@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The New York Terminal Radar Approach Control facility (N90) provides ATC services to overhead flights in the Northeast corridor and to the New York City area airports, including JFK, LGA, and EWR. The airspace complexity resulting from the close proximity of the major commercial airports serving the New York City region is a significant contributing factor to delays at JFK, LGA, and EWR. Against this challenging backdrop, N90 is also facing staffing shortfalls that are impacting its ability to efficiently manage the volume of air traffic in this congested airspace. The FAA has made it a top priority to address these capacity constraints, including by dedicating significant resources to training a new air traffic controller workforce, and these efforts remain ongoing. In addition, based on FAA observations of air carrier operations and recent discussions with industry, there are likely other contributing factors, including air carrier staffing issues on the ground.

With demand for air travel at a record high, additional measures are necessary to ensure that the FAA is able to provide expeditious services to aircraft operators and their passengers that traverse this airspace during this time of transition. Early carrier schedules/discussions indicate an increase in operations after October 29, 2023, through most of the winter 2023/2024 scheduling season and for all of the summer 2024 scheduling season. This being the case, the FAA expects increased delays and cancellations in the New York region to exceed those experienced over winter 2022/2023 and summer 2023 if a waiver similar to the one in effect for summer 2023 is not in place for the winter 2023/2024 and summer 2024 scheduling season to allow carriers to reduce schedules without penalties for non-use of slots or previously approved operating times. Reducing schedules will improve the alignment between scheduled operations and actual operations, will help prevent unnecessary delays, will help optimize the efficient use of the airports' resources, and will help deliver passengers to their destinations more reliably and on time.

Summary of Petitions Received

On July 26th, 2023, the FAA received a petition from American Airlines Inc. (American) requesting an extension of the initial summer 2023 waiver until the end of the IATA winter 2023/2024 season. American contends that extending the relief will support operational integrity in the New York region. In addition, American argues that the winter season leads to unique operational challenges, particularly de-icing, where ramp space increasingly is congested and aircraft have a limited window to depart.

On September 1, 2023, the FAA received a petition from Alaska Airlines, Inc. (Alaska) sharing the concerns of other carriers regarding the impact of ATC staffing on airspace management in the New York Area for an additional waiver extension but requested a waiver only through the winter 2023/2024 season. Alaska urges the FAA to use the additional tools at its disposal to help minimize operational disruptions before granting a long-term waiver. Alaska avers that a long-term waiver would fail to appropriately maximize the use of limited slots and potentially hinder new future competition in the New York market.

Standard

At JFK and LGA, slot-holding carriers must use each assigned slot at least 80 percent of the time.[1] The FAA will withdraw slots not meeting the minimum usage requirements. The FAA may waive the 80 percent usage requirement in the event of a highly unusual and unpredictable condition that is beyond the control of the slot-holding air carrier, and which affects carrier operations for a period of five consecutive days or more.[2]

[1] Operating Limitations at John F. Kennedy International Airport, 87 FR 65161 (Oct. 28, 2022); Operating Limitations at New York LaGuardia Airport, 87 FR 65159 (Oct. 28, 2022).

[2] At JFK, the FAA will determine historical rights to operating authorizations and withdrawal of those rights due to insufficient usage on a seasonal basis and in accordance with the schedule approved by the FAA prior to the commencement of the applicable season. *See* JFK Order, 87 FR at 65163. At LGA, the FAA will withdraw any operating

Continued

At DCA, the FAA also will recall any slot not used at least 80 percent of the time over a two-month period.[3] The FAA may waive this minimum usage requirement in the event of a highly unusual and unpredictable condition that is beyond the control of the slot-holding carrier, and which exists for a period of nine or more days.[4]

In determining historical rights to allocated slots, including whether to grant a waiver of the usage requirement, the FAA seeks to ensure the efficient use of valuable aviation infrastructure and maximize the benefits to both airport users and the traveling public. The minimum usage requirement is expected to accommodate routine cancellations under all but the most unusual circumstances. Carriers proceed at risk if they make scheduling decisions in anticipation of the FAA granting a slot usage waiver.

Analysis

Due to the volume of originating and destination flights in the New York City region, as well as the interdependency and complexity of the airspace surrounding JFK, LGA, and EWR, delays caused in part by N90 staffing shortfalls are expected to significantly impact carriers' ability to operate and meet minimum usage requirements in the winter 2023/2024 and summer 2024 scheduling seasons. Absent increased flexibility, the FAA anticipates a high likelihood of congestion and delay at JFK, LGA, and EWR.

Typically, the 20 percent non-utilization allowed under the minimum usage requirement accounts for cancellations due to ATC staffing delays; however, the extent of N90 staffing shortfalls and the increase in scheduled operations for the winter 2023/2024 season and expected increase in schedules in the summer 2024 season present a highly unusual and unpredictable condition beyond the control of carriers that will impact operations through the entire winter 2023/2024 and summer 2024 scheduling seasons. A waiver of minimum slot usage requirements at JFK and LGA, and a similar policy of prioritizing returned operations at EWR, is necessary to allow carriers to reduce operations to enable scheduling and operational stability. In addition, because New York City-DCA is a high-frequency market for multiple carriers, the FAA recognizes this market is a likely target for carriers to consolidate flights while retaining their network connectivity. If carriers choose to reduce their schedules in the New York City-DCA market, the FAA encourages, to the extent practical, carriers to utilize their DCA slots to operate to other destinations. However, if carriers choose not to utilize their DCA slots elsewhere, the FAA may consider providing relief to DCA slots that are impacted by the reduction in operations at the New York City airports.

Finally, carriers should be aware that the N90 staffing shortfalls will not form a sufficient basis for further relief going forward in the winter 2023/2024 and summer 2024 scheduling seasons because carriers will have had sufficient opportunity to plan and take remedial action under this waiver policy. The FAA does not foresee providing additional post-hoc relief associated with ATC staffing given the extraordinary relief provided here. Given this relief, operational impacts associated with N90 staffing during the winter 2023/2024 and summer 2024 scheduling season will not have been beyond carriers' control and will not serve as a justification for a separate waiver.

Decision

The FAA determined that the post-pandemic effects on N90 staffing meet the applicable waiver standards and warrant a limited waiver of minimum slot usage requirements at JFK and LGA to allow carriers to return up to ten percent of their slots at each airport, as well as impacted operations between DCA and the New York City airports. In addition, the FAA has determined the post-pandemic effects on N90 staffing warrant a limited policy for prioritizing returned operations at EWR to allow carriers to return up to ten percent of their approved operating timings, for purposes of establishing a carrier's operational baseline in the next corresponding season. Carriers seeking to return their slots and approved operating timings must do so by October 13, 2023, for the winter 2023/2024 scheduling season (October 29, 2023, through March 30, 2024); and by December 15, 2023, for the summer 2024 scheduling season (March 31 through October 26, 2024) to be eligible for relief under this waiver. For DCA, this relief is available only for flights impacted by operations to or from the New York City area airports. If carriers utilizing the relief provided under this limited waiver at EWR subsequently operate unapproved flights at that airport, those carriers will forfeit their scheduling preference to an equal number of returned, approved operating timings chosen at the FAA's discretion for the subsequent equivalent traffic season. Furthermore, the FAA expects carriers to up-gauge aircraft serving the affected airports to the extent possible to maintain passenger throughput and minimize the impact on consumers. The FAA also expects carriers to maintain connections between the affected airports and regional airports to the extent possible in support of continuous scheduled interstate air transportation for small communities and isolated areas. In addition, the FAA urges carriers to return scheduled operations in the peak delay periods of the day. The following hours (in local time) are the most prone to delay at each airport: EWR: 1400–2159, JFK: 1300–2259, LGA: 1300–2159.

The FAA will not reallocate the temporarily returned slots or approved operating timings at JFK, LGA, or EWR, as the goal is to reduce the volume of operations in the New York City region. Carriers are encouraged to utilize their DCA slots in other markets before returning them to the FAA. In the event DCA slots are returned under this waiver, other carriers will have an opportunity to operate the slots on an *ad hoc* basis without historic precedence.

The FAA will treat as used the specific slots returned in accordance with the conditions in this notice for the period from October 29, 2023, through March 30, 2024 (winter 2023/2024) and March 31, 2024, through October 26, 2024 (summer 2024).

The relief is subject to the following conditions:

1. The specific slots and approved operating timings must be returned to the FAA by October 13, 2023, for the winter 2023/2024 scheduling season; and by December 15, 2023, for the summer 2024 scheduling season.

2. This waiver applies only to slots that have corresponding, scheduled operations during the period of the grant. A carrier temporarily returning a slot or approved operating time to the FAA for relief under this waiver must identify corresponding scheduled operations for winter 2023/2024, or approved slots or operating timings for summer 2024. The FAA may validate information against published schedule data prior to the issuance of this notice, and other operational data maintained by FAA. Slots or operating times returned without an associated scheduled and canceled operation will not receive relief.

3. Slots or approved operating timings newly allocated for initial use since the

authorization not used at least 80 percent of the time over a two-month period. *See* LGA Order, 87 FR at 65160.

[3] *See* 14 CFR 93.227(a).

[4] *See* 14 CFR 93.227(j).

previous corresponding scheduling season are not eligible for relief.

4. Slots authorized at DCA by Department of Transportation or FAA exemptions are not eligible for relief.

Issued in Washington, DC, on September 15, 2023.

Marc A. Nichols,

Chief Counsel.

Alyce Hood-Fleming,

Vice President, System Operations Services.

[FR Doc. 2023–20416 Filed 9–18–23; 4:15 pm]

BILLING CODE 4910–13–P

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), Department of Transportation (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: Effective 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 effective at 0901 UTC, October 05, 2023.

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
§ 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
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	HOTHAM, AK NDB	* 8000

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINT—Continued

[Amendment 574 effective date October 05, 2023]

From	To	MEA
*4100—MOCA		
HOTHAM, AK NDB	TIN CITY, AK NDB/DME	*5000
*4300—MOCA		
TIN CITY, AK NDB/DME	FORT DAVIS, AK NDB	*7000
*5900—MOCA		
*6000—GNSS MEA		

§ 95.3000 LOW ALTITUDE RNAV ROUTES

From	To	MEA	MAA
§ 95.322 RNAV Route T225 Is Amended To Read in Part			
HOOPER BAY, AK VOR/DME	AKELT, AK FIX	*4600	17500
*2800—MOCA			
AKELT, AK FIX	ZIPIX, AK WP	*2100	17500
*1300—MOCA			
ZIPIX, AK WP	ALMOT, AK FIX	*3300	17500
*2500—MOCA			
ALMOT, AK FIX	HERLA, AK FIX	*3700	17500
*2200—MCA HERLA, AK FIX, SW BND			
*2200—MOCA			
HERLA, AK FIX	MKLUR, AK WP	*2000	17500
*2200—MCA MKLUR, AK WP, NE BND			
MKLUR, AK WP	UNALAKLEET, AK VOR/DME	*3000	17500
*3000—MCA UNALAKLEET, AK VOR/DME, NE BND			
§ 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	HEXAX, AK WP	*7100	17500
*3600—MCA HEXAX, AK WP, S BND			
§ 95.3227 RNAV Route T227 Is Amended To Read in Part			
PERZO, AK WP	FAIRBANKS, AK VORTAC	**3600	17500
*3600—MCA FAIRBANKS, AK VORTAC, N BND			
§ 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	BARROW, AK VOR/DME	*2100	17500
*1400—MOCA			
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	ECIPI, AK WP	*10000	17500
*2000—MOCA			
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	KING SALMON, AK VORTAC	*2400	17500
*1500—MOCA			
Is Amended To Delete			
ST PAUL ISLAND, AK NDB/DME	CHINOOK, AK NDB	*3000	17500

§ 95.3000 LOW ALTITUDE RNAV ROUTES—Continued

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

§ 95.3000 LOW ALTITUDE RNAV ROUTES—Continued

From	To	MEA	MAA
Is Amended To Delete			
VENCE, AK FIX	HORSI, AK FIX	5000	17500
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	*5000	10000
*4300—MOCA			
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

§ 95.3000 LOW ALTITUDE RNAV ROUTES—Continued

From	To	MEA	MAA
*1900—MOCA			
JOPES, AK WP	ANESE, AK WP	*3000	17500
*2000—MOCA			
ANESE, AK WP	EYOPA, AK WP	*4000	17500
*3200—MOCA			
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	6400	17500
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

§ 95.3000 LOW ALTITUDE RNAV ROUTES—Continued

From	To	MEA	MAA
§ 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			
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

From	To	MEA	MAA
§ 95.417 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			
ZILLS, NC WP	YLEEE, NC WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
YLEEE, NC WP	EARZZ, NC WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
KALDA, VA FIX	ZJAAY, MD WP	*18000	45000
*18000—GNSS MEA			
*DME/DME/IRU MEA			
Is Amended by Adding			
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			

§ 95.4000 HIGH ALTITUDE RNAV ROUTES—Continued

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

§ 95.6001 VICTOR ROUTES—U.S.

From	To	MEA
§ 95.6011 VOR Federal Airway V11 Is Amended To Delete		
BROOKLEY, AL VORTAC	GREENE COUNTY, MS VORTAC	2000
GREENE COUNTY, MS VORTAC	MIZZE, MS FIX	*4000
*1900—MOCA		
*3000—GNSS MEA		
MIZZE, MS FIX	MAGNOLIA, MS VORTAC	*3000
*2400—MOCA		
§ 95.6013 VOR Federal Airway V13 Is Amended To Read in Part		
DULUTH, MN VORTAC	*WEMAN, MN FIX	4000
*6000—MRA		
*10000—MCA WEMAN, MN FIX, NE BND		
WEMAN, MN FIX	U.S. CANADIAN BORDER	10000
§ 95.6037 VOR Federal Airway V37 Is Amended To Read in Part		
JOTTA, NC FIX	DOILY, VA FIX	*7000
*5900—MOCA		
DOILY, VA FIX	PULASKI, VA VORTAC	6000
§ 95.6044 VOR Federal Airway V44 Is Amended To Read in Part		
BALTIMORE, MD VORTAC	*PALEO, MD FIX	2200
*13500—MCA PALEO, MD FIX, E BND		
§ 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

§ 95.6001 VICTOR ROUTES—U.S.—Continued

From	To	MEA
§ 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		
MC COMB, MS VORTAC *3500—MCA MIZZE, MS FIX, SW BND **2000—MOCA	*MIZZE, MS FIX	**3500
§ 95.6212 VOR Federal Airway V212 Is Amended To Read in Part		
SETTA, MS FIX *2000—MOCA	MC COMB, MS VORTAC.	
§ 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 *6000—MCA TULLO, LA WP, SE BND **1800—MOCA	*TULLO, LA WP	**6000
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
§ 95.6611 VOR Federal Airway V611 Is Amended To Read in Part		
SHELA, MT FIX	ESTRO, MT FIX	7700
ESTRO, MT FIX	LEWISTOWN, MT VOR/DME	7800

§ 95.7001 JET ROUTES

From	To	MEA	MAA
§ 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 *MEA IS ESTABLISHED WITH A GAP IN NAVIGATION SIGNAL COVERAGE.	DICKINSON, ND VORTAC	*21000	45000
§ 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

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 925

[SATS No. MO–049–FOR; Docket ID: OSM–2019–0001; S1D1S SS08011000 SX064A000 234S180110; S2D2S SS08011000 SX064A000 23XS501520]

Missouri AML Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving an amendment to the Missouri Abandoned Mine Land Reclamation Fund and Abandoned Mine Reclamation and Restoration regulations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The amendment was submitted in response to two executive orders by the Governor of Missouri. Each State agency was directed to review and amend their regulations to ensure that they were efficient, effective, and necessary, and to significantly reduce the volume of regulations. Missouri's amendments to their regulations will replace text to improve clarity and remove redundant sections already addressed under their Abandoned Mine State Reclamation Plan or elsewhere in their statutes and regulations (hereinafter, the Missouri Plan).

DATES: Effective October 20, 2023.

FOR FURTHER INFORMATION CONTACT: William Joseph, Chief, Alton Field Division, Office of Surface Mining Reclamation and Enforcement, 501 Belle Street, Suite 216, Alton, Illinois 62002. Telephone (618) 463–6460. Email: *bjoseph@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Missouri Program

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and other authorized activities. Section 405 of the Act allows States and Tribes to assume exclusive responsibility for reclamation activity within the State or on Tribal lands if they develop and submit for approval to the Secretary of the Interior a program (often referred to as a plan) for the reclamation of abandoned coal mines. On the basis of these criteria, the Secretary of the Interior approved the Missouri Plan effective January 29, 1982. You can find background information on the Missouri Plan, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Missouri Plan in the January 29, 1982, **Federal Register** (47 FR 4253). You can also find later actions concerning the Missouri Plan and amendments to the Plan at 30 CFR 925.20 and 925.25.

II. Submission of the Amendment

By letter dated March 6, 2019 (Administrative Record No. MO–685), Missouri sent us an amendment to its Abandoned Mine Land Reclamation Fund and Abandoned Mine Reclamation and Restoration regulations under SMCRA (30 U.S.C. 1201 *et seq.*) on its own initiative. We announced receipt of the proposed amendment in the May 10, 2019, **Federal Register** (84 FR 20597). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. We did not hold a public hearing or meeting because one was not requested. We did not receive any public comments on the proposed amendment. The public comment period ended on June 10, 2019.

III. OSMRE's Findings

The following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 884. We are approving the amendment as described below.

Missouri Executive Order 17–03 (January 10, 2017) and Missouri Executive Order 18–04 (June 29, 2018) directed Missouri State agencies to review and revise existing state regulations to reduce textual length and regulatory burden. Several of Missouri's revisions were proposed in response to these Orders.

Missouri proposed to add more specific statutory citations to section 10 CSR 40–9.010. We find the additional citations to be relevant and appropriate for inclusion.

Missouri proposed to replace the phrase ''shall include:'' with ''includes:'' in 10 CSR 40–9.010(2) with the goal of increasing clarity. We find that this change does not alter the meaning of the regulation, and therefore we approve the change.

Missouri proposed to revise 10 CSR 40–9.010 (3) from ''the fund *shall* be used . . .'' to ''the fund *are to be* used . . .'' (emphasis added). The State has determined that this change provides better clarity. OSMRE finds that this change does not alter the meaning of the regulation, and therefore we approve the change.

Missouri proposed to revise section 10 CSR 40–9.020(1), replacing ''*shall* be used to offset the cost of reclamation . . .'' with ''*are to* be used to offset the cost of reclamation . . .'' (emphasis added). Missouri further proposed changing ''if not *required* for further reclamation . . .'' to ''if not *needed* for further reclamation . . .'' (emphasis added). Missouri offers these changes in the assertion it improves the clarity of the regulation. OSMRE finds this does not alter the meaning of the regulation and approves.

Missouri proposed to remove paragraphs 10 CSR 40–9.020(4) and (5) from their regulations entirely. These paragraphs address reclamation objectives and priorities as well as reclamation project evaluation factors. Reclamation goals and objectives are already included in State law at Mo.

Rev. Stat. § 444.915 and in the Missouri Plan section titled *Goals and Objectives—884.13(c)(1),* pages C–1–1 through C–1–6. Reclamation project evaluation factors are already addressed in the Missouri Plan section *Project Ranking and Selection—884.13(c)(2),* pages C–2–1 through C–2–7. We find the sections included in the statute and Missouri Plan have met the requirements of 30 CFR 884.13(c)(1) and (2), thereby rendering the referenced regulatory paragraphs unnecessary and we approve their removal from the regulations.

Missouri proposed to amend 10 CSR 40–9.030(2)(B) to replace the term ''general welfare'' with ''environment'' with the stated goal of aligning with the Federal regulation. The Federal regulation, however, uses the term ''general welfare.'' Nevertheless, we find that Missouri's program remains consistent with the Federal regulation under the proposed amendment. Even if the term ''environment'' could be construed as a term with a more limited meaning than ''general welfare,'' we note that Missouri's statute construes entry as an exercise of the police power for ''the protection of public health, safety, and general welfare . . .'' Mo. Rev. Stat. § 444.925(4). Thus, Missouri's proposed amendment does not make Missouri's program inconsistent with the Federal requirements.

Missouri proposed to change 10 CSR 40–9.030(2)(c) to replace ''Entry *required* to investigate and explore reported emergency conditions will be governed by 10 CSR 40–9.030(4)'' with ''Entry *necessary* to investigate and explore emergency conditions will be governed by 10 CSP 40–9.030(4)'' (emphasis added). Missouri determined this change provided increased clarity. OSMRE finds this change does not alter the meaning of the regulation, and therefore we approve the change.

Missouri proposed to amend 10 CSR 40–9.030(3)(B)(2) by replacing the term ''the general welfare'' with ''environment.'' For the reasons stated above, we find that Missouri's proposal is consistent with Federal requirements.

Missouri proposed to change 10 CSR 40–9.030(3) from ''The owner of the land or water resources where entry *must be made* to restore, . . .'' to ''The owner of the land or water resources where entry is *necessary* to restore, . . .'' (emphasis added). Missouri determined this change improves the clarity of the regulation. OSMRE finds the change does not alter the meaning of the regulation, and therefore we approve the change.

Missouri proposed to revise 10 CSR 40–9.030(3)(C) to read ''The notice shall be in writing and mailed, return receipt requested'' instead of ''The notice shall be requested in writing and *shall be* mailed, return receipt requested'' (emphasis added). The State determined removing the second ''shall be'' improved the readability of the regulation. OSMRE approves of this non-substantive change.

Missouri proposed to amend 10 CSR 40–9.040 to add more specific statutory citations. OSMRE approves the proposal because the additional citations are relevant and appropriate.

Missouri proposed to remove sections 10 CSR 40–9.040(1)(A)(1), (A)(2), and (B) and replace these sections with a cross-reference to the State statute: Mo. Rev. Stat. § 444.925.1. The information contained in the deleted sections is included by reference to 30 CFR part 879 in section C–4–2 of the Missouri Plan and in Mo. Rev. Stat. § 444.925. The program remains as effective as the Federal counterpart regulation by including the necessary information by reference. Therefore, we approve this change.

In 10 CSR 40–9.040(2), Missouri proposed to update the citation ''Interagency Land Acquisition Conference 1973'' to ''Interagency Land Acquisition Conference 2016''. We approve Missouri's proposal as consistent with the Federal requirement in 30 CFR 879.12(d).

Missouri proposed to revise 10 CSR 40–9.050 to change the citations to the State statutes (Mo. Rev. Stat. §§ 444.825.5 and 444.825.6) in the current regulation to the correct citations (Mo. Rev. Stat. §§ 444.925.5 and 444.925.6). OSMRE approves of this correction.

Missouri proposed to edit 10 CSR 40–9.050 to remove paragraphs (1)(B) and (1)(C) in their entirety. As background, section 407(f) of SMCRA authorizes the Secretary of the Interior to ''provide by regulation that money derived from the lease, rental, or user charges of such acquired land and facilities thereon will be deposited in the fund.'' 30 U.S.C. 1237(f). Federal implementing regulations at 30 CFR 879.14 provide: ''Procedures for collection of user charges or the waiver of such charges by the OSM, State, or Indian tribe shall provide that all user fees collected shall be deposited in the appropriate Abandoned Mine Reclamation Fund.'' Missouri's previously approved regulations at 10 CSR 40–9.050(1)(B)–(C) provide that any user of acquired land must be charged a use fee and that such use fees will be deposited in the fund in accordance with 10 CSR 40–9.010. Missouri proposed to continue to allow use of acquired land under 10 CSR 40–9.050(A), which is not proposed to be amended, while deleting the provisions about user fees in 10 CSR 40–9.050(1)(B)–(C). Nevertheless, we find that Missouri continues to meet the requirements of 30 CFR 879.14 because a separate provision, 10 CSR 40–9.010(2)(B), specifies that monies collected by the State from charges for uses of acquired or reclaimed lands will be treated as revenue to the abandoned mine reclamation fund. Therefore, we approve this change.

Missouri proposed to revise 10 CSR 40–9.050(2)(E) to read, ''All monies received from the disposal of land under this rule will be de-obligated and returned to the office,'' instead of ''All monies received from the disposal of land under this rule shall be deposited in the abandoned mine land fund.'' ''Office'' is defined in 10 CSR 40.9010(1) as OSMRE. More specific details outlining this requirement can be found in the Missouri Plan contained in section 30 C–4–2, which states that the provisions of 30 CFR part 879 will be followed. 30 CFR 879.15(b)(2)(h), in turn, dictates: ''We will handle all monies received under this paragraph as unused funds in accordance with § 886.20 of this Chapter.'' We find this change to be no less effective than the Federal counterpart, and therefore we approve the change.

The State proposed to revise 10 CSR 40–9.060(1) to remove the word ''required'' and replace it with ''necessary.'' The State asserts that this change improves clarity and complies with Executive Order 17–03. OSMRE finds this does not alter the meaning of the regulation, and therefore we approve the change.

The State proposed to revise 10 CSR 40–9.060(2) to remove the word ''require'' and replace it with ''necessitates.'' The State asserts that this improves clarity and complies with Executive Order 17–03. OSMRE finds this does not alter the meaning of the regulation, and therefore we approve the change.

Missouri proposed removal of ''acquired title prior to May 2, 1977 and who'' from 10 CSR 40–9.060(3)(2). OSMRE removed this date under a 2008 amendment to 30 CFR 882.13 (73 FR 35236). This revision aligns the amended language exactly to the Federal counterpart; therefore, it is no less effective, and we approve the change.

The State proposed to revise 10 CSR 40–9.060(3) to remove the word ''shall'' and replace it with ''will.'' The State asserts that this improves clarity and complies with Missouri Executive Order 17–03. OSMRE finds this proposal does

not alter the meaning of the regulation, and therefore we approve the change.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment. As noted in Section II, we did not receive any public comments on this proposed amendment.

Federal Agency Comments

On February 14, 2019, under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Missouri program (Administrative Record No. MO–685). We did not receive any comments.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to get a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Missouri proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment. However, on February 14, 2019, under 30 CFR 732.17(h)(11)(i), we requested comments from the EPA on the amendment (Administrative Record No. MO–685). The EPA did not respond to our request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP on amendments that may have an effect on historic properties. On February 14, 2019, we requested comments on the Missouri amendment (Administrative Record No. MO–685). We did not receive comments from the SHPO or the ACHP.

V. OSMRE's Decision

Based on the above findings, we are approving Missouri's submittal sent to us on March 6, 2019 (Administrative Record No. MO–685) because the proposed amendments are consistent with Federal standards.

To implement this decision, we are amending the Federal regulations, at 30 CFR part 925, that codify decisions concerning the Missouri program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the date of publication. Section 405 of SMCRA requires that each State with an abandoned mine reclamation program must have an approved State regulatory program pursuant to Section 503 of the Act. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. SMCRA requires consistency of State and Federal standards.

VI. Statutory and Executive Order Reviews

Executive Order 12630—Governmental Actions and Interference With Constitutionally Protected Property Rights

This rule would not effect a taking of private property or otherwise have taking implications that would result in private property being taken for government use without just compensation under the law. Therefore, a takings implication assessment is not required. This determination is based on an analysis of the corresponding Federal regulations.

Executive Orders 12866—Regulatory Planning and Review,13563—Improving Regulation and Regulatory Review, and 14094—Modernizing Regulatory Review

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State plan amendments are exempted from OMB review under Executive Order 12866, as amended by Executive Order 14094. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has reviewed this rule as required by Section 3 of Executive Order 12988. The Department determined that this **Federal Register** document meets the criteria of Section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency's legislation and regulations provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because Section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive Order to the quality of this **Federal Register** document and to changes to the Federal regulations. The review under this Executive Order did not extend to the language of the State amendment that Missouri drafted.

Executive Order 13132—Federalism

This rule has potential Federalism implications as defined under Section 1(a) of Executive Order 13132. Executive Order 13132 directs agencies to ''grant the States the maximum administrative discretion possible'' with respect to Federal statutes and regulations administered by the States. Missouri, through its approved reclamation program, implements and administers SMCRA and its implementing regulations at the state level. This rule approves an amendment to the Missouri reclamation program submitted and drafted by the State and, thus, is consistent with the direction to provide maximum administrative discretion to States.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175, and have determined that it has no substantial direct effects on Federally recognized Tribes or on the distribution of power and responsibilities between the Federal government and Tribes. Therefore, consultation under the Department's Tribal consultation policy is not required. The basis for this determination is that our decision is on the Missouri plan, which does not include Tribal lands or regulation of activities on Tribal lands. Tribal lands are regulated independently under the applicable, approved Federal program.

Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rulemaking that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not

significant energy action under the definition in Executive Order 13211, a Statement of Energy Effects is not required.

Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

This rule is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866; and this action does not address environmental health or safety risks disproportionately affecting children.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. We are not required to provide a detailed statement under the National Environmental Policy Act of 1969 because this rule qualifies for a categorical exclusion under the U.S. Department of the Interior Departmental Manual, part 516, section 13.5(B)(29).

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA; 15 U.S.C. 3701 *et seq.*) directs OSMRE to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. (OMB Circular A–119 at p. 14). This action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA.

Paperwork Reduction Act

This rule does not include requests and requirements of an individual, partnership, or corporation to obtain information and report it to a Federal agency. As this rule does not contain information collection requirements, a submission to OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

Regulatory Flexibility Act

This rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to impose an unfunded mandate. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

List of Subjects in 30 CFR Part 925

Intergovernmental relations, Surface mining, Underground mining.

William L. Joseph,

Acting Regional Director, OSMRE IRs 3, 4 and 6.

For the reasons set out in the preamble, 30 CFR part 925 is amended as follows:

PART 925—MISSOURI

■ 1. The authority citation for part 925 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. In § 925.25 amend the table by adding an entry for ''March 6, 2019'' at the end of the table to read as follows:

§ 925.25 Approval of Missouri abandoned mine land reclamation plan amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	*	* * * * *
March 6, 2019	September 20, 2023.	10 CSR 40–9.010 through 40–9.060.

[FR Doc. 2023–20019 Filed 9–19–23; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

[SATS No. OH–261–FOR; Docket ID: OSM–2019–0007; S1D1S SS08011000 SX064A000 234S180110; S2D2S SS08011000 SX064A000 23XS501520]

Ohio Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule, approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving an amendment to the Ohio regulatory program (the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Ohio's proposed amendment is prompted by requirements within the Ohio statute that all agencies must review their administrative rules every five years. Consistent with this requirement, the Ohio Reclamation Commission (the Commission), proposes an amendment to its procedural rules in order to ensure an orderly, efficient, and effective appeals process.

DATES: The effective date is October 20, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Owens, Acting Field Office Director, Pittsburgh Field Office, 3 Parkway Center, Pittsburgh, PA 15220. Telephone: (412) 937–2827, Email: *bowens@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Ohio Program

Section 503(a) of the Act, State Programs, permits a state to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, state laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. *See* 30 U.S.C. 1253(a)(1) and (7).

On the basis of these criteria, the Secretary of the Interior conditionally approved the Ohio program on August 16, 1982. You can find background information on the Ohio program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Ohio program in the August 10, 1982, **Federal Register** (47 FR 34717). You can also find later actions concerning the Ohio program and program amendments at 30 CFR 935.10, State Regulatory Program Approval; and 935.11, Conditions of State Regulatory Program Approval; and 935.15, Approval of Ohio Regulatory Program Amendments.

II. Submission of the Amendment

By letter dated June 13, 2018 (Administrative Record OH–2197–01), Ohio sent us an amendment regarding its program under SMCRA (30 U.S.C. 1201 *et seq.*) to clarify existing definitions and to provide additional definitions related to work of the Commission. This submittal was prompted by requirements of Sections 106.03 and 119.04 of the Ohio Revised Code (ORC) that all state agencies must review their administrate rules every five years.

For background purposes, the Commission is an adjudicatory board established pursuant to ORC 1513.05. The Commission is the office to which administrative appeals may be filed by any person claiming to be aggrieved or adversely affected by a decision of the Ohio Department of Natural Resources, Chief of the Division of Mineral Resources Management (DMRM), relating to mining and reclamation issues. Following an adjudicatory hearing, the Commission affirms, vacates, or modifies the DMRM Chief's decision. The Commission is comprised of eight members appointed by the Governor of Ohio. Members represent a variety of interests relevant to mining and reclamation issues. The Commission adopts rules to govern its procedures. The Commission's rules are found in the Ohio Administrative Code (OAC) at OAC 1513–3–01 through 1513–3–22, and are the subject of the current amendment.

We announced receipt of the proposed amendment in the February 25, 2020 **Federal Register** (85 FR 10636) (Administrative Record No. OH–2197). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. No meeting or hearing was requested, and no public comments were received. The public comment period ended on March 11, 2020.

III. OSMRE's Findings

We made the following findings concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. In making these findings, we compared Ohio's provisions to 43 CFR part 4, which governs administrative proceedings and appeals relevant to OSMRE's actions under the Federal regulatory program. We are approving the amendments as described below. The full text of this program amendment is available at *www.regulations.gov.*

A. Ohio's revisions to OAC 1513–3–01 consist of additions and modifications to the definitions outlined herein. As a result, renumbering was also made to facilitate the addition of new terms.

1. ''Amicus curiae''. Ohio seeks to add this term as paragraph (B), describing it to mean a ''friend of the court.'' The amendment also explains the participation of a non-party amicus curiae is addressed under OAC 1513–3–07 (F).

2. ''Ex parte communication''. Ohio seeks to add this term as paragraph (J), describing it to mean ''a communication between the commission and one party to an appeal, without the inclusion of other parties to the appeal.'' The amendment also explains that ex parte contacts and communications are addressed and prohibited under OAC 1513–3–03 (G).

3. ''In camera''. Ohio seeks to add this term as paragraph (N), describing it to mean ''in private rather than in open hearing.'' The amendment also references OAC 1513–3–16 (C) for in camera procedures.

4. ''Pro hac vice''. Ohio seeks to add this term as paragraph (S), describing it to mean ''for one particular case''. In accordance with OAC 1513–3–03 (A) and (C), it explains the ability of an out-of-state attorney to appear in an appeal before the commission.

5. ''Subpoena ad testificandum''. Ohio seeks to add this term as paragraph (V), describing it to mean ''a subpoena for the appearance and testimony of a witness.'' The definition also references the use of this term at OAC 1513–3–02 (I).

6. ''Subpoena duces tecum''. Ohio seeks to add this term as paragraph (W), describing it to mean ''a subpoena requiring a witness to produce documents or other items at hearing''. The definition also references use of this term at OAC 1513–3–02 (I).

B. Ohio made typographical, editorial, and other minor revisions to the following sections: OAC 1513–3–01(I) (the definition of ''discovery'') and (T) (the definition of ''Regular business hours''); OAC 1513–3–02 *Internal Regulations;* OAC 1513–3–04 *Appeals to the Reclamation Commission;* OAC

1513–3–05 *Filing Service of Papers;* OAC 1513–3–06 *Computation and Extension of Time;* OAC 1513–3–11 *Motions;* OAC 1513–3–14 *Site Views an Location of Hearings;* OAC 1513–3–16 *Conduct of Evidentiary Hearings;* and OAC 1513–3–22 *Appeals from Commission Decisions.*

OSMRE Finding: While the definitions of ''amicus curiae,'' ''ex parte communication,'' ''in camera,'' ''pro hac vice,'' ''subpoena ad testificandum,'' and ''subpoena duces tecum'' are not defined terms in the equivalent Federal regulations at 43 CFR part 4, they are used at 43 CFR 4.3 and 4.27. Ohio's definition of ''amicus curiae'' and ''ex parte communication'' are not inconsistent with the use of those terms within 43 CFR part 4. The remaining terms do not appear in 43 CFR part 4 or other relevant regulations of the Department. However, Ohio's definition of ''in camera'' is not inconsistent with the process for protecting certain materials from disclosure described at 43 CFR 4.31. Likewise, Ohio's definition of ''pro hac vice'' is not inconsistent with the standards for who may practice before the Department at 43 CFR 1.3 and 4.3. Finally, Ohio's definitions for ''subpoena ad testificandum'' and ''subpoena duces tecum'' are not inconsistent with the Department's subpoena provisions at 43 CFR 4.26. Therefore, we approve the addition of these definitions.

Any revisions that we have not specifically discussed concerning non-substantive wording or editorial changes, including the addition of paragraph (A)(4) to OAC 1513–3–06 (providing a citation to a provision defining state holidays), can be found in the full text of the program amendment available at *www.regulations.gov.*

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment; however, none were received.

Federal Agency Comments

On October 1, 2018, under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Ohio program (Administrative Record No. OH–2197). We did not receive any comments.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain a written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Ohio proposed to make in this amendment pertain to air or water quality standards. Therefore, we did not ask EPA to concur on the amendment. However, on October 1, 2018, under 30 CFR 732.17(h)(11)(i), we requested comments from the EPA on the amendment (Administrative Record No. OH–2197). The EPA responded on November 2, 2018, that the proposed program amendment does not fall under the purview of the EPA's Clean Water Act (Administrative Record OH–2197–05).

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and ACHP that may have an effect on historic properties. On October 1, 2018, we requested comments on Ohio's amendment (Administrative Record No. OH–2197). We did not receive comments from the SHPO or ACHP.

V. OSMRE's Decision

Based on the above findings, we are approving Ohio's program amendment submission sent to us on June 13, 2018 (Administrative Record No. OH–2197–01). To implement this decision, we are amending the Federal regulations at 30 CFR part 935, that codify decisions concerning the Ohio program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the date of publication. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. SMCRA requires consistency of State and Federal standards.

VI. Statutory and Executive Order Reviews

Executive Order 12630—Governmental Actions and Interference With Constitutionally Protected Property Rights

This rule would not effect a taking of private property or otherwise have taking implications that would result in public property being taken for government use without just compensation under the law. Therefore, a takings implication assessment is not required. This determination is based on an analysis of the corresponding Federal regulations.

Executive Order 12866—Regulatory Planning and Review and Executive Order 13563—Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program amendments is exempted from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

State program amendments are not regulatory actions under Executive Order 13771 because they are exempt from review under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has reviewed this rule as required by Section 3 of Executive Order 12988. The Department determined that this **Federal Register** document meets the criteria of Section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency's legislation and regulations provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because Section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive order to the quality of this **Federal Register** document and to changes to the Federal regulations. The review under this Executive order did not extend to the language of the program amendment that the State of Ohio drafted.

Executive Order 13132—Federalism

This rule has potential Federalism implications as defined under Section 1(a) of Executive Order 13132. Executive Order 13132 directs agencies to ''grant the States the maximum administrative discretion possible'' with respect to Federal statutes and regulations administered by the States. Ohio, through its approved regulatory program, implements and administers

SMCRA and its implementing regulations at the state level. This rule approves an amendment to the Ohio program submitted and drafted by the State and, thus, is consistent with the direction to provide maximum administrative discretion to States.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Tribes or on the distribution of power and responsibilities between the Federal government and Tribes. Therefore, consultation under the Department's tribal consultation policy is not required. The basis for this determination is that our decision is on the Ohio program does not regulate Indian lands or surface coal mining activities on Indian lands. Indian lands, as that term is defined under 30 U.S.C. 1291(9) are regulated independently under the Federal Indian lands program.

Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rulemaking that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not significant energy action under the definition in Executive Order 13211, a Statement of Energy Effects is not required.

Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

This rule is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866; and this action does not address environmental health or safety risks disproportionately affecting children.

National Environmental Policy Act

Consistent with sections 501(a) and 702(d) of SMCRA (30 U.S.C. 1251(a) and 1292(d), respectively) and the U.S. Department of the Interior Departmental Manual, part 516, section 13.5(A), State program amendments are not major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 3701 *et seq.*) directs OSMRE to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. (OMB Circular A–119 at p. 14). This action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA.

Paperwork Reduction Act

This rule does not include requests and requirements of an individual, partnership, or corporation to obtain information and report it to a Federal agency. As this rule does not contain information collection requirements, a submission to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

Regulatory Flexibility Act

This rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon corresponding Federal regulations for which an economic analysis was prepared, and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal Governments or the private sector. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to impose an unfunded mandate. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

List of Subjects in 30 CFR Part 935

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope,

Regional Director, North Atlantic—Appalachian Region.

For the reasons set out in the preamble, 30 CFR part 935 is amended as set forth below:

PART 935—OHIO

■ 1. The authority citation for part 935 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 935.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 935.15 Approval of Ohio regulatory program amendment.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* *	* * *
June 13, 2018	September 20, 2023	OAC 1513–3–01 Definitions. Addition of definitions of ''Amicus curiae'', ''Ex parte communication'', ''In camera'', ''Pro hac vice'', ''Subpoena ad testificandum'', ''Subpoena duces tecum''. OAC 1513–3–06(A)(4) Computation and Extension of Time.

[FR Doc. 2023–20348 Filed 9–19–23; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 943

[SATS No. TX–071–FOR; Docket No. OSM–2019–0011; S1D1S SS08011000 SX064A000 234S180110; S2D2S SS08011000 SX064A000 23XS501520]

Texas Abandoned Mine Land Reclamation Plan and Regulations

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving an amendment to the Texas abandoned mine land reclamation plan (Texas Plan) and regulations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Texas proposed to revise its existing Plan and regulations in response to OSMRE's request to amend the Texas Plan and to improve the readability and efficiency of the document.

DATES: October 20, 2023.

FOR FURTHER INFORMATION CONTACT: Joe Maki, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 1645 South 101st East Avenue, Suite 145, Tulsa, Oklahoma 74128–4629. Telephone (918) 581–6430, Email: *jmaki@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Texas Program and Plan

The Abandoned Mine Land Reclamation (AML) Program was established by Title IV of the Act (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded primarily by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian Tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit for approval to the Secretary of the Interior a program (often referred to as a plan) for the reclamation of coal mines abandoned or otherwise left in an inadequate reclamation status at the time SMCRA was enacted.

On June 23, 1980, the Secretary of the Interior approved the Texas Plan. You can find general background information on the Texas Plan, including the Secretary's findings and the disposition of comments, in the June 23, 1980, **Federal Register** (45 FR 41937). You can also find later actions concerning Texas's AML Program and Plan amendments at 30 CFR 943.25.

II. Submission of the Amendment

Under the authority of 30 CFR 884.15, OSMRE by letter dated March 8, 2019 (Administrative Record No. TX–0707), directed Texas to update the Texas Plan. In that letter, known as a Part 884 letter, OSMRE indicated that the Texas Plan required revisions to meet the requirements of SMCRA as revised on December 20, 2006, by the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432), and in response to changes made to the implementing Federal regulations as revised on November 14, 2008 (73 FR 67576), and February 5, 2015 (80 FR 6435). The letter required Texas to provide either ''(1) a proposed written Reclamation Plan amendment or, (2) a description of the Reclamation Plan amendments you will propose in response to the revised regulations or, (3) a detailed statement explaining why [Texas] believe[d] no amendment to [Texas's] Reclamation Plan is necessary.'' The letter further provided Texas with a summary of the changes to the Federal Program that might require amendments to the Texas Plan to ensure Texas's program was consistent with and no less effective than the Federal Program.

By letter dated December 3, 2019 (Administrative Record No. TX–708), Texas sent us amendments to the Texas Plan and conforming State regulations. The Texas amendments are intended to address all required amendments identified in OSMRE's letter dated March 8, 2019. Texas's amendments will revise the State's existing AML Plan and AML program regulations.

We announced receipt of the proposed amendments in the July 20, 2020, **Federal Register** (85 FR 43759). In the same document, we opened a public comment period and provided an opportunity for a public hearing or meeting on the amendment. We received three comments. We did not hold a public hearing or meeting because none were requested. The public comment period ended on August 19, 2020.

In compliance with 30 CFR 884.14, Texas also allowed public input on the Texas Plan and held a public comment period during the development of the State regulations. The comment period on the regulatory amendments was from August 23, 2019, to September 23, 2019 (Administrative Record No. TX–708.04). Texas received no comments. In addition, in November, 2019, the Railroad Commission of Texas provided public notice that it was considering adoption of the amended and restated Texas Plan and provided an opportunity for public input on the proposal.

III. OSMRE's Findings

A. Texas's Explanation for Not Amending Certain Provisions

In response to our Part 884 letter, Texas stated that several items mentioned in the Part 884 letter do not appear to be applicable or require regulatory or plan changes. We agree.

First, in our Part 884 letter, we advised that certified States such as Texas are no longer authorized to set aside AML funds for future reclamation. In response, Texas stated that it has not undertaken future reclamation set aside and is no longer eligible to do so.

Second, in our Part 884 letter, we advised of certain changes related to

requirements and restrictions of acid mine drainage treatment and abatement programs for certified States. In response, Texas stated that it has not undertaken an acid mine drainage program and does not intend to create one in the foreseeable future.

Third, in our Part 884 letter, we advised of changes to certain requirements for uncertified States. In response, Texas noted that these provisions are inapplicable to Texas as a certified State.

Fourth and finally, we advised that 30 CFR part 887 has been amended to clarify funding sources for subsidence insurance grants. In response, Texas stated that it does not operate a subsidence insurance program and does not intend to create one in the foreseeable future.

Texas's responses to these provisions of the Part 884 letter are appropriate.

B. Revisions to the Texas Plan

Our review of a proposed State Reclamation Plan amendment is governed by section 405 of SMCRA and 30 CFR part 884. Section 405(e) of SMCRA requires a State Reclamation Plan to ''generally identify the areas to be reclaimed, the purposes for which the reclamation is proposed, the relationship of the lands to be reclaimed and the proposed reclamation to surrounding areas, the specific criteria for ranking and identifying projects to be funded, and the legal authority and programmatic capability to perform such work[.]'' Under 30 CFR 884.15(a), we follow the procedures of 30 CFR 884.14 if the State proposes a major amendment that changes the objectives, scope, or major policies followed by the State in the conduct of its reclamation program. Texas generally proposes to respond to our Part 884 letter, update the objectives, scope, and policies of its program to reflect its status as a certified state, and amend its plan consistent with the 2006 changes to SMCRA and the associated changes to the implementing Federal regulations. Accordingly, we are considering Texas's proposal as a major amendment and following the procedures set out in 30 CFR 884.14.

The rule at 30 CFR 884.14 requires: (1) public input, (2) solicitation and consideration of the views of interested Federal agencies, (3) a determination that the State has the legal authority, policies, and administrative structure necessary to carry out the proposed plan, (4) a determination that the proposed plan meets the requirements of 30 CFR Subchapter R, (5) a determination that the State has an approved regulatory program, and (6) a determination that the plan is in compliance with all applicable State and Federal laws and regulations. The rule at 30 CFR 884.13 describes the contents that each State Reclamation Plan must include.

We make the following findings concerning Texas's AML plan amendment under SMCRA and the Federal regulations at 30 CFR 884.13 and 884.14. We are approving the Texas Plan amendment, with an exception, as described below.

Before approving a State Reclamation Plan, we must ''h[o]ld a public hearing on the plan within the State which submitted it, or ma[k]e a finding that the State provided adequate notice and opportunity for public comment in the development of the plan.'' 30 CFR 884.14(a)(1).

We find that Texas provided adequate notice and opportunity for public comment in the development of the plan. A Railroad Commission of Texas Open Meeting Notice for November 19, 2019, provided notice to the public that the Railroad Commission (Commission) was considering adoption of the amended and restated Texas Plan. The notice stated that the Commission would provide an opportunity for public input on any matter under the jurisdiction of the Commission, in accordance with a policy adopted on September 7, 2005. The notice further provided opportunities for concerned individuals to view the open meeting via webcast and offered accommodations and auxiliary aids or services for persons with a disability.

Additionally, when Texas submitted the proposed Texas Plan, we announced receipt of the proposed amendment in the **Federal Register**, opened a 30-day public comment period, and provided an opportunity for a public hearing or meeting on the amendment. We did not hold a public hearing or meeting because none were requested.

Before approving a State Reclamation plan, we must solicit and consider the views of other Federal agencies having an interest in the plan. 30 CFR 884.14(a)(2). As discussed in Part IV below, we solicited the views of other Federal agencies and received no comments.

Before approving a State Reclamation plan, we must determine that the State has an approved State regulatory program. 30 CFR 884.14(a)(5). 30 CFR part 943 codifies the approval and amendments of Texas's state regulatory program.

Finally, before approving a State Reclamation plan, we must determine that the State has the legal authority, policies, and administrative structure necessary to carry out the proposed plan, that the plan meets the requirements of 30 CFR Part VII Subchapter R (''Abandoned Mine Land Reclamation''), and that the plan is in compliance with all applicable State and Federal laws and regulations. As discussed in detail below, we find that the proposed Texas Plan meets these requirements and the specific content requirements of 30 CFR 884.13.

Under 30 CFR 884.13(a)(1), a State Reclamation Plan must include a designation by the Governor of the State of the agency authorized to administer the State reclamation program and administer grants under Part 885 or 886. The revised Texas Plan includes a copy of the Governor's 1979 letter designating the Railroad Commission of Texas as the agency authorized to administer the State AML Program and to receive and administer grants. Texas has incorporated the Governor's letter designating the Railroad Commission as the agency authorized to administer the State AML Program and receive and administer grants in the Texas Plan as required under 30 CFR 884.13(a)(1). The 1979 designation remains current and provides adequate authority for the Railroad Commission to carry out the plan.

Under 30 CFR 884.13(a)(2), a State Reclamation Plan must include a legal opinion from the State Attorney General or the chief legal officer of the designated state agency that the agency has authority under State law to conduct the program in accordance with the requirements of Title IV of SMCRA. Texas provided a copy of the March 20, 1980, legal opinion from the State Assistant Attorney General indicating that the Railroad Commission is the designated agency with the authority to conduct the AML Program in accordance with all requirements of SMCRA Title IV. Texas has incorporated the Assistant Attorney General's letter in the Texas Plan as required under 30 CFR 884.13(a)(2). The 1980 legal opinion remains current, and there have not been any State constitutional or statutory developments that would impair the ability of the Railroad Commission to conduct its AML Program in accordance with the requirements of Title IV of the Act. Federal regulations at 30 CFR 884.13(a)(3) require a description of the policies and procedures of the State agency, including the purposes of the State AML Program. The Texas Plan includes a Policies and Procedures section that provides succinct descriptions of, and legal citations for, the purposes of its AML Program consistent with 30 CFR 884.13(a)(3).

Under 30 CFR 884.13(a)(3)(ii), a State Reclamation Plan must include the ''specific criteria, consistent with section 403 of the Act for ranking and identifying projects to be funded. . . .'' Section 403 of SMCRA provides that expenditures must reflect certain priorities except as provided for under section 411 of SMCRA. Section 411(c) of SMCRA provides that expenditures of moneys according to Section 411(b) of SMCRA must reflect the objectives and priorities of Section 411(c) in lieu of the priorities set forth in section 403. OSMRE's implementing regulations at 30 CFR 874.13 and 875.15 respectively list the priorities for coal and noncoal AML reclamation programs.

In our Part 884 letter, we advised Texas that certified States must comply with Parts 874 and 875 to maintain certification status. We further advised that the 2006 SMCRA amendments revised the reclamation priorities in section 403 by removing ''general welfare'' from Priorities 1 and 2, including an ''adjacent to'' provision in Priorities 1 and 2, and deleting Priorities 4 and 5.

The revised Texas Plan includes a section entitled ''Ranking and Selecting Sites'' that states that Texas will use the priority system as outlined in 30 CFR parts 874 or 875 and operate noncoal reclamation projects under 30 CFR part 875. The Plan also includes the prioritization matrix Texas uses to assess and prioritize potential project areas for reclamation. This section is consistent with the Plan content requirements of 30 CFR 884.13(a)(3)(ii), which requires specific criteria, consistent with SMCRA, for ranking and identifying projects to be funded; 30 CFR parts 874 and 875, which list priorities; and the direction in our Part 884 letter.

Reclamation projects will not be undertaken without first receiving an Authorization to Proceed from OSMRE. This is in accordance with section 405(l) of SMCRA and consistent with 30 CFR 874.15 and 875.19, which provide limited liability coverage to certified State coal and noncoal reclamation activities, unless the costs or damages were the result of gross negligence or intentional misconduct. The requirement to receive written authorization from OSMRE before the expenditure of construction funds on an individual project is documented as a grant condition under 30 CFR 885.16(e).

Under 30 CFR 844.13(a)(3)(iii), a State Reclamation Plan must include policies and procedures for ''coordination of reclamation work among the State reclamation program, the Rural Abandoned Mine Program administered by the Soil Conservation Service, the reclamation programs of any Indian tribes located within the States, and [OSMRE's] reclamation programs . . .'' The revised Texas Plan includes a section entitled ''Interagency Coordination'' that indicates that the State will coordinate with other agencies and offices including the Natural Resources Conservation Service and OSMRE, as required, as well as multiple other State and Federal entities. By indicating it will coordinate and work with all required agencies, Texas's proposed section is consistent with the requirements of 30 CFR 884.13(a)(3)(iii).

Under 30 CFR 884.13(a)(3)(iv), a State Reclamation Plan must include policies and procedures about land acquisition, management, and disposal under 30 CFR part 879. In our Part 884 letter, we notified Texas that it ''must comply with [30 CFR part 879] when expending funds awarded after October 1, 2007 . . .'' We further noted that all ''moneys received from the sale of property acquired under [section 407 of SMCRA] is disposed of as if it were unused funds under 30 CFR 886.20 . . .'' The revised Texas Plan includes a section entitled ''Land Acquisition, Management and Disposal'' that states that ''acquisition, management, and disposal of abandoned mine(s) land shall be in accordance with applicable provisions of 30 CFR part 879 and Texas Natural Resources Code Chapter 134 [(Texas Surface Coal Mining and Reclamation Act (TSCMARA))].'' By committing to act in accordance with 30 CFR part 879, Texas has taken action to address this issue on a plan level. *See* 30 CFR 879.15(h) (''You must return all moneys received from disposal of land under this part to us. We will handle all moneys received under this paragraph as unused funds in accordance with §§ 885.19 and 886.20 of this chapter.'').

Under 30 CFR 884.13(a)(3)(v), a State Reclamation Plan must include policies and procedures about reclamation on private land in accordance with 30 CFR part 882. The revised Texas Plan includes a section entitled ''Reclamation on Private Land'' that indicates that the State will carry out reclamation activities on private lands in accordance with 30 CFR part 882 and the provisions in Texas Natural Resources Code Chapter 134 about reclamation work on private land. This section of the Texas Plan provides the State's policies and procedures for reclamation on private lands and is therefore consistent with the State Reclamation Plan content requirements of 30 CFR 884.13(a)(3)(v). Furthermore, by committing to act in accordance with 30 CFR part 882 and the previously approved provisions of TSCMARA, Texas's proposal meets the requirements of Federal regulations.

Before the 2006 amendments to SMCRA, 30 U.S.C. 1238(a) provided that, ''[n]o lien shall be filed against the property of any person, in accordance with this subsection, who owned the surface prior to May 2, 1977, and who neither consented to nor participated in nor exercised control over the mining operation which necessitated the reclamation performed hereunder.'' In the 2006 amendments to SMCRA, the May 2, 1977, limitation was deleted. In our Part 884 letter, we notified Texas that this language was removed. Texas removed this language from State statute in June 2007, and the Texas Plan does not include the former language.

Under 30 CFR 884.13(a)(3)(vi), a State Reclamation Plan must include policies and procedures about rights of entry under 30 CFR part 877. Our Part 884 letter did not note any necessary changes to policies and procedures about rights of entry. The Texas Plan includes a section entitled ''Rights of Entry'' that indicates that the State will take all reasonable actions to obtain written voluntary permission from a landowner before conducting reclamation activities. The Texas Plan further outlines the authority under the provisions in Chapter 134 of TSCMARA and the conditions under which the State can execute reclamation activities if the landowner will not provide consent. This section of the Texas Plan is consistent with the State Reclamation Plan content requirements of 30 CFR 884.13(a)(3)(vi). Furthermore, the State's policies and procedures about rights of entry are consistent with 30 CFR part 877.

Under 30 CFR 884.13(a)(3)(vii), a State Reclamation Plan must include policies and procedures for public participation and involvement in the preparation of the State Reclamation Plan and in the State reclamation program. The revised Texas Plan does not meet this requirement. It states only that the Commission must conform to the Texas Administrative Procedure Act when it issues or amends rules, or issues permits under TSCMARA and allows opportunity for public comment on adoption or amendment of rules. The general citations in the revised Texas Plan to the Texas Administrative Procedure Act relate to rulemaking and permit issuance and do not clearly provide procedures for participation and involvement in the preparation of the Texas Plan or in activities under the State reclamation program. Therefore, we are not approving this portion of the amendment. Texas may continue to rely

on the public participation procedures established in its existing plan or, if desired, propose a new amendment to its public participation policies and procedures that also meets the requirements of 30 CFR 884.13(a)(3)(vii).

As discussed above, the revised Texas Plan includes sections responding to the requirements of 30 CFR 884.13(a)(3)(i) through (vii). These sections provide updated descriptions of the State's policies and procedures for conducting its AML Program including: the purposes of the AML Program; specific criteria for ranking and identifying projects to be funded; coordination of reclamation work between the State and all applicable State and Federal agencies; land acquisition; reclamation on private land; and right of entry. The revised Texas Plan, with the exception discussed above, is consistent with the State Reclamation Plan content requirements of 30 CFR 884.13(a)(3).

Federal regulations at 30 CFR 884.13(a)(4)(i) require a description of the designated agency's organization and relationship to other State entities that may participate in or augment the State's AML reclamation abilities. The Texas Plan includes a section entitled ''884.13 Administrative Framework, 884.13(a)(4)(i) Commission Structure and Relationships,'' that provides an organizational chart depicting the Railroad Commission of Texas, Surface Mining & Reclamation Division, and the Abandoned Mine Land and Reclamation Program's place within it.

Federal regulations at 30 CFR 884.13(a)(4)(ii) require a description of the personnel staffing policies that will govern assignments within the AML Program. The revised Texas Plan includes a section entitled ''Staffing and Personnel Policies'' that provides the information required under 30 CFR 884.13(a)(4)(ii).

Federal regulations at 30 CFR 884.13(a)(4)(iii) require State purchasing and procurement systems to meet the requirements of Office of Management and Budget Circular A–102, Attachment 0, relating to ''Grants and Cooperative Agreements with State and Local Governments.'' Federal grantmaking agencies were previously required to issue a grants management common rule to adopt governmentwide terms and conditions for grants to States and local governments. As a result, we notified Texas in our Part 884 letter that the attachments to Circular A–102, including Attachment 0 referenced in 30 CFR 884.13(a)(4)(iii), have been replaced by the grants management common rule at 2 CFR part 200. The Federal regulations have not yet been updated to reflect this change; however, it is reflected in the revised Texas Plan under the section entitled ''Purchasing and Procurement,'' which indicates its purchasing and procurement policies are consistent with 2 CFR part 200. Additionally, Texas revised its plan to acknowledge, effective September 1, 2019, that the Railroad Commission has delegated authority to enter in all purchasing functions related to procurement under TSCMARA. This section provides descriptions of purchasing and procurement systems consistent with the requirements of 30 CFR 884.13(a)(4)(iii).

Federal regulations at 30 CFR 884.13(a)(4)(iv) require a description of the accounting system to be used by the agency including specific procedures for operation of the State AML Fund. The revised Texas Plan includes a section entitled ''Accounting System'' that describes the Centralized Accounting and Payroll/Personnel System uniform statewide accounting system. Referenced Texas Government Code Title 10 Subtitle C provides the State accounting and auditing procedures. As a condition of its annual grant (and consistent with the obligations outlined in the previous paragraph), Texas is required to comply with all the conditions of 2 CFR part 200, which addresses administrative requirements, cost principles, and audit requirements for Federal awards.

As discussed above, the revised Texas Plan includes four sections providing revised descriptions of the State's administrative and management structure, staffing and personnel Policies, purchasing and procurement; and accounting system. By providing all required descriptions of the administrative and management structure of the State AML agency, the revised Texas Plan is consistent with all State Reclamation Plan content requirements under 30 CFR 884.13(a)(4).

Under 30 CFR 884.13(a)(5), a State Reclamation Plan must include a general description, derived from available data, of the reclamation activities to be conducted under the State Reclamation Plan. The revised Texas Plan includes a section entitled ''Description of Reclamation Activities.'' Texas provided general descriptions derived from available data of the reclamation activities to be conducted under the State Reclamation Plan including: a map showing the general location of known or suspected eligible lands and waters; a description of the problems occurring on those lands and waters; and how the Texas Plan proposes to address each of the problems. Because Texas is certified, the State has already completed reclamation of all known high priority coal hazards. Individual project approval and funding are appropriately handled through the Authorization to Proceed process under 30 CFR 885.16(e). The revised Texas Plan sections entitled ''Description of Reclamation Activities,'' ''Map of Eligible Reclamation Locations,'' ''Description of Problems,'' and ''How Reclamation Activities Address Problems'' are consistent with the State Reclamation Plan content requirements of 30 CFR 884.13(a)(5) in providing general descriptions of reclamation activities to be conducted, including maps, descriptions of AML problems, and descriptions of hazard abatement strategies.

Under 30 CFR 884.13(a)(6), a State Reclamation Plan must include a general description, derived from available data, of the conditions prevailing in the different geographic areas of the State where reclamation is planned. The revised Texas Plan includes sections entitled: ''Conditions in Geographic Areas''; ''Economic Base''; ''Significant Esthetic, Historic or Cultural, and Recreational Values''; and ''Endangered and Threatened Plant, Fish, and Wildlife and Their Habitat'' that provide general descriptions on each subject derived from available data on the conditions prevailing in the areas of the State where reclamation may occur. The revised Texas Plan provides descriptions of the prevailing conditions consistent with the requirements of 30 CFR 884.13(a)(6).

Under 30 CFR 884.13(b), a certified State Reclamation Plan must include a commitment to address eligible coal problems found or occurring after certification. In our Part 884 letter, we reiterated this requirement. The revised Texas Plan includes a section entitled ''Commitment to Address Eligible Coal Problems'' that provides a commitment to address all eligible coal problems found or occurring after certification as required under 30 CFR 875.13(a)(3) and 875.14(b). Texas has indicated it will prioritize coal hazards over noncoal. As a condition of certification on May 21, 1992 (57 FR 21640), Texas agreed: ''If a coal problem occurs or is identified sometime in the future, Texas must seek immediate funding for reclaiming the coal-related problem. In the event of concurrence with certification by the Secretary, Texas has agreed to this condition.'' In section 884.13(a)(3)(ii) of the amendment, Texas commits to compliance with the priority systems outlined in 30 CFR part 874 or 30 CFR part 875. By committing to give priority to addressing eligible coal problems found or occurring after certification as

required in 30 CFR 875.13(a)(3) and 875.14(b), the revised Texas Plan is consistent with the State Reclamation Plan content requirements of 30 CFR 884.13(b).

In our Part 884 letter, we notified Texas that the State Reclamation Plan for a certified State may provide for construction of specific public facilities related to coal or minerals development in accordance with 30 CFR 884.17. Texas declined to include this provision.

In our Part 884 letter, we notified Texas that ''[c]ertified States . . . are covered by the limited liability provision when they are performing'' coal reclamation and certain noncoal reclamation. As background, in 2015, we issued the rule *Abandoned Mine Land Reclamation Program; Limited Liability for Noncoal Reclamation by Certified States and Indian Tribes,* 80 FR 6435 (Feb. 5, 2015). The rule gave certified states two options for conducting noncoal reclamation projects. First, a certified State could expend its prior balance replacement funds and certified in lieu funds on projects outside the scope of a SMCRA noncoal AML reclamation program but without limited liability protection. Second, a certified State can receive limited liability protection if it voluntarily uses its prior balance replacement funds and certified in lieu funds to conduct noncoal reclamation projects pursuant to a SMCRA noncoal AML reclamation program under the provisions of section 411(b)–(g) of SMCRA, 30 CFR part 875, and other applicable regulations. The rule placed additional administrative requirements on States that voluntarily choose to conduct noncoal reclamation projects under the second option because OSMRE must verify that such projects meet applicable statutory and regulatory requirements. 80 FR at 6438–39. The Texas Plan states that noncoal reclamation projects will be operated under 30 CFR part 875 to receive the limited liability protections of SMCRA. Additionally, as discussed in more detail below, Texas retains previously approved regulatory language corresponding to the Federal statutory and regulatory limited liability provisions.

In the 2015 rule, we revised Part 875 to ''set forth the procedures that certified states must follow if they voluntarily choose to use their Title IV funding for noncoal reclamation projects under Part 875 . . . pursuant to an approved SMCRA noncoal AML reclamation plan.'' 80 FR at 6439. Those procedures included the contractor eligibility requirements set forth in 30 CFR 875.20. In our Part 884 letter, citing section 405(l) of SMCRA and 30 CFR 875.20, we notified Texas that a certified State must comply with contractor eligibility requirements when they are voluntarily conducting noncoal reclamation. Texas's existing regulation at 16 Texas Administrative Code (TAC) section 12.807 requires every successful bidder for an AML contract to be eligible under section 12.215 (Review of Permit Applications) at the time of contract award to receive a permit or conditional permit and requires that bidder eligibility be confirmed by OSMRE's Applicant/Violator System for each contract to be awarded. Accordingly, Texas's program meets the contractor eligibility requirements set forth in 30 CFR 875.20 and our Part 884 letter.

Thus, we find that the revised Texas Plan, with the one exception noted above, meets all content requirements stipulated under 30 CFR 884.13 while also updating the State Reclamation Plan and regulations consistent with changes made to the Federal program in 2006, 2008, and 2015. The revised Texas Plan, therefore, meets the requirements of OSMRE's March 6, 2019, letter, and we approve it.

B. Revisions to Texas's AML Regulations

Texas proposes amendments to regulations governing its AML program at 16 TAC sections 12.801–12.809, 12.811, 12.812, 12.814–12.816, and 12.818–12.823. Generally, the changes align Railroad Commission rules with SMCRA and the corresponding Federal regulations.

Non-substantive changes can be found in sections 16 TAC sections 12.801, 12.802, 12.806, 12.807, 12.809, 12.811, 12.812, 12.814, 12.816, 12.818, 12.820, 12.821, and 12.822. These changes define terms used throughout the regulations, capitalize ''Commission,'' correct rule citations and cross-references, and clarify existing language. These changes have no substantive impact on the effectiveness of the regulation.

Texas proposes to amend 16 TAC section12.803(a)(3) to add ''or any prior balance replacement funds may be used.'' to the end of the paragraph. This allows Texas to use prior balance replacement funds where a forfeited bond is not sufficient to pay the cost of reclamation. This is consistent with 30 CFR 874.12.

Texas's previously approved regulations at 16 TAC section 12.804 state that reclamation project expenditures ''shall reflect the priorities of Section 403(a) of the Federal Act.'' In our Part 884 letter, we notified Texas that the 2006 amendments to SMCRA removed the phrase ''general welfare'' from Priorities 1 and 2; added an ''adjacent to'' provision to Priorities 1 and 2, defining that term as ''geographically contiguous''; and eliminated Priorities 4 and 5. In response, Texas proposes to amend 16 TAC section 12.804 to state that projects shall reflect the priorities of Section 403(a) ''in the order stated'' and list the priorities from 30 CFR 874.13(a) in the text of 16 TAC section 12.804. Texas also proposes to provide an updated reference to OSMRE's ''Final Guidelines for Reclamation Programs and Projects.'' The amended language of 16 TAC section 12.804 is in accordance with section 403(a) of SMCRA, consistent with 30 CFR 874.13(a), and meets the requirements of our Part 884 letter.

In our Part 884 letter, we further notified Texas that stand-alone Priority 3 reclamation is restricted to projects using prior balance replacement funds, projects undertaken after the completion of Priority 1 and 2 sites, and projects completed ''in conjunction with'' Priority 1 or 2 reclamation projects. We noted that projects ''in conjunction with'' Priority 1 and 2 projects must either facilitate Priority 1 or 2 reclamation or provide reasonable savings toward reclaiming all Priority 3 coal problems. Texas is retaining previously approved language in 16 TAC § 12.804(c) that addresses these aspects of our Part 884 letter.

The 2006 amendments removed section 403(a)(4) of SMCRA. In 2008, we amended 30 CFR 874.14 to change the section heading and revise paragraph (a) related to water supply restoration. In response, Texas proposes to amend 16 TAC § 12.805 to match the 2008 revision to the Federal regulation. The revised language is consistent with 30 CFR 874.14.

As discussed in the Texas Plan section above, in our Part 884 letter, we notified Texas that its State Reclamation Plan must include a commitment to address eligible coal problems found after certification as required in 30 CFR 875.13(a)(3) and 875.14(b). Previously, 16 TAC section 12.808 stated that if eligible coal problems were found or occurred after certification, Texas would ''address the coal problem utilizing state share funds no later than the next grant cycle, subject to the availability of funds distributed to the commission in the cycle.'' As amended, 16 TAC section 12.808 states that Texas will ''submit to OSMRE a plan that describes the approach and funds that will be used to address those problems in a timely manner.'' The amended language is in accordance with the statute, consistent

with the requirements of 30 CFR 875.14(b), and meets the requirements of our Part 884 letter.

Unrelated to our Part 884 letter, Texas amended the appraisal valuation method in 16 TAC section 12.815 to add: ''The appraisal shall state the estimated fair market value of the land as adversely affected by past mining and the estimated fair market value of the property as reclaimed.'' This edit is consistent with the Federal counterpart at 30 CFR 882.12.

Previously, 16 TAC section 12.819(a)(2)(C) stated that Texas could acquire coal refuse disposal sites if it made certain written findings, including a finding that acquisition of coal refuse disposal sites and the coal refuse on those sites would serve the purposes of Texas's program. The regulation at 16 TAC section 12.819 also provided that OSMRE must approve acquisitions in advance. The Federal regulation at 30 CFR 879.11(b), as amended, states that a certified State conducting noncoal reclamation projects under Part 875, if approved in advance, may acquire coal refuse disposal sites with moneys from the Abandoned Mine Reclamation Fund and with prior balance replacement funds and certified in lieu funds. Texas proposes to remove the discussion of coal refuse disposal sites from 16 TAC section 12.819(a)(2)(C) and add a new paragraph § 12.819(c) that is identical to the language of 30 CFR 879.11(b). The proposed amendment is consistent with the Federal counterpart at 30 CFR 879.11.

Previously, 16 TAC section 12.823(f) stated that all moneys received from disposal of land would be deposited in the Texas Abandoned Mine Reclamation Fund. In our Part 884 letter, we notified Texas that all ''moneys received from the sale of property acquired under [section 407 of SMCRA] is disposed of as if it were unused funds under 30 CFR 886.20 . . .'' In response, Texas proposes to amend 16 TAC section 12.823(f) to state that all moneys received will be returned to OSMRE. The proposed amendment is consistent with the Federal counterpart at 30 CFR 879.15.

We find that the proposed regulations are in accordance with SMCRA and consistent with Federal regulation. Therefore, we approve the amendments.

IV. Summary and Disposition of Comments

Public Comments

During our public comment period on the amendments, we received two anonymous public comments and one named comment. One anonymous comment expressed the recommendation that the state of Texas be held liable for all the extractive industry damage not covered by the entity responsible for the damage and cleanup. We did not take any action based on this comment as it was outside the scope of this review. The other anonymous comment and the named comment did not contain any substantive feedback on the proposed rule.

None of the comments asked for any changes to the Texas Plan or regulations, and no further action by us is required. These comments are available in their entirety at *www.regulations.gov.*

Federal Agency Comments

Pursuant to 30 CFR 884.15(a) and 884.14(a)(2), on December 11, 2019, OSMRE solicited comments on the proposed amendments from various Federal agencies with an actual or potential interest in the Texas Plan (Administrative Record No. TX–0708.01). We did not receive any comments.

Environmental Protection Agency (EPA) Concurrence and Comments

OSMRE solicited EPA's comments on the proposed amendments (Administrative Record No. TX–0708.01) on December 11, 2019. The EPA did not respond to our request.

State Historical Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)

OSMRE solicited comments on the proposed amendments from the SHPO (Administrative Record No. TX–0708.01) and ACHP (Administrative Record No. TX–0708) on December 11, 2019. Neither responded to our request.

V. OSMRE's Decision

Based on the above findings, we are approving Texas's AML Plan and Reclamation Program amendments that were submitted on December 3, 2019 (Administrative Record No. TX–0708), with the exception described above.

To implement this decision, we are amending the Federal regulations at 30 CFR part 943, which codify decisions concerning the Texas Plan. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the date of publication.

VI. Procedural Determinations

Executive Order 12630—Governmental Actions and Interference With Constitutionally Protected Property Rights

This rule would not affect a taking of private property or otherwise have taking implications that would result in public property being taken for government use without just compensation under the law. Therefore, a takings implication assessment is not required. This determination is based on an analysis of the corresponding Federal regulations.

Executive Orders 12866—Regulatory Planning and Review and 13563—Improving Regulation and Regulatory Review

Executive Order (E.O.) 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program amendments is exempted from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has reviewed this rule as required by Section 3(a) of Executive Order 12988. The Department has determined that this **Federal Register** notice meets the criteria of Section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and regulations to minimize litigation, and that the agency's legislation and regulations provide a clear legal standard for affected conduct, rather than a general standard, and promote simplification and burden reduction. Because Section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive Order to the quality of this **Federal Register** notice and to changes to the Federal regulations. The review under this Executive Order did not extend to the language of the Texas Plan or to the Plan amendment that the State of Texas submitted.

Executive Order 13132—Federalism

This rule is not a ''[p]olicy that [has] Federalism implications'' as defined by Section 1(a) of Executive Order 13132 because it does 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.'' Instead, this rule approves an amendment to the Texas Plan submitted and drafted by that State. OSMRE reviewed the submission with fundamental federalism principles in mind as set forth in Section 2 and 3 of the Executive Order and with the principles of cooperative federalism as set forth in SMCRA. *See, e.g.,* 30 U.S.C. 1201(f). As such, pursuant to the provisions in section 503(a)(1) and (7) (30 U.S.C. 1253(a)(1) and (7)), OSMRE reviewed the revised Texas Plan to ensure that it is ''in accordance with'' the requirements of SMCRA and ''consistent with'' the regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Tribes or on the distribution of power and responsibilities between the Federal government and Tribes. Therefore, consultation under the Department's Tribal consultation policy is not required. The basis for this determination is that our decision is on the Texas program, which does not include Indian lands or regulation of activities on Indian lands. AML reclamation on Indian lands is regulated independently under the applicable, approved Federal program or a Tribal AML program.

Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rulemaking that is (1) considered significant under Executive Order 12866, as amended by E.O. 14094, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not significant energy action under the definition in Executive Order 13211, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. We are not required to provide a detailed statement under the National Environmental Policy Act of 1969 because this rule qualifies for a categorical exclusion under the U.S. Department of the Interior Departmental Manual, part 516, section 13.5(B)(29).

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA; 15 U.S.C. 3701 *et seq.*) directs OSMRE to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. OMB Circular A–119 at p. 14. This action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA.

Paperwork Reduction Act

This rule does not include requests and requirements of an individual, partnership, or corporation to obtain information and report it to a Federal agency. As this rule does not contain information collection requirements, a submission to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

Regulatory Flexibility Act

This rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to impose an unfunded mandate. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

List of Subjects in 30 CFR Part 943

Intergovernmental relations, Surface mining, Underground mining.

William L. Joseph,

Acting Regional Director, OSMRE IR 3, 4 and 6.

For the reasons set out in the preamble, 30 CFR part 943 is amended as follows:

PART 943—TEXAS

■ 1. The authority citation for part 943 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 943.25 is amended in the table by adding an entry for ''December 3, 2019'' at the end of the table to read as follows:

§ 943.25 Approval of Texas abandoned mine land reclamation plan amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * * * *
December 3, 2019	September 20, 2023	Replace AML Plan in response to OSMRE 884 Letter. Updates AML Plan to be consistent with changes to Federal program and extends limited liability protection for certain coal and noncoal reclamation projects. 16 TAC Texas Administrative Code Sections: 12.801; 12.802; 12.803; 12.804; 12.805; 12.806; 12.807; 12.808; 12.809; 12.811; 12.812; 12.814; 12.815; 12.815; 12.816; 12.818; 12.819; 12.820; 12.821; 12.822; 12.823.

[FR Doc. 2023–20018 Filed 9–19–23; 8:45 am]
BILLING CODE 4310–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0004]

RIN 1625–AA00

Safety Zone; Pacific Ocean; Santa Catalina Island, California

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

ACTION: Temporary final rule.

SUMMARY: The U.S. Coast Guard is establishing a temporary safety zone for the navigable waters in the Pacific Ocean on the East end of Santa Catalina Island, California. This safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by ongoing recovery operations relating to the grounding of the 62-foot F/V PACIFIC KNIGHT. Entry of persons or vessels into this safety zone is prohibited unless specifically authorized by the Captain of the Port Los Angeles-Long Beach, or his designated representative.

DATES: This rule is effective without actual notice from September 20, 2023, through September 22, 2023. For the purposes of enforcement, actual notice will be used from September 15, 2022, through September 20, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0004 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email LCDR Kevin Kinsella, Waterways Management Division, U.S. Coast Guard Sector Los Angeles-Long Beach; telephone (310) 467–2099, email *D11-SMB-SectorLALB-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Los Angeles-Long Beach
DHS Department of Homeland Security
E.O. Executive order
FR Federal Register
NPRM Notice of proposed rulemaking
Pub. L. Public Law
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because this is an emergency response to a vessel grounding that occurred today, and immediate action is needed to respond to potential safety hazards associated with the emergency recovery operations. It is impracticable to publish an NPRM because we must establish this safety zone by September 15, 2023.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to public interest because immediate action is needed to ensure the safety of persons, vessels, and the marine environment in the vicinity of the East end of Santa Catalina Island during emergency recovery operations.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Los Angeles-Long Beach (COTP) has determined that potential hazards associated with emergency recovery operations starting September 15, 2023, will be a safety concern for anyone within a 300-yard radius of the grounded fishing vessel in the vicinity of the East end of Santa Catalina Island. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while recovery operations take place.

IV. Discussion of the Rule

This rule establishes a safety zone from September 15, 2023, until September 22, 2023. The safety zone will cover all navigable waters from the surface to the sea floor in and around the Pacific Ocean at the East end of Santa Catalina Island from the vessel's location at 33°18.923′ N, 118°21.985′ W and extending out along a 300-yard radius from that point. These coordinates are based on North American Datum of 1983. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or his designated representative. Sector Los Angeles-Long Beach may be contacted on VHF–FM Channel 16 or (310) 521–3801. The marine public will be notified of the safety zone via Broadcast Notice to Mariners.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory

approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. Vessel traffic will be able to safely transit around this safety zone, which will impact a small, designated area of the Pacific Ocean in the vicinity of the East end of Santa Catalina Island, CA. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 regarding the safety zone and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone encompassing an area extending 300-yards out from a grounded vessel in vicinity of the East end of Santa Catalina Island and will last only 7 days while recovery operations are ongoing. It is categorically excluded from further review under paragraph L60(c), in Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T11–130 to read as follows:

§ 165.T11–130 Safety Zone; Pacific Ocean; Santa Catalina Island, California.

(a) *Location.* The following area is a safety zone: All navigable waters from the surface to the sea floor in and around in the Pacific Ocean at the East end of Santa Catalina Island from the vessel's location at 33°18.923′ N, 118°21.985′ W and extending out along a 300-yard radius from that point. These coordinates are based on North American Datum of 1983.

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

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of

this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by hailing Coast Guard Sector Los Angeles-Long Beach on VHF–FM Channel 16 or calling at (310) 521–3801. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from September 15, 2023, through September 22, 2023. The marine public will be notified of this safety zone via Broadcast Notice to Mariners. If the COTP determines that the zone need not be enforced during this entire period, the Coast Guard will announce via Broadcast Notice to Mariners when the zone will no longer be subject to enforcement.

R.D. Manning,

Captain, U.S. Coast Guard, Captain of the Port Los Angeles-Long Beach.

[FR Doc. 2023–20443 Filed 9–18–23; 11:15 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2022–0832; FRL–11393–01–OCSPP]

Flonicamid; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of flonicamid in or on multiple crops listed later in this document. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 20, 2023. Objections and requests for hearings must be received on or before November 20, 2023, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2022–0832, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The 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 and the OPP Docket is (202) 566–1744. Please review the visitor instructions and additional information about the docket available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Director, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Office of the Federal Register e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2022–0832 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before November 20, 2023. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2022–0832, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerances

In the **Federal Register** of January 3, 2023 (88 FR 38) (FRL–9410–08–OCSPP), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 2E9000) by IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of flonicamid in or on the raw agricultural commodities: Bushberry crop subgroup 13–07B at 1.5 ppm; Caneberry crop subgroup 13–07A at 3 ppm; Cherry subgroup 12–12A at 0.6 ppm; Corn, sweet, kernel plus cob with husks removed at 0.4 ppm; Corn, sweet, forage at 9 ppm; Corn, sweet, stover at 20 ppm; Peach crop subgroup 12–12B at 1.5 ppm; Plum subgroup 12–12C at 0.6 ppm; Pomegranate at 0.5 ppm; Prickly pear, fruit at 2 ppm; Prickly pear, pads at 3 ppm; Edible podded bean subgroup 6–22A and Edible podded pea subgroup 6–22B at 4 ppm; Succulent shelled bean subgroup 6–22C and Succulent shelled

pea subgroup 6–22D at 7 ppm; and Pulses, dried shelled bean (except soybean) subgroup 6–22E and Pulses, dried shelled pea subgroup 6–22F at 3 ppm.

The petition also requested to remove the following established flonicamid tolerances: Fruit, stone group 12–12, at 0.6 ppm; Pea and bean, dried shelled, except soybean, subgroup 6C at 3.0 ppm; Pea and bean, succulent shelled, subgroup 6B at 7.0 ppm; and Vegetable, legume, edible podded, subgroup 6A at 4.0 ppm.

That document referenced a summary of the petition, which is available in the docket, *https://www.regulations.gov.* No comments on the tolerance action were received.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified therein, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for flonicamid including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with flonicamid follows.

In an effort to streamline its publications in the **Federal Register**, EPA is not reprinting sections that repeat what has been previously published for tolerance rulemakings for the same pesticide chemical. Where scientific information concerning a particular chemical remains unchanged, the content of those sections would not vary between tolerance rulemakings, and EPA considers referral back to those sections as sufficient to provide an explanation of the information EPA considered in making its safety determination for the new rulemaking.

EPA has previously published tolerance rulemakings as well as a Flonicamid Interim Registration Decision for Registration Review for flonicamid in which EPA concluded, based on the available information, that there is a reasonable certainty that no harm would result from aggregate exposure to flonicamid and established tolerances for residues of that chemical. EPA is incorporating previously published sections from these rulemakings as described further in this rulemaking, as they remain unchanged.

Toxicological profile. The kidney and liver effects are seen via the oral route in rats and dogs. Increased kidney weight and hyaline droplet deposition as well as liver centrilobular hypertrophy were observed in the subchronic, developmental, and reproductive studies in rats. The subchronic dog study showed effects on kidney adrenals and thymus. No dermal or systemic toxicity was seen in the 28-day dermal study at the limit dose (1,000 mg/kg/day). There is no concern for increased susceptibility of developing young or for neurotoxicity or immunotoxicity for flonicamid. Flonicamid is classified by the Agency as ''suggestive evidence of carcinogenicity, but not sufficient to assess human carcinogenic potential.'' The chronic reference dose (cRfD) approach was used as a quantitation method for cancer risk.

Toxicological points of departure/ Levels of concern. For a full summary of the Toxicological points of departure/ Levels of concern for flonicamid used for human risk assessment, see ''Flonicamid. Human Health Risk Assessment for the Proposed New Uses and Tolerance Establishment in/on Bushberry Subgroup 13–07B, Caneberry Subgroup 13–07A, Cherry Subgroup 12A, Peach Subgroup 12–12B, Plum Subgroup 12C, Pomegranate, Prickly Pear Cactus, Sweet Corn, and Crop Group Conversions/Expansions for Legume Vegetables New Crop Group 6–22A–F'' (hereafter the Flonicamid Human Health Review) in docket EPA–HQ–OPP–2022–0832 and the ''Flonicamid: Human Health Draft Risk Assessment for Registration Review'' by going to docket ID number EPA–HQ–OPP–2014–0777 at *https://www.regulations.gov*.

Exposure assessment. EPA's dietary exposure assessments have been updated since the previous published rules as well as Registration Review to include the additional exposure from the requested tolerances for residues of flonicamid and were conducted with Dietary Exposure Evaluation Model software using the Food Commodity Intake Database (DEEM–FCID) Version 4.02, which uses the 2005–2010 food consumption data from the United States Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). A slightly refined chronic dietary exposure assessment was conducted for all proposed and registered uses of flonicamid. The analysis assumed tolerance level residues for all commodities. Separate tolerances have been established for potato granules/flakes, tomato paste, and tomato puree based on processing studies. The processing factors were set to 1.0 for these commodities. Percent crop treated (PCT) estimates were incorporated where available. Default processing factors were used for the other processed commodities for which default processing factors are available.

Anticipated residues and PCT information. EPA has not relied on anticipated residues in assessing exposures to flonicamid. Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- *Condition a:* The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition b:* The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition c:* Data are available on pesticide use and food consumption in a particular area, and the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The following average PCT estimates were used in the chronic dietary risk assessment for the following crops that are currently registered for flonicamid: celery, 65%; potatoes, 15%; spinach, 20%; and strawberries, 55%.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and California Department of Pesticide Regulation (CalDPR) Pesticide Use

Reporting (PUR) for the chemical/crop combination for the most recent 10 years. EPA uses an average PCT for chronic dietary risk analysis and a maximum PCT for acute dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than 1% or less than 2.5%. In those cases, the Agency would use 1% or 2.5% as the average PCT value, respectively. The maximum PCT figure is the highest observed maximum value reported within the most recent 10 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%, except where the maximum PCT is less than 2.5%, in which case, the Agency uses 2.5% as the maximum PCT.

The Agency believes that Conditions a, b, and c discussed above have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which flonicamid may be applied in a particular area.

Drinking water and non-occupational exposures. The estimated drinking water concentrations have not changed since the 2018 rulemaking. For a detailed summary of the drinking water analysis for flonicamid used for the human health risk assessment, see Unit III.C.2. of the flonicamid tolerance rulemaking published in the **Federal Register** of July 23, 2018 (83 FR 34775) (FRL–9977–82).

There are no proposed residential uses at this time; however, there are existing residential uses that have been previously assessed using current data and assumptions. The residential uses for flonicamid include residential handler application to roses, flowers, shrubs, and small (non-fruit bearing) ornamental trees. Residential handler exposure is expected to be short-term in duration. Intermediate-term exposures are not likely because of the intermittent nature of applications by homeowners. Since no hazard was identified for the dermal route of exposure, dermal risks were not assessed, but the Agency did assess risks to residential handlers from inhalation exposure.

Residential post-application dermal and inhalation exposures for adults and children entering an environment previously treated with flonicamid are also possible; incidental oral exposures are not expected with the registered use patterns. Since no hazard was identified for the dermal route of exposure, dermal risks were not assessed. Outdoor post-application inhalation exposures are considered negligible. Therefore, residential post-application scenarios were not assessed at this time.

The recommended residential exposure for use in the adult aggregate assessment is inhalation exposure from applications to roses, flowers, shrubs, and small (non-fruit bearing) ornamental trees via backpack spray equipment.

Cumulative exposure. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to flonicamid and any other substances and flonicamid does not appear to produce a toxic metabolite produced by other substances. For the purposes of this action, therefore, EPA has not assumed that flonicamid has a common mechanism of toxicity with other substances.

Safety factor for infants and children. EPA concludes that there are reliable data to support the reduction of the Food Quality Protection Act (FQPA) safety factor from 10X to 1X.

The toxicity database is adequate for FQPA safety factor evaluation and the quantification of risk for dietary, non-occupational and occupational exposure scenarios. The acceptable studies available for evaluation of neurotoxicity and susceptibility include prenatal developmental toxicity studies in rats and rabbits; a reproduction and fertility effects study in rats; an acute neurotoxicity study in rats; and a subchronic neurotoxicity study in rats.

The current database includes acute and subchronic neurotoxicity studies. The clinical effects seen in these studies, while suggestive of an adverse effect on nervous tissue and/or function, occurred in the presence of other effects. In the acute study, the increase in mortality along with impaired respiration (seen only at the highest dose level of 1,000 mg/kg) suggest the animals were in an extreme condition. In the subchronic study, food consumption and body weight measurements suggest the animals were otherwise compromised and in a state of general malaise. Also, these types of clinical effects were not observed in the other subchronic or chronic studies in mice, rats or dogs. Thus, there is not clear evidence of neurotoxicity. Lastly, clear NOAELs and LOAELs were defined for these effects, which are above the levels currently used for risk assessment purposes. The current risk assessment is protective of these clinical effects, and a developmental neurotoxicity study is not required.

There was no evidence of increased susceptibility following pre-/post-natal exposure in prenatal developmental toxicity studies or the reproduction and fertility effects study.

The exposure databases are complete or are estimated based on data that reasonably account for potential exposures. The chronic dietary food exposure assessment was slightly refined based on PCT assumptions and conservative ground water drinking water modeling estimates. All of the exposure estimates are based on conservative assumptions and, the Agency is confident the risk is not under-estimated in these assessments.

Aggregate risks and determination of safety. EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing dietary (food and drinking water) exposure estimates to the acute population-adjusted dose (aPAD) and chronic population-adjusted dose (cPAD). Short- and intermediate-term risks are evaluated by comparing the estimated total food, water, and residential exposure to the appropriate points of departure to ensure that an adequate margin of exposure (MOE) exists.

No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected.

Therefore, flonicamid is not expected to pose an acute risk. Chronic dietary risks are below the Agency's level of concern of 100% of the cPAD; they are 97% of the cPAD for children 1 to 2 years old, the group with the highest exposure.

For short-term aggregate risk, adult residential handler exposure estimates are aggregated with adult dietary exposure estimates, which are considered background. The estimated aggregate MOE for adult handlers is 1,100 and is not of concern because it is higher than the level of concern of 100.

A cancer dietary assessment was not conducted as flonicamid has been determined to be ''suggestive evidence of carcinogenicity, but not sufficient to assess human carcinogenicity potential.'' The Agency has determined that quantification of risk using a non-linear approach (*i.e.,* using a chronic reference dose) adequately accounts for all chronic toxicity, including carcinogenicity that could result from exposure to flonicamid. As stated above, the chronic risks are not of concern.

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to flonicamid residues. More detailed information on this action can be found in the Flonicamid Human Health Review in docket ID EPA–HQ–OPP–2022–0832 and ''Flonicamid: Human Health Draft Risk Assessment for Registration Review'' in docket ID EPA–HQ–OPP–2014–0777.

IV. Other Considerations

A. Analytical Enforcement Methodology

For a discussion of the available analytical enforcement method, see Unit IV.A. of the July 23, 2018, rulemaking.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

The tolerance expression for plant and livestock commodities is not harmonized with Codex. Codex residues of concern are expressed as flonicamid only. There are no Codex established MRLs for bushberry subgroup 13–07B, caneberry subgroup 13–07A, sweet corn, pomegranate, or prickly pear. There are established Codex MRLs for nectarine and peach. The U.S. tolerance of 1.5 ppm being established for the peach subgroup is higher than the Codex MRLs of 0.7 ppm. Harmonization is not possible because decreasing the tolerance to harmonize would put U.S. growers at risk of violative residues despite legal use of the pesticide according to the label.

With respect to crop groups 6–22A–F, the U.S. tolerances and Codex MRLs are not harmonized. Most commodities have no established Codex MRL or the established Codex MRL is lower than the U.S. tolerances. Therefore, harmonization is not possible because decreasing the tolerance to harmonize would put U.S. growers at risk of violative residues despite legal use of the pesticide according to the label.

V. Conclusion

Therefore, tolerances are established for residues of flonicamid in or on Bushberry subgroup 13–07B at 1.5 ppm; Caneberry subgroup 13–07A at 3 ppm; Cherry subgroup 12–12A at 0.6 ppm; Corn, sweet, forage at 9 ppm; Corn, sweet, kernel plus cob with husks removed at 0.4 ppm; Corn, sweet, stover at 20 ppm; Peach subgroup 12–12B at 1.5 ppm; Plum subgroup 12–12C at 0.6 ppm; Pomegranate at 0.5 ppm; Prickly pear, fruit at 2 ppm; Prickly pear, pads at 3 ppm; Vegetable, legume, bean, edible podded, subgroup 6–22A at 4 ppm; Vegetable, legume, bean, succulent shelled, subgroup 6–22C at 7 ppm; Vegetable, legume, pea, edible podded, subgroup 6–22B at 4 ppm; Vegetable, legume, pea, succulent shelled, subgroup 6–22D at 7 ppm; Vegetable, legume, pulse, bean, dried shelled, except soybean, subgroup 6–22E at 3 ppm; and Vegetable, legume, pulse, pea, dried shelled, subgroup 6–22F at 3 ppm.

Additionally, the following existing tolerances are removed as unnecessary: Fruit, stone, group 12–12; Pea and bean, dried shelled, except soybean, subgroup 6C; Pea and bean, succulent shelled, subgroup 6B; and Vegetable, legume, edible podded, subgroup 6A.

VI. Statutory and Executive Order Reviews

This establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), or to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides, and pests, Reporting and recordkeeping requirements.

Dated: September 7, 2023.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter 1 as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.613, amend table 1 to paragraph (a)(1) by:

■ i. Adding in alphabetical order entries for ''Bushberry subgroup 13–07B''; ''Caneberry subgroup 13–07A''; ''Cherry subgroup 12–12A''; ''Corn, sweet, forage''; ''Corn, sweet, kernel plus cob with husks removed''; and ''Corn, sweet, stover''.

■ ii. Removing the entries for ''Fruit, stone, group 12–12''; ''Pea and bean, dried shelled, except soybean, subgroup 6C'' and ''Pea and bean, succulent shelled, subgroup 6B''.

■ iii. Adding in alphabetical order entries for ''Peach subgroup 12–12B''; ''Plum subgroup 12–12C''; ''Pomegranate''; ''Prickly pear, fruit''; and ''Prickly pear, pads''; ''Vegetable, legume, bean, edible podded, subgroup 6–22A''; and ''Vegetable, legume, bean, succulent shelled, subgroup 6–22C''.

■ iv. Removing the entry for ''Vegetable, legume, edible podded, subgroup 6A''.

■ v. Adding in alphabetical order entries for ''Vegetable, legume, pea, edible podded subgroup 6–22B''; ''Vegetable, legume, pea, succulent shelled, subgroup 6–22D''; ''Vegetable, legume, pulse, bean, dried shelled, except soybean, subgroup 6–22E''; and ''Vegetable, legume, pulse, pea, dried shelled, subgroup 6–22F''.

The additions read as follows:

§ 180.613 Flonicamid; tolerances for residues.

(a) * * *

(1) * * *

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
* * * * * * *	
Bushberry subgroup 13–07B	1.5
Caneberry subgroup 13–07A	3
* * * * * * *	
Cherry subgroup 12–12A	0.6
Corn, sweet, forage	9
Corn, sweet, kernel plus cob with husks removed	0.4
Corn, sweet, stover	20
* * * * * * *	
Peach subgroup 12–12B	1.5
* * * * * * *	
Plum subgroup 12–12C	0.6
Pomegranate	0.5
* * * * * * *	
Prickly pear, fruit	2
Prickly pear, pads	3
* * * * * * *	
Vegetable, legume, bean, edible podded, subgroup 6–22A	4
Vegetable, legume, bean, succulent shelled, subgroup 6–22C	7
Vegetable, legume, pea, edible podded, subgroup 6–22B	4
Vegetable, legume, pea, succulent shelled, subgroup 6–22D	7
Vegetable, legume, pulse, bean, dried shelled, except soybean, subgroup 6–22E	3
Vegetable, legume, pulse, pea, dried shelled, subgroup 6–22F	3
* * * * * * *	

* * * * *

[FR Doc. 2023–20273 Filed 9–19–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2023–0027; FXES1113090FEDR–234–FF09E22000]

RIN 1018–BA54

Endangered and Threatened Wildlife and Plants; Technical Corrections for Eight Species of Endangered and Threatened Fish and Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Direct final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), correct the information provided in the ''Where listed'' column of the List of Endangered and Threatened Wildlife (List) for eight species listed as endangered species under the Endangered Species Act of 1973, as amended (Act). Errors introduced into the List may be interpreted as indicating that only some populations of these species are listed. We are correcting the List to clarify that protections apply to these species wherever found.

DATES: This rule is effective December 19, 2023 without further action, unless significant adverse comment is received by October 20, 2023. If significant adverse comment is received, we will publish a timely withdrawal of the applicable portions of this rule in the **Federal Register**.

ADDRESSES: You may submit comments by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2023–0027, which is the docket number for this rulemaking. Then, click the Search button. In the Search panel on the left side of the screen, under the Document Type heading, click on the box next to Rule to locate this document. You may submit a comment by clicking on ''Comment.''
- *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2023–0027, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W); 5275 Leesburg Pike, Falls Church, VA 22041–3803.

See Public Comments under **SUPPLEMENTARY INFORMATION** for more information about submitting comments.

FOR FURTHER INFORMATION CONTACT: Elizabeth Maclin, Chief, Division of Restoration and Recovery, U.S. Fish and Wildlife Service, Ecological Services, MS:ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2646. 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 information on a particular species, contact the appropriate person listed in table 1 under **SUPPLEMENTARY INFORMATION**, below.

SUPPLEMENTARY INFORMATION:

Purpose of Direct Final Rule and Next Steps

The purpose of this direct final rule is to revise the List to reflect the correct geographical scope of the listing of eight endangered wildlife species under section 4 of the Act (16 U.S.C. 1531 *et seq.*). The List is set forth in title 50 of the Code of Federal Regulations (CFR) at § 17.11(h) (50 CFR 17.11(h)). Table 1 shows the species for which we are correcting the information provided in the ''Where listed'' column of the List, as well as the name, telephone number, and U.S. mail address of the person to contact for additional information on a particular species.

TABLE 1—SPECIES WITH CORRECTED ENTRIES AND CONTACT INFORMATION

Common name	Scientific name	Contact person, phone	Contact person's U.S. mail address
Margay	*Leopardus (=Felis) wiedii*	Rachel London, Branch Chief, 703–358–2491.	U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041.
Condor, California	*Gymnogyps californianus*	Ashleigh Blackford, California Condor Coordinator, 916–414–6464.	Pacific Southwest Regional Office, 2800 Cottage Way, Sacramento, CA 95825.
Kite, Everglade snail	*Rostrhamus sociabilis plumbeus.*	Victoria Garcia, 772–562–3909.	Vero Beach Fish and Wildlife Office, 1339 20th Street, Vero Beach, FL 32960–3559.
Parrot, thick-billed	*Rhynchopsitta pachyrhyncha*	Heather Whitlaw, Field Supervisor, 602–242–0210.	Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517.
Rail, light-footed Ridgway's	*Rallus obsoletus levipes*	Lauren Kershek and Sandra Hamilton, 760–431–9440.	Carlsbad Fish and Wildlife Office, 2177 Salk Avenue, Suite 250, Carlsbad, CA 92008.
Rail, Yuma Ridgway's	*Rallus obsoletus yumanensis*	Heather Whitlaw, Field Supervisor, 602–242–0210.	Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517.
Topminnow, Gila	*Poeciliopsis occidentalis*	Heather Whitlaw, Field Supervisor, 602–242–0210.	Arizona Ecological Services Office, 9828 North 31st Avenue, #C3, Phoenix, AZ 85051–2517.
Skipper, Carson wandering	*Pseudocopaeodes eunus obscurus.*	Lara Enders, 775–861–6300 ..	Reno Fish and Wildlife Office, 1340 Financial Boulevard, Suite 234, Reno, NV 89502–7147.

We are publishing this rule without a prior proposal because this is a noncontroversial action that, in the best interest of the public, should be undertaken as quickly as possible. This rule will be effective, as published in this document, on the effective date specified above in **DATES**, unless we receive significant adverse comments on or before the comment due date specified above in **DATES**. Significant adverse comments are comments that provide strong justification as to why our rule should not be adopted or why it should be changed.

If we receive significant adverse comments, we will publish a document in the **Federal Register** withdrawing this rule for the species in question before the effective date, and we will

determine whether to engage in the normal rulemaking process to promulgate changes to 50 CFR 17.11(h) for that species.

Public Comments

You may submit your comments and materials regarding this direct final rule by one of the methods listed in **ADDRESSES**. Please include sufficient information with your comments that allows us to verify any scientific or commercial information you include. We will not consider comments sent by email or fax, or to an address not listed in **ADDRESSES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us. Before including your address, phone number, email address, or other personal 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.

Comments and materials we receive, as well as supporting documentation we use in preparing this direct final rule, will be available for public inspection on the internet at *https://www.regulations.gov* or by appointment, during normal business hours at the U.S. Fish and Wildlife Service. Please note that comments posted to *https://www.regulations.gov* are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission. Information regarding this rule is available in alternative formats upon request (see **FOR FURTHER INFORMATION CONTACT**).

Background for the Current List

In accordance with 50 CFR 17.11(a), the ''Common name,'' ''Scientific name,'' ''Where listed,'' and ''Status'' columns of the List provide regulatory information; together, they identify listed wildlife species within the meaning of the Act and describe where they are protected. Under 50 CFR 17.11(d), the ''Where listed'' column sets forth the geographic area where the species is listed for purposes of the Act. Except when providing a geographic description of a distinct population segment (DPS) of vertebrate fish or wildlife, an evolutionary significant unit of salmon stock, or an experimental population designation, ''Wherever found'' is used to indicate that the Act's protections apply to all individuals of the species, wherever found. If only specific populations of the species are included in the listed entity, then those populations are specifically described in the ''Where listed'' column and the name of the population listed is included in brackets in the ''Common name'' column.

We note that in 2016 we revised the format of the List at 50 CFR 17.11(h) and the List of Endangered and Threatened Plants at 50 CFR 17.12(h) (2016 revision; 81 FR 51550, August 4, 2016). Among other things, the 2016 revision changed the former column heading of ''Vertebrate population where threatened or endangered'' to ''Where listed.'' Information in this column for non-DPS listings was changed from ''Entire'' (or ''do'' for ''ditto'') to ''Wherever found.'' The 2016 revision revised this column heading and its information to reflect their meaning and usage more accurately, but also to provide equivalent information and have the same regulatory effect. For a detailed description of the changes to the format of the Lists, see the 2016 revision.

In this rule, discussion of entries in the List prior to the 2016 revision may reference the column headings and information of the previous format. The columns ''Where listed'' and ''Vertebrate population where endangered or threatened,'' and the information ''Wherever found'' and ''Entire'' (or ''do''), are synonymous.

Background for the Corrections in This Direct Final Rule

The Service has identified several species that appear in the List as if they are listed under the Act as a DPS even though we listed them as endangered species in their entirety. Information in the ''Where listed'' column in the List erroneously describes these species as population listings. Review of the listing histories of these species indicates that they are protected in their entirety despite their appearance in the List as DPS listings that protect only certain populations of the taxonomic species or subspecies. These species are the Mexican grizzly bear (*Ursus arctos*), northern swift fox (*Vulpes velox hebes*), margay (*Leopardus wiedii*), California condor (*Gymnogyps californianus*), Everglade snail kite (*Rostrhamus sociabilis plumbeus*), thick-billed parrot (*Rhynchopsitta pachyrhyncha*), light-footed Ridgway's rail (*Rallus obsoletus levipes*), Yuma Ridgway's rail (*Rallus obsoletus yumanensis*), Gila topminnow (*Poeciliopsis occidentalis*), and Carson wandering skipper (*Pseudocopaeodes eunus obscurus*).

In this direct final rule, we are correcting the entries for 8 of these 10 species. We are correcting the List at 50 CFR 17.11(h) by revising the information in the ''Where listed'' column to ''Wherever found'' for margay, California condor, Everglade snail kite, thick-billed parrot, light-footed Ridgway's rail, Yuma Ridgway's rail, Gila topminnow, and Carson wandering skipper. This action is based on a review of changes to the List made in the 1980s that erroneously altered the listed ranges for these species from ''Entire'' (equivalent to ''Wherever found'' in the 2016 revision) to geographically defined DPS listings.

We are not correcting the entries for Mexican grizzly bear (*Ursus arctos*) and northern swift fox (*Vulpes velox hebes*) at this time because we believe they may no longer be valid taxonomic subspecies and, therefore, may warrant delisting as a result. Because removal of Mexican grizzly bear and northern swift fox from the List would require publication of a proposed rule and request for public comment, it would be inappropriate to include those actions in this administrative direct final rule, which merely corrects errors without changing the listed entities or their statuses. Therefore, we will not correct the entries for Mexican grizzly bear and northern swift fox pending further review of their appropriate listing statuses.

Below, we explain the nature and information known about the errors we are correcting in this document.

Pre-Act Listings

Prior to the Act, two statutes allowed listing of, and certain protections for, endangered species. In 1966, the Endangered Species Preservation Act (ESPA; Pub. L. 89–669, October 15, 1966) provided for the listing of species of native fish and wildlife found to be threatened with extinction (see section 1(c), 80 Stat. 926 (1966)). In 1969, the ESPA was amended and renamed the Endangered Species Conservation Act (ESCA; Pub. L. 91–135, December 5, 1969). The ESCA retained, without change, the ESPA's standard for listing native species found to be threatened with extinction. In addition, section 3(a) of the ESCA called for the Secretary to list species or subspecies of fish or wildlife deemed to be threatened with worldwide extinction (see Pub. L. 91–

135, section 3(a), 83 Stat. 275 (1969)). The new standard for listing foreign species was codified separately from the standard for listing native species.

Five species (California condor, Everglade snail kite, light-footed Ridgway's rail, Yuma Ridgway's rail, and Gila topminnow) were all listed as endangered native wildlife under the ESPA (32 FR 4001, March 11, 1967; 34 FR 5034, March 8, 1969). These five species listed under the ESPA were transferred to the new list of endangered native fish and wildlife promulgated under the ESCA (35 FR 16047; October 13, 1970). On June 2, 1970, we published a final rule adding the Mexican grizzly bear, northern swift fox, and thick-billed parrot to the list of endangered foreign fish and wildlife under the ESCA (35 FR 8491), and we added the margay on March 30, 1972 (37 FR 6476).

The Service's new regulations implementing the ESCA explained, in particular for species listed under the new authority, that the entire species or subspecies was protected under the ESCA. For foreign species listings, the definition of ''Endangered Species List'' explained that it included species or subspecies of fish and wildlife found in other countries that are threatened with worldwide extinction (see § 17.2(g) in 35 FR 8491, June 2, 1970). The foreign species list included geographic descriptions for each species in a ''Where found'' column, but the introduction also explained that this information was a general guide to the native countries or regions where the named animals are found. It was not intended to be definitive. For domestic listings, the definition of ''Native Endangered Species List'' explained that it included species or subspecies of fish and wildlife native to the United States that are threatened with extinction (see § 17.2(h) in 35 FR 8491, June 2, 1970).

Listings Under the Endangered Species Act of 1973, as Amended

On December 28, 1973, the current Act (16 U.S.C. 1531 *et seq.*) was enacted and repealed the ESCA. However, section 4(c)(3) of the Act provided that any list of endangered species issued under the ESCA was to be republished, without public hearing or comment, as the initial list of species under the Act (Pub. L. 93–205, section 4(c)(3), 87 Stat. 884, 888 (1973)). (Section 4(c)(3) was repealed in a subsequent amendment of the Act because it had no legal effect once the earlier lists had been republished.) Thus, those species previously listed under the ESPA or ESCA were automatically provided protection under the newly enacted Endangered Species Act. Accordingly, these species were transferred to the lists of endangered species published pursuant to the Act, with the Service originally keeping separate lists for native and foreign species (see the 1974 issue of the CFR at 50 CFR 17.11 (Endangered foreign wildlife) and 50 CFR 17.12 (Endangered native wildlife)).

One of the major changes between the Act and the prior ESPA and ESCA was that it provided the legal authority for population-based listings. Similar to the ESPA and the ESCA, the Act provided for the listing of species (or subspecies), but the new definition of ''species'' included any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature (Pub. L. 93–205, section 3(11), 87 Stat. 884, 886 (1973)). (This definition was amended in 1978 to the current statutory language in which species includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.) The original lists under the Act did not accommodate this option, with the native endangered species list containing only the scientific and common names of each protected species. The foreign endangered species list continued to include a ''Where found'' column, now with the further clarification that the information provided there was for the convenience of the public, was not exhaustive, was not required to be given by law, and had no legal significance (see 39 FR 1158, January 4, 1974, p. 1171).

Consistent with the new listing option under the Act, the first unified list of native and foreign wildlife contained a new column, ''Population'', to provide for population-based listings (see 40 FR 44412; September 26, 1975). In the September 26, 1975, rule, at 50 CFR 17.11(b), the regulations explained that the columns entitled ''Common name'', ''Scientific name'', and ''Population'' defined the ''species'' of wildlife within the meaning of the Act. Thus, for example, in that rule, the ''Population'' column indicated that the grizzly bear was listed only in the ''USA (48 conterminous States).'' The ''Population'' column read ''N/A'' (for ''not applicable'') for the Mexican grizzly bear, northern swift fox, margay, California condor, Everglade snail kite, thick-billed parrot, light-footed Ridgway's rail, Yuma Ridgway's rail, and Gila topminnow, indicating that these were not population-based listings and each species was listed in its entirety. The September 26, 1975, rule, at 50 CFR 17.11(b), noted that the prohibitions of the Act and regulations apply to all specimens of the ''species'' listed, wherever they are found, and to their progeny. The September 26, 1975, rule also established a new column, ''Known Distribution,'' with countries or geographic regions included for each listed species similar to the previous ''Where found'' column; however, the rule explained at 50 CFR 17.11(d) that this column was for informational purposes only and did not imply any limitation on the application of the prohibitions in the Act and 50 CFR part 17.

It is clear, therefore, that all of these listed species were originally listed in their entirety. All were originally listed as endangered under either the ESPA or the ESCA, statutes that did not provide the legal authority for population-based listings. The ESCA and the Service's regulations implementing the statute made it clear, especially for species listed under the ESCA, that listed species were those threatened with worldwide extinction. When the Act was enacted in 1973 (with its authority for population-based listings), the Service's first regulations to accommodate population-based listings (through the addition of the ''Population'' column to the List) indicated that the listing of these species was not based on the authority for population-based listings (through the use of ''N/A,'' or not applicable, in the ''Population'' column). The CFR continued to reflect that all these species were listed in their entirety for a number of years. In 1980, the Service adopted the organization of the List (see the 1980 edition of the CFR at 50 CFR 17.11(h)) that immediately preceded the current format adopted in 2016. The ''Population'' column was removed and a new column—''Vertebrate population where endangered or threatened''—indicated whether a species was listed in its entirety or whether it was a DPS listing.

For six of these species, the Mexican grizzly bear, California condor, Everglade snail kite, light-footed Ridgway's rail, Yuma Ridgway's rail, and Gila topminnow, the 1980 list indicated that all six of the species at issue here were listed in their entirety (*i.e.,* the word ''Entire'' appears for each one in the ''Vertebrate population where endangered or threatened'' column of the List) (see the 1980 edition of the CFR at 50 CFR 17.11(h)). Then in the mid-1980s, the information in the ''Vertebrate population where endangered or threatened'' column was

inadvertently changed from ''Entire'' (or its equivalent of ''do'' for ''ditto'') for each of the six species to new information that indicated geographically limited listings. The only manner in which the scope of a listed entity (a taxonomic species, subspecies, or DPS) can be changed is through the rulemaking procedures specified in section 553 of the Administrative Procedure Act (APA; 5 U.S.C. 551 *et seq.*) and section 4(b)(4) of the Act, and those procedures were never undertaken for these six species.

On July 25, 1979, we published in the **Federal Register** (44 FR 43705) a ''notification'' document announcing that for seven listed species, including the northern swift fox, margay, and thick-billed parrot, with the consolidation of the ''foreign'' and ''native'' species lists under the Act, the native populations of these species were not listed as endangered, although the foreign populations were listed and received all the protections of the Act. The document stated that the ESCA requires consultation with States prior to listing native species as endangered, and for the seven species, the Service had failed to consult with the governors of the States with U.S. populations of these species; therefore, the Service concluded that the U.S. populations were not listed under the Act. That July 25, 1979, document went on to say that it has always been the intent of the Service that all populations of those species deserve to be listed as endangered, whether they occur in the United States or in foreign countries; that the status of these native populations is truly endangered; and that it is only as a result of an oversight that the native populations of these species are currently excluded from the protections of the Act.

No rulemakings to change the scope of the northern swift fox, margay, or thick-billed parrot listings that meet the requirements of section 4(b)(5) and 4(b)(6) of the Act were ever promulgated, yet on May 20, 1980, we published a final rule (45 FR 33768) that republished the Lists, and in that rule, the entries for northern swift fox, margay, and thick-billed parrot were amended to indicate that only populations of the species outside the United States were listed under the Act. Specifically, the northern swift fox appeared as a DPS listing in ''Canada,'' the margay appeared as a DPS listing in ''Mexico southward,'' and the thick-billed parrot appeared as a DPS listing in ''Mexico.'' The entries for the other four species addressed in the July 25, 1979, ''notification'' document (44 FR 43705) have already been corrected in other rulemakings and are therefore not addressed further in this document.

In an April 30, 2009, memorandum from the Assistant Solicitor for Fish and Wildlife to the Director of the Fish and Wildlife Service, the Solicitor's Office explained that these species are listed in their entirety despite their appearance as DPS listings in the List at 50 CFR 17.11(h) (DOI 2009). As explained in the 2009 memorandum, the Service did not have the legal authority to change the scope of the listed entity through a **Federal Register** notice. The memo advised us that, without going through the proper rulemaking procedures required under section 553 of the APA and section 4(b)(4) of the Act, the Service had no authority to simply remove the U.S. populations of the northern swift fox, margay, and thick-billed parrot, along with the other species, from their protected status under the Act. As a result, the Solicitor's Office instructed us that the July 25, 1979, ''notification'' document (44 FR 43705) was without legal effect, and no other rulemakings consistent with the Act's requirements occurred to change the listings from the species or subspecies level to DPSs.

Furthermore, we were advised that failure to consult with a State under the ESCA did not invalidate the species' legal status under the Act. In fact, in 1973, Congress validated the lists under the ESCA by its explicit incorporation of them into the Act through section 4(c)(3) of the Act. Also, for species where there were no populations within the United States at the time of the listing, there were no States with which to consult. This may have been the case with at least two of the species at issue here. For example, the last verified report of the thick-billed parrot in the United States was in the 1930s, decades before it was listed as endangered under the ESCA (see 45 FR 49844, July 25, 1980). The margay was known in the United States from a single specimen taken in Texas, and by 1980, there were almost certainly no resident populations in the United States (see 45 FR 49844, July 25, 1980).

The 2009 memorandum concluded that the changes to the CFR in the 1980s, indicating that only a particular DPS of each of these species is endangered while the remainder of the species is not protected under the Act, are without legal effect because the Service had no authority to change the scope of the listed entity without following the rulemaking procedures required by section 553 of the APA and section 4(b)(4) of the Act. Therefore, these species continue to be listed in their entirety despite their appearance as DPS listings in the CFR. As such, we are correcting the List to read ''Wherever found'' in the ''Where listed'' column for the following species: margay, Everglade snail kite, thick-billed parrot, light-footed Ridgway's rail, Yuma Ridgway's rail, and Gila topminnow. Likewise, we are correcting the information in the ''Where listed'' column of the California condor's entry to read, ''Wherever found, except where listed as an experimental population.'' (As noted above, we are not correcting the entries for Mexican grizzly bear and northern swift fox at this time due to the likelihood that they are not valid subspecies.)

The final species with an erroneous entry is the Carson wandering skipper, a subspecies of butterfly, which incorrectly appears as a DPS listing despite being listed in its entirety. The Service listed the Carson wandering skipper as an endangered species on August 7, 2002 (67 FR 51116). The final rule amended the List to indicate ''U.S.A., (Lassen County, CA; Washoe County, NV)'' in the ''Vertebrate population where endangered or threatened'' column. However, the Service intended to list the subspecies in its entirety. The rulemaking analyzed the status of the species rangewide and did not include a DPS analysis. In addition, the locations included in the ''Vertebrate population where endangered or threatened'' column encompassed the entire known range of the species at the time of its listing.

The Service also lacks the legal authority to list a DPS of this or any invertebrate subspecies. The Act's section 4(a)(1) authorizes the Service to determine whether any species is an endangered species or a threatened species. The term ''species,'' as defined in the Act (see section 3(16)), includes any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. Distinct population segments of invertebrate wildlife do not fall within the Act's definition of ''species.'' Accordingly, DPSs of invertebrate wildlife cannot be included on the List. Instead, when the Service determines that a species of invertebrate wildlife is endangered or threatened, the species may only be listed in its entirety.

Because the rulemaking analyzed the species in its entirety and the Service was without legal authority to list a subspecies of butterfly as a DPS, the subspecies is in fact listed in its entirety despite its appearance as a DPS listing in the CFR. Therefore, we are correcting the List by replacing ''U.S.A., (Lassen County, CA; Washoe County, NV)'' with

''Wherever found'' in the ''Where listed'' column in the entry for the Carson wandering skipper.

Correction of Listed Range

The table below summarizes information regarding the entries in the List at 50 CFR 17.11(h) for each of the species, followed by a narrative description of the changes being made to the entries. Please note that we do not include a narrative description for the Carson wandering skipper, as that description is provided above.

TABLE 2—LIST OF CORRECTIONS

Species	Scientific name	Original listing	Date of incorporated error	Current ''where listed'' information	Corrected ''where listed'' information
Margay	*Leopardus (=Felis) wiedii*	37 FR 6476; 3/30/1972 ..	5/20/1980 (45 FR 33768)	Mexico southward	Wherever found.
California condor	*Gymnogyps californianus*	32 FR 4001; 3/11/1967 ..	1987 (1987 edition of CFR).	U.S.A. only, except where listed as an experimental population.	Wherever found, except where listed as an experimental population.
Everglade snail kite	*Rostrhamus sociabilis plumbeus.*	32 FR 4001; 3/11/1967 ..	1986 (1986 edition of CFR).	U.S.A. (FL)	Wherever found.
Thick-billed parrot	*Rhynchopsitta pachyrhyncha.*	35 FR 8491; 6/2/1970	5/20/1980 (45 FR 33768)	Mexico	Wherever found.
Light-footed Ridgway's rail.	*Rallus obsoletus levipes*	34 FR 5034; 3/8/1969	1988 (1988 edition of CFR).	U.S.A. only	Wherever found.
Yuma Ridgway's rail	*Rallus obsoletus yumanensis.*	32 FR 4001; 3/11/1967 ..	1988 (1988 edition of CFR).	U.S.A. only	Wherever found.
Gila topminnow	*Poeciliopsis occidentalis*	32 FR 4001; 3/11/1967 ..	1988 (1988 edition of CFR).	U.S.A. only	Wherever found.
Carson wandering skipper	*Pseudocopaeodes eunus obscurus.*	67 FR 51116; 8/7/2002 ..	8/7/2002 (67 FR 51116)	U.S.A., (Lassen County, CA; Washoe County, NV).	Wherever found.

Corrected Species Where Listed

Margay (Leopardus (=Felis) Wiedii)

The margay was originally listed as endangered under the ESCA of 1969 (37 FR 6476; March 30, 1972). Currently, the information in the ''Where listed'' column for this species reads, ''Mexico southward.'' As explained above, this current information erroneously indicates that protections are afforded only to a subset of the species as a DPS. We are correcting the margay's entry in the List at 50 CFR 17.11(h) so that the information in the ''Where listed'' column reads, ''Wherever found.'' This correction reflects the intent of the original listing that the species, not a DPS, is in danger of extinction and that protections of the Act extend to all individuals of the species wherever found. Currently, the species is known to occur in Mexico and southward in Central and South America. There is a single record of a specimen taken in United States in Texas, and it is believed that there are no resident margay populations in the United States. Regardless, because the species is listed in its entirety and protections of the Act extend to all individuals of the species wherever found, any individual of the species found in the United States would be afforded the full protections of the Act. This correction does not change the description, distribution, or endangered status of the margay.

California Condor (Gymnogyps Californianus)

The California condor was originally listed as endangered under the ESPA of 1966 (32 FR 4001; March 11, 1967). In 1996, a nonessential experimental population of condors was established in Arizona, and special regulations pursuant to that rulemaking apply to the population of California condors found in parts of Arizona, Utah, and Nevada (61 FR 54044; October 16, 1996). Subsequently, another nonessential experimental population of condors was established in the Pacific Northwest, and special regulations pursuant to that rulemaking apply to the population of California condors found in Oregon, and specific portions of northern California and northwest Nevada (86 FR 15602; March 24, 2021).

Currently, in the California condor's first (original) entry on the List, the information in the ''Where listed'' column reads, ''U.S.A. only, except where listed as an experimental population.'' As explained above, this current information erroneously indicates that protections are afforded only to a subset of the species as a DPS. We are correcting that entry's ''Where listed'' information to read, ''Wherever found, except where listed as an experimental population.'' This correction reflects the intent of the original listing that the species, not a DPS, is in danger of extinction and that protections of the Act extend to all individuals of the species wherever found, except as modified by the current nonessential experimental population designations and their associated rules. Currently, the species is known to occur in the United States in California, northern Arizona, southern Utah, Nevada, and Oregon. This correction does not change the description, distribution, or endangered status of the California condor.

In addition, in the California condor's first (original) entry on the List, in the ''Listing citations and applicable rules'' column, we are removing the **Federal Register** citation for the rule establishing the nonessential experimental population of condors in Arizona. The subject rule will continue to be cited under the appropriate entry in the List. This correction ensures consistency in our presentation of citations in the List.

Everglade Snail Kite (Rostrhamus Sociabilis Plumbeus)

The Everglade snail kite was originally listed as endangered under the ESPA of 1966 (32 FR 4001; March 11, 1967). Currently, the information in the ''Where listed'' column for this subspecies reads, ''U.S.A. (FL).'' As explained above, this current information erroneously indicates that protections are afforded only to a subset of the subspecies as a DPS. We are correcting the Everglade snail kite's entry in the List at 50 CFR 17.11(h) so that the information in the ''Where listed'' column reads, ''Wherever found.'' This correction reflects the intent of the original listing that the subspecies, not a DPS, is in danger of extinction and that protections of the Act extend to all individuals of the subspecies wherever found. Currently, the subspecies is known to occur in the United States in Florida and in Cuba. This correction does not change the

description, distribution, or endangered status of the Everglade snail kite.

In addition, we are making a nonsubstantive correction to the information in the ''Common name'' column of the Everglade snail kite's entry to present the standard usage.

Thick-Billed Parrot (Rhynchopsitta Pachyrhyncha)

The thick-billed parrot was originally listed as endangered under the ESCA of 1969 (35 FR 8491; June 2, 1970). Currently, the information in the ''Where listed'' column for this species reads, ''Mexico.'' As explained above, this current information erroneously indicates that protections are afforded only to a subset of the species as a DPS. We are correcting the thick-billed parrot's entry in the List at 50 CFR 17.11(h) so that the information in the ''Where listed'' column reads, ''Wherever found.'' This correction reflects the intent of the original listing that the species, not a DPS, is in danger of extinction and that protections of the Act extend to all individuals of the species wherever found. Currently, the species is known to occur primarily in Mexico. Historically the thick-billed parrot's range extended as far north as the mountains of southeastern Arizona and possibly southwestern New Mexico, but whether the species ever bred historically in the United States has not been confirmed. The last confirmed sighting of a naturally occurring flock in the United States was in 1938, in the Chiricahua Mountains of Arizona. However, should individuals of the species be found in the United States in the future, pursuant to the original listing, they will be afforded the full protections of the Act. This correction does not change the description, distribution, or endangered status of the thick-billed parrot.

Light-Footed Ridgway's Rail (Rallus Obsoletus Levipes)

The light-footed Ridgway's rail was originally listed as endangered under the ESPA of 1966 (34 FR 5034; March 8, 1969). The species name on the List was recently revised to reflect the current scientifically accepted taxonomy and nomenclature (88 FR 49314; July 31, 2023). Currently, the information in the ''Where listed'' column for this subspecies reads, ''U.S.A. only.'' As explained above, this current information erroneously indicates that protections are afforded only to a subset of the subspecies as a DPS. We are correcting the light-footed Ridgway's rail's entry in the List at 50 CFR 17.11(h) so that the information in the ''Where listed'' column reads, ''Wherever found.'' This correction reflects the intent of the original listing that the subspecies, not a DPS, is in danger of extinction and that protections of the Act extend to all individuals of the subspecies wherever found. Currently, the subspecies is known to occur in the United States in California and in Mexico in Baja California. This correction does not change the description, distribution, or endangered status of the light-footed Ridgway's rail.

Yuma Ridgway's Rail (Rallus Obsoletus Yumanensis)

The Yuma Ridgway's rail was originally listed as endangered under the ESPA of 1966 (32 FR 4001; March 11, 1967). Currently the information in the ''Where listed'' column for this subspecies reads, ''U.S.A. only.'' As explained above, this current information erroneously indicates that protections are afforded only to a subset of the subspecies as a DPS. We are correcting the Yuma Ridgway's rail's entry in the List at 50 CFR 17.11(h) so that the information in the ''Where listed'' column reads, ''Wherever found.'' This correction reflects the intent of the original listing that the subspecies, not a DPS, is in danger of extinction and that protections of the Act extend to all individuals of the subspecies wherever found. Currently, the subspecies is known to occur in the United States in Arizona and California and in Mexico. This correction does not change the description, distribution, or endangered status of the Yuma Ridgway's rail.

Gila Topminnow (Poeciliopsis Occidentalis)

The Gila topminnow was originally listed as endangered under the ESPA of 1966 (32 FR 4001; March 11, 1967). Currently, the information in the ''Where listed'' column for this species reads, ''U.S.A. only.'' As explained above, this current information erroneously indicates that protections are afforded only to a subset of the species as a DPS. We are correcting the Gila topminnow's entry in the List at 50 CFR 17.11(h) so that the information in the ''Where listed'' column reads, ''Wherever found.'' This correction reflects the intent of the original listing that the species, not a DPS, is in danger of extinction and that protections of the Act extend to all individuals of the species wherever found. Currently, the species is known to occur in Arizona and New Mexico in the United States, and in Sonora in Mexico. This correction does not change the description, distribution, or endangered status of the Gila topminnow.

Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To help us to revise this rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations issued pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). Even if NEPA were to apply, this amendment of the regulations is purely administrative in nature, and therefore is categorically excluded under the Department of the Interior's NEPA procedures in 43 CFR 46.210(i); no exceptional circumstances apply.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal

Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that this rule will not affect Tribes or Tribal lands.

References Cited

A complete list of the referenced materials is provided in Docket No. FWS–HQ–ES–2023–0027 at *https://regulations.gov* or is available upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11, amend paragraph (h), in the List of Endangered and Threatened Wildlife, by:
■ a. Under MAMMALS, revising the entry for ''Margay'';
■ b. Under BIRDS, revising the first entry for ''Condor, California'', and the entries for ''Kite, snail (Everglade)'''', ''Parrot, thick-billed'', ''Rail, light-footed Ridgway's'', and ''Rail, Yuma Ridgway's'';
■ c. Under FISHES, revising the entry for ''Topminnow, Gila (incl. Yaqui)''; and
■ d. Under INSECTS, revising the entry for ''Skipper, Carson wandering''.

The revisions read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
MAMMALS				
* *	*	* *	*	*
Margay	*Leopardus* (=*Felis*) *wiedii*	Wherever found	E	37 FR 6476, 3/30/1972.
* *	*	* *	*	*
BIRDS				
* *	*	* *	*	*
Condor, California	*Gymnogyps californianus*	Wherever found, except where listed as an experimental population.	E	32 FR 4001, 3/11/1967; 50 CFR 17.95(b).[CH]
* *	*	* *	*	*
Kite, Everglade snail	*Rostrhamus sociabilis plumbeus*.	Wherever found	E	32 FR 4001, 3/11/1967; 50 CFR 17.95(b).[CH]
* *	*	* *	*	*
Parrot, thick-billed	*Rhynchopsitta pachyrhyncha*	Wherever found	E	35 FR 8491, 6/2/1970.
* *	*	* *	*	*
Rail, light-footed Ridgway's	*Rallus obsoletus levipes*	Wherever found	E	34 FR 5034, 3/8/1969; 35 FR 16047, 10/13/1970.
* *	*	* *	*	*
Rail, Yuma Ridgway's	*Rallus obsoletus yumanensis*	Wherever found	E	32 FR 4001, 3/11/1967.
* *	*	* *	*	*
FISHES				
* *	*	* *	*	*
Topminnow, Gila (incl. Yaqui)	*Poeciliopsis occidentalis*	Wherever found	E	32 FR 4001, 3/11/1967.
* *	*	* *	*	*
INSECTS				
* *	*	* *	*	*
Skipper, Carson wandering	*Pseudo copaeodes eunus obscurus*.	Wherever found	E	67 FR 51116, 8/7/2002.
* *	*	* *	*	*

Martha Williams,
Director, U.S. Fish and Wildlife Service.
[FR Doc. 2023–20291 Filed 9–19–23; 8:45 am]
BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 230911–0216]

RTID 0648–XC870

Atlantic Highly Migratory Species; Adjustments to 2023 North Atlantic Albacore Tuna, North and South Atlantic Swordfish, and Atlantic Bluefin Tuna Reserve Category Quotas

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

ACTION: Temporary final rule.

SUMMARY: NMFS adjusts the 2023 baseline quotas for U.S. North Atlantic albacore tuna (northern albacore), North and South Atlantic swordfish, and the Atlantic bluefin Reserve category based on available underharvest of the 2022 adjusted U.S. quotas. This action is necessary to implement binding recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as required by the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This action to adjust the quotas is only temporary and will be effective through December 31, 2023. On January 1, 2024, full annual baseline allocations of northern albacore, North and South Atlantic swordfish, and the Atlantic bluefin tuna will be available to the U.S. harvest.

DATES: Effective September 20, 2023, through December 31, 2023.

ADDRESSES: Supporting documents, including environmental assessments and environmental impact statements, as well as the 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and its amendments, may be downloaded from the Highly Migratory Species (HMS) website at *https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species*. These documents also are available upon request from Lisa Crawford or Steve Durkee at the email addresses and telephone numbers below.

FOR FURTHER INFORMATION CONTACT: Lisa Crawford (301–427–8503, *lisa.crawford@noaa.gov*) or Steve Durkee (301–427–8503, *steve.durkee@noaa.gov*).

SUPPLEMENTARY INFORMATION: Atlantic HMS fisheries, including northern albacore, swordfish, and bluefin tuna fisheries, are managed under the authority of ATCA (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*). The HMS FMP and its amendments are implemented by regulations at 50 CFR part 635. Section 635.27(e) implements the northern albacore annual quota recommended by ICCAT and describes the annual northern albacore quota adjustment process. Section 635.27(c) implements the ICCAT-recommended quotas and describes the quota adjustment process for both North and South Atlantic swordfish. Section 635.27(a) implements the ICCAT-recommended quota and describes the annual quota adjustment process for bluefin tuna. NMFS is required under the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest quotas under relevant international fishery agreements such as the ICCAT Convention, which is implemented domestically pursuant to ATCA.

Note that, consistent with how the quotas are established, weight information for northern albacore and bluefin tuna below is shown in metric tons (mt) whole weight (ww), and weight information for swordfish is shown in both dressed weight (dw) and ww.

Northern Albacore Annual Quota and Adjustment Process

Consistent with the northern albacore quota regulations at 50 CFR 635.27(e), NMFS adjusts the U.S. annual northern albacore quota for allowable underharvest, if any, in the previous year. NMFS makes such adjustments consistent with ICCAT carryover limits and when complete catch information for the prior year is available and finalized. Consistent with ICCAT Recommendation 21–04, on June 1, 2022, NMFS finalized a final rule that implemented a management procedure for northern albacore (87 FR 33049). This management procedure established a total allowable catch (TAC) of 37,801 mt and maintained the 711.5-mt U.S. northern albacore quota for 2022 and 2023. The annual baseline quota of 711.5 mt is codified at § 635.27(e).

Relevant to the northern albacore quota adjustment in this action, and as codified at § 635.27(e)(2), the maximum underharvest that an ICCAT Contracting Party may carry forward from one year to the next is 25 percent of its baseline quota, which equates to 177.9 mt for the United States. For 2022, the adjusted quota was 889.4 mt (711.5 mt plus 177.9 mt of 2021 underharvest). In 2022, U.S. landings of northern albacore were 310.6 mt, which is an underharvest of 578.8 mt of the 2022 adjusted quota. This underharvest exceeds the 177.9-mt underharvest carryover limit allowed under Recommendation 21–04; therefore, only 177.9 mt may be carried forward to the 2023 fishing year. Thus, the adjusted 2023 northern albacore quota will be 889.4 mt (711.5 mt plus 177.9 mt) (Table 1).

TABLE 1—2023 NORTHERN ALBACORE QUOTA

Northern albacore quota (mt ww)	2022	2023
Baseline Quota	711.5	711.5
Underharvest from Previous Year	573.7	578.8
Underharvest Carryover from Previous Year †	(+)177.9	(+)177.9
Adjusted Quota (Baseline + Underharvest)	889.4	889.4

† Allowable underharvest carryover is capped at 25 percent of the baseline quota allocation (177.9 mt ww).

North and South Atlantic Swordfish Annual Quota and Adjustment Process

North Atlantic Swordfish

Consistent with the North Atlantic swordfish quota regulations at § 635.27(c), NMFS adjusts the U.S. annual North Atlantic swordfish quota for allowable underharvest, if any, in the previous year. NMFS makes such adjustments consistent with ICCAT carryover limits and when complete catch information for the prior year is available and finalized. Consistent with ICCAT Recommendation 17–02 as amended by Recommendations 21–02 and 22–03, the U.S. North Atlantic swordfish baseline annual quota through 2023 is 2,937.6 mt dw (3,907.0 mt ww).

Relevant to the North Atlantic swordfish quota adjustment in this action, and as codified at § 635.27(c)(3), the maximum underharvest that the United States may carry forward from one year to the next is 15 percent of the baseline quota, which equates to 440.6 mt dw (586.0 mt ww). For 2022, the adjusted North Atlantic swordfish quota was 3,378.2 mt dw (2,937.6 mt dw baseline quota plus 440.6 mt dw of 2021 underharvest). In 2022, landings U.S. landings of North Atlantic swordfish, which includes landings and dead discards, was 1,006.9 mt dw, which is an underharvest of 2,371.3 mt dw of the 2022 adjusted quota. This underharvest exceeds the 440.6-mt dw underharvest carryover limit allowed under Recommendation 22–03; therefore, only 440.6 mt dw may be carried forward to the 2023 fishing year. Thus, the adjusted 2023 North Atlantic Swordfish quota will be 3,378.2 mt dw (2,937.6 mt dw plus 440.6 mt dw). In accordance with regulations at § 635.27(c)(1)(i), 50 mt dw of the adjusted quota will be allocated to the Reserve category for inseason adjustments and research, 300 mt dw of the adjusted quota will be allocated to the incidental category, which covers recreational landings and landings by incidental swordfish permit holders, and the remainder of the adjusted quota (3,028.2 mt dw) will be allocated to the directed category, which will be split equally between two seasons in 2023 (January through June, and July through December) (Table 2).

South Atlantic Swordfish

Consistent with the South Atlantic swordfish quota regulations at § 635.27(c), NMFS adjusts the U.S. annual South Atlantic swordfish quota for allowable underharvest, if any, in the previous year. NMFS makes such adjustments, if needed, consistent with ICCAT carryover limits and when complete catch information for the prior year is available and finalized. Consistent with ICCAT Recommendation 17–03 as amended by Recommendation 22–04, the U.S. South Atlantic swordfish baseline annual quota through 2026 is 75.2 mt dw (100 mt ww), and the amount of underharvest that the U.S. can carry forward from one year to the next is 75.2 mt dw (100 mt ww) (Table 2). In 2022 there were no landings of South Atlantic swordfish by U.S. fishermen, which is an underharvest of 75.2 mt dw of the 2022 adjusted quota. Of that underharvest 75.2 mt dw may be carried forward to the 2023 fishing year. Under Recommendations 17–03 and 22–04, the United States continues to transfer a total of 75.2 mt dw (100 mt ww) to other countries. These transfers are 37.6 mt dw (50 mt ww) to Namibia, 18.8 mt dw (25 mt ww) to Côte d'Ivoire, and 18.8 mt dw (25 mt ww) to Belize. Thus, the adjusted 2023 South Atlantic swordfish quota will be 75.2 mt dw.

TABLE 2—2023 NORTH AND SOUTH ATLANTIC SWORDFISH QUOTAS

North Atlantic swordfish quota (mt dw)	2022	2023
Baseline Quota	2,937.6	2,937.6
Underharvest from Previous Year	2,416.4	2,371.3
Underharvest Carryover from Previous Year †	(+)440.6	(+)440.6
Adjusted Quota (Baseline + Carryover)	3,378.2	3,378.2
Quota Allocation:		
Directed Category	3,028.2	3,028.2
Incidental Category	300.0	300.0
Reserve Category	50.0	50.0
South Atlantic swordfish quota (mt dw)	**2022**	**2023**
Baseline Quota	75.2	75.2
International Quota Transfers *	(−)75.2	(−)75.2
Underharvest from Previous Year	75.2	75.2
Underharvest Carryover from Previous Year †	75.2	75.2
Adjusted quota (Baseline + Transfers + Carryover)	75.2	75.2

† Allowable underharvest carryover is capped at 15 percent of the baseline quota allocation (440.6 mt dw) for the North Atlantic and 75.2 dw (100 mt ww) for the South Atlantic.

* Under ICCAT Recommendations 17–03 and 21–03, the United States transfers 75.2 mt dw (100 mt ww) annually to Namibia (37.6 mt dw, 50 mt ww), Côte d'Ivoire (18.8 mt dw, 25 mt ww), and Belize (18.8 mt dw, 25 mt ww).

Bluefin Tuna Annual Quota and Adjustment Process

Consistent with the regulations regarding annual bluefin tuna quota adjustment at § 635.27(a), NMFS annually announces the addition of available underharvest, if any, to the bluefin tuna Reserve category once complete catch information for the prior year is available and finalized.

In 2022, NMFS implemented relevant provisions of an ICCAT western Atlantic bluefin tuna recommendation [adopted at the 2021 annual meeting] (Rec. 21–07) in a final rule that published on June 1, 2022 (87 FR 33049). That rulemaking implemented the annual U.S. baseline quota of 1,316.1 mt, plus an additional 25 mt to account for bycatch related to pelagic longline fisheries in the Northeast Distant gear restricted area (NED), for a total quota of 1,341.1 mt. At the 2022 annual meeting, a management procedure was implemented for bluefin tuna (Rec. 22–09). This management procedure set the western Atlantic bluefin tuna TAC for 2023 through 2025 at the same level as 2021 (Rec. 22–10). As such, the total annual U.S. bluefin tuna quota for 2023 remains 1,341.1 mt

(see § 635.27(a)). Consistent with Recommendation 22–10, the maximum underharvest that the United States can carry forward from one year to the next is 10 percent of its total annual quota, which equates to 134.1 mt.

In 2022, the adjusted U.S. quota was 1,468.4 mt and the U.S. catch, including landings and dead discards, totaled 1,361.9 mt. Thus, the 2022 underharvest was 106.5 mt, which is less than the underharvest carryover limit (134.1 mt). As such, the United States is carrying forward the allowable 106.5 mt underharvest to 2023. Per § 635.27(a) this underharvest augments the Reserve category quota. The 2023 Reserve category quota of 38.2 mt was recently adjusted to 27.4 mt (88 FR 48136, July 26, 2023). Thus, the adjusted 2023 Reserve category quota is now, through this action, 133.9 mt (106.5 mt plus 27.4 mt) (Table 3).

TABLE 3—2023 BLUEFIN TUNA QUOTA

Bluefin tuna quota (mt ww)	2022	2023
Baseline Quota	1,316.1	1,316.1
Total Quota (Baseline Quota + Bycatch Allocation) *	1,341.1	1,341.1
Underharvest from Previous Year	194.5	106.5
Underharvest Carryover from Previous Year †	(+)127.3	(+)106.5
Adjusted Quota (Total quota + Carryover)	1,468.4	1,447.7
Baseline Reserve Category Quota	38.2	‡ 38.2
Adjusted Reserve Category Quota (Reserve quota + Carryover)	306.7	133.9

Values in this table are subject to rounding error.

* The United States is allocated an additional 25 mt to account for bycatch related to pelagic longline fisheries in the Northeast Distant gear restricted area (NED).

† Allowable underharvest carryover is capped at 10 percent of the total annual quota (134.11 mt ww).

‡ The 2023 Reserve category quota of 38.2 mt was recently adjusted to 27.4 mt (88 FR 48136, July 26, 2023).

Classification

NMFS is issuing this rule pursuant to 305(d) of the Magnuson-Stevens Act and regulations at 50 CFR part 635 and is exempt from review under Executive Order 12866.

The Assistant Administrator for NMFS (AA) has determined that this final rule is consistent with the 2006 Consolidated HMS FMP, Amendment 13 to the 2006 Consolidated Atlantic HMS FMP, ATCA, and other applicable law.

The AA finds that pursuant to 5 U.S.C. 553(b)(B), it is unnecessary to provide prior notice of, and an opportunity for public comment on, this action for the following reasons. The rulemaking processes for Amendment 13 to the 2006 Consolidated HMS FMP (87 FR 59966, October 3, 2022), the 2022 Atlantic bluefin tuna and northern albacore quota rule (87 FR 33049, June 1, 2022), and the 2016 North and South Atlantic Swordfish Quota Adjustment Rule (81 FR 48719, July 26, 2016) specifically provided prior notice of, and accepted public comment on, the formulaic quota adjustment processes for the northern albacore, Atlantic bluefin tuna, and swordfish fisheries and the manner in which they occur. These processes have not changed, and the application of these formulas to the relevant quotas in this temporary final rule is a routine action that does not have discretionary aspects requiring additional agency consideration. There are no new baseline quotas for the relevant species for 2023. Additionally, similar actions to adjust the quotas based on the previous year's underharvest occur annually and the regulated community expects similar adjustments in 2023. Thus, it is unnecessary to provide prior notice and an additional opportunity for public comment on this rule.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date and to make the rule effective upon publication in the **Federal Register**. This rule is a routine action that the regulated community anticipates annually and does not need time to prepare for. The 2023 fisheries for northern albacore, North and South Atlantic swordfish, and bluefin tuna opened on January 1, 2023. NMFS monitors northern albacore, North and South Atlantic swordfish, and bluefin tuna annual catch and uses the previous year's catch data to calculate the legally allowable quotas for the current year. However, these adjustments to the 2023 quotas could not occur earlier in the year because the final 2022 landings data—which first must collected, compiled, and submitted in association with ICCAT reporting requirements—were not available until now. Given that these fisheries are currently open and permit-holders are actively fishing, delaying the effective date of this rule's quota adjustments would in turn lead to premature closure of one or more affected fisheries if the unadjusted quota limit is reached within the next 30 days. Such an event would negatively affect the regulated fisheries' reasonable opportunity to catch the available quotas, contrary to Magnuson-Stevens Act requirements and overall purpose of sound conservation and management of fisheries—including highly migratory species—in a manner that achieves optimum yield. Furthermore, delaying the effective date of this rule would delay the application of North and South Atlantic swordfish quota transfers pursuant to ICCAT obligations to U.S. quota limits, contrary to requirements under ATCA, and delay NMFS' ability to transfer quota inseason, as needed, from the bluefin Reserve category to other fishing categories to ensure fishing opportunities and avoid premature fishery closures. As with the quota adjustments, such a delay would be contrary to the Magnuson-Stevens Act requirement to allow U.S. vessels reasonable opportunity to harvest highly migratory species allocations and quotas under relevant international fishery agreements such as the ICCAT Convention.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* are inapplicable.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: September 14, 2023.

Samuel D. Rauch, III,

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

[FR Doc. 2023–20301 Filed 9–19–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306–0065; RTID 0648–XD376]

Fisheries of the Exclusive Economic Zone Off Alaska; Exchange of Flatfish in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is exchanging unused flathead sole Community Development Quota (CDQ) for rock sole CDQ acceptable biological catch (ABC) reserves in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the 2023 total allowable catch of rock sole in the Bering Sea and Aleutian Islands management area to be harvested.

DATES: Effective November 20, 2023 through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands management area (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2023 flathead and rock sole CDQ reserves specified in the BSAI are 3,799 metric tons (mt) and 7,062 mt as established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) and correction (88 FR 18258, March 28, 2023). The 2023 flathead sole and rock sole CDQ ABC reserves are 3,193 mt and 5,962 mt as established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) and correction (88 FR 18258, March 28, 2023).

The Norton Sound Economic Development Corporation has requested that NMFS exchange 400 mt of flathead sole CDQ reserves for 400 mt of rock sole CDQ ABC reserves under § 679.31(d). Therefore, in accordance with § 679.31(d), NMFS exchanges 400 mt of flathead sole CDQ reserves for 400 mt of rock sole CDQ ABC reserves in the BSAI. This action also decreases and increases the TACs and CDQ ABC reserves by the corresponding amounts. Tables 11 and 13 of the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) and correction (88 FR 18258, March 28, 2023) are further revised as follows:

TABLE 11–FINAL 2023 COMMUNITY DEVELOPMENT QUOTA (CDQ) RESERVES, INCIDENTAL CATCH AMOUNTS (ICAS), AND AMENDMENT 80 ALLOCATIONS OF THE ALEUTIAN ISLANDS PACIFIC OCEAN PERCH AND BSAI FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE TACS

[Amounts are in metric tons]

Sector	Pacific ocean perch			Flathead sole	Rock sole	Yellowfin sole
	Eastern aleutian district	Central aleutian district	Western aleutian district	BSAI	BSAI	BSAI
TAC	8,152	5,648	12,000	35,100	66,400	230,000
CDQ	872	604	1,284	3,399	7,462	24,610
ICA	100	60	10	3,000	6,000	4,000
BSAI trawl limited access	718	498	214	.....	.....	45,498
Amendment 80	6,462	4,485	10,492	28,702	52,938	155,892

Note: Sector apportionments may not total precisely due to rounding.

TABLE 13—FINAL 2023 AND 2024 ABC SURPLUS, ABC RESERVES, COMMUNITY DEVELOPMENT QUOTA (CDQ) ABC RESERVES, AND AMENDMENT 80 ABC RESERVES IN THE BSAI FOR FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE

[Amounts are in metric tons]

Sector	2023 Flathead sole	2023 Rock sole	2023 Yellowfin sole	2024 [1] Flathead sole	2024 [1] Rock sole	2024 [1] Yellowfin sole
ABC	65,344	121,719	378,499	66,927	119,969	462,890
TAC	35,100	66,400	230,000	35,500	66,000	230,656
ABC surplus	30,244	55,319	148,499	31,427	53,969	232,234
ABC reserve	30,244	55,319	148,499	31,427	53,969	232,234
CDQ ABC reserve	3,593	5,562	15,889	3,363	5,775	24,849
Amendment 80 ABC reserve	26,651	49,757	132,610	28,064	48,194	207,385

[1] The 2024 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2023.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion

and would delay the flatfish exchange by the Norton Sound Economic Development Corporation in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 8, 2023.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

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

Dated: September 15, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–20362 Filed 9–15–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 181
Wednesday, September 20, 2023

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

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 630

[Docket No. FHWA–2022–0017]

RIN 2125–AG05

Work Zone Safety and Mobility and Temporary Traffic Control Devices

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of Proposed Rulemaking (NPRM); request for comments.

SUMMARY: The FHWA proposes to amend its regulations that govern traffic safety and mobility in highway and street work zones. The FHWA recognizes that increasing road construction activity on our highways can lead to travel disruptions which could potentially result in congestion and crashes, as well as loss in productivity and public frustration with work zones. These proposed changes are intended to facilitate consideration of the broader safety and mobility impacts of work zones in a more coordinated and comprehensive manner across project development stages.

DATES: Comments must be received on or before November 20, 2023.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit comments by only one of the following means:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

All submissions should include the agency name and the docket number that appears in the heading of this document or the Regulation Identifier Number (RIN) for the rulemaking. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Jawad Paracha, Office of Transportation Operations (HOTO–1), (202) 366–4628, or via email at *Jawad.Paracha@dot.gov,* or Mr. William Winne, Office of the Chief Counsel (HCC–30), (202) 366–1379, or via email at *William.Winne@dot.gov.* Office hours are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at *www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are also available at *www.regulations.gov.* An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.FederalRegister.gov* and the Government Publishing Office's website at *www.GovInfo.gov.*

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date and interested persons should continue to examine the docket for new material. A final rule may be published at any time after the close of the comment period and after DOT has had the opportunity to review the comments submitted.

Background

The principal mission of the DOT is to ensure America has the safest, most efficient, and modern transportation system in the world. This system boosts our economic productivity and global competitiveness and enhances the quality of life in communities both rural and urban. We depend on transportation for access to jobs, to enable us to conduct our business, to supply us with services and goods, and to facilitate our leisure and recreational activities. The Department's mission is accomplished through strategic goals pertaining to safety, economic strength and global competitiveness, equity, climate and sustainability, transformation, and organizational excellence.

An efficient and well-maintained roadway network is a critical component of our overall transportation system. Our roadway network must be continuously monitored and repaired to keep it functioning. Periodically, roadways must also be rehabilitated, reconstructed, or otherwise improved. The FHWA strongly encourages that work zones to accomplish these activities be implemented and maintained as safely as possible and with the least possible amount of travel disruption. Doing so directly supports the DOT safety strategic goal and facilitates the movement of people and goods while that work occurs, which is essential for maintaining economic strength and global competitiveness. Similarly, effective work zone management also ensures that impacts themselves do not unduly burden any one user group excessively without efforts to mitigate those differential impacts, which furthers the DOT equity strategic goal. Congestion generated by work zones contributes to vehicular pollution, and reducing congestion undoubtedly supports DOT goals pertaining to climate and sustainability. Finally, continuous development and support of new technologies, strategies, and uses of new sources of data for work zone management relate directly to the Department's transformation and organizational excellence goals.

This NPRM proposes changes to Subpart J, Work Zone Safety and Mobility, and Subpart K, Temporary Traffic Control Devices to clarify and correct certain aspects of the regulations that were last modified in 2004 and 2006, respectively.

Subpart J—Work Zone Safety and Mobility

Work zones are a necessary part of meeting the need to maintain and

upgrade our aging roadway infrastructure. Work zone activities are expected to increase significantly with the passage of the Bipartisan Infrastructure Law (BIL) (enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117–58) (November 15, 2021)). The law provides approximately $350 billion for Federal highway programs during Fiscal Years 2022 through 2026.[1] This represents a 55 percent increase in highway and bridge program funding over the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114–94, December 4, 2015).[2]

Even without increased funding, work zones already result in significant safety and mobility impacts. In 2020 (the latest year for which data are available), the National Highway Traffic Safety Administration (NHTSA) reports that 857 individuals lost their lives in 774 fatal work zone crashes.[3] In 2020, 117 workers at road construction sites experienced a fatal occupational injury, 62 of which involved a worker on foot being struck by a motor vehicle.[4]

In terms of mobility impacts, it has been estimated that 10 percent of congestion in urban areas and 35 percent of congestion in rural areas is caused by work zones.[5] In Pennsylvania, 17 to 26 percent of congestion is attributed to roadwork; [6] in Florida, 4 to 7 percent of mid-day and p.m. peak congestion on arterial streets are attributed to work zones.[7] Certainly, the requirements contained in 23 CFR part 630 Subpart J continue to be needed to help manage and mitigate work zone safety and mobility impacts across the country.

The FHWA has developed multiple resources to assist States in implementing the revisions to the Work Zone Safety and Mobility Rule 2004.[8] [9] [10] [11] [12] Overall, States have complied with requirements to establish a work zone safety and mobility policy and to implement a process for identifying significant projects. However, the extent of implementation of some of the other required State-level processes and procedures has varied across the country. For example, many States have developed and implemented systematic procedures to assess anticipated work zone impacts in project development. However, only a few States have established procedures to monitor and manage actual safety and mobility impacts during project implementation or to perform post-project evaluations, despite increased availability of data sources and methodologies available to do so.[13] [14] [15] Similarly, many States have not fully embraced the opportunities for conducting data-driven performance-based work zone process reviews that these data sources and methodologies now offer, despite additional guidance and encouragement to do so.[16] [17] The FHWA acknowledges that a lack of clarity in what is specifically required by certain parts of the regulation may partially explain the uneven adoption. The existing regulation has language that was considered necessary at the time it was established to ensure State understanding of the regulation, but which is now considered superfluous to its understanding and implementation.

In addition, FHWA recognizes that the required frequency of Agency work zone process reviews may be hampering some States from performing more in-depth assessments using available data and methods. Section 11302 of the BIL calls for revisions to § 630.1008(e) to ensure that the work zone process review is required not more frequently than once every 5 years. In addition, Section 11303 of the BIL calls for revisions to § 630.1010(c) to ensure that only a project with a lane closure for 3 or more consecutive days shall be considered to be a significant project for purposes of that section and, notwithstanding any other provision of law, a State shall not be required to develop or implement a transportation management plan (TMP) (as described in § 630.1012) for a highway project not on the Interstate System if the project requires not more than 3 consecutive days of lane closures.

These regulations were last modified in 2004 and introduced requirements for State departments of transportation to develop and adopt work zone safety policies; to conduct work zone impacts analyses during project development to better understand individual project characteristics and the associated work zone impacts; to develop TMPs for projects as determined by the State's policy and results of impact analysis; and provisions to allow States flexibility to choose either method-based or performance-based specifications for their contracts. The FHWA proposes to revise §§ 630.1004, 630.1006, 630.1008, 630.1010, 630.1012, 630.1014, and 630.1016 to clarify certain aspects of the regulation and to update and provide additional emphasis to certain elements that have not seen the quality of implementation that was initially envisioned. The following is a summary of key proposed changes:

- Incorporation of new definitions and clarification of some existing definitions;

[1] BIL information can be viewed at the following internet website: *https://www.fhwa.dot.gov/bipartisan-infrastructure-law/funding.cfm.*

[2] FAST Act information can be viewed at the following internet website: *https://www.govinfo.gov/content/pkg/PLAW-114publ94/html/PLAW-114publ94.htm.*

[3] Fatal Analysis Reporting System (FARS) maintained by NHTSA. More information is available at the following internet website: *http://www-fars.nhtsa.dot.gov/.*

[4] Census of Fatal Occupational Injuries maintained by the Bureau of Labor Statistics, U.S. Department of Labor. More information is available at the following internet website: *https://www.bls.gov/iif/data.htm.*

[5] ''Traffic Congestion and Reliability: Trends and Advanced Strategies for Congestion Mitigation, FHWA Office of Operations,'' can be viewed at the following internet website: *https://ops.fhwa.dot.gov/congestion_report/executive_summary.htm.*

[6] ''Transportation Systems Management and Operations Performance Report,'' Pennsylvania Department of Transportation, January 2020, can be viewed at the following internet website: *https://www.penndot.gov/ProjectAndPrograms/operations/Documents/2020-January_TSMOPerformance-Report.pdf.*

[7] Soltani-Sobh, A., Ostojic, M., Stevanovic, A., Ma, J. and Hale, D.K. (2017). ''Development of Congestion Causal Pie Charts for Arterial Roadways.'' International Journal for Traffic & Transport Engineering, 7(1).

[8] ''Implementing the Rule on Work Zone Safety and Mobility (23 CFR 630 Subpart J),'' September 2005, can be viewed at the following internet website: *https://ops.fhwa.dot.gov/wz/rule_guide/index.htm.*

[9] ''Work Zone Impacts Assessment—An Approach to Assess and Manage Work Zone Safety and Mobility Impacts of Road Projects'' August 2006, can be viewed at the following internet website: *https://ops.fhwa.dot.gov/wz/resources/final_rule/wzi_guide/index.htm.*

[10] ''Developing and Implementing Transportation Management Plans for Work Zones,'' December 2005, can be viewed at the following internet website: *https://ops.fhwa.dot.gov/wz/resources/publications/trans_mgmt_plans/index.htm.*

[11] ''Work Zone Public Information and Outreach Strategies,'' November 2005, can be viewed at the following website: *https://ops.fhwa.dot.gov/wz/info_and_outreach/index.htm.*

[12] ''Work Zone Process Reviews'' can be viewed at the following internet website: *https://ops.fhwa.dot.gov/wz/prtoolbox/wzpr.htm.*

[13] ''Guidance on Data Needs, Availability, and Opportunities for Work Zone Performance Measures,'' March 2013, can be viewed at the following internet website: *https://ops.fhwa.dot.gov/wz/resources/publications/fhwahop13011/index.htm.*

[14] ''Work Zone Performance Management Peer Exchange Workshop,'' May 2013, can be viewed at the following internet website: *https://ops.fhwa.dot.gov/wz/p2p/pmwkshop053013/index.htm.*

[15] ''Work Zone Intelligent Transportation Systems Implementation Guide,'' January 2014, can be viewed at the following internet website: *https://ops.fhwa.dot.gov/publications/fhwahop14008/index.htm.*

[16] ''Utilizing the Work Zone Capability Maturity Framework to Improve Work Zone Management Capabilities and Process Review Efforts,'' April 2019, can be viewed at the following internet website: *https://ops.fhwa.dot.gov/wz/webinars/wzcmf/presentation/index.htm.*

[17] ''Guidance for Conducting Effective Work Zone Process Reviews,'' April 2015, can be viewed at the following internet website: *https://ops.fhwa.dot.gov/publications/fhwahop15013/index.htm.*

• Incorporation of a requirement in a State's Work Zone Safety and Mobility Policy to define the safety and mobility performance measures that the State will monitor and report;

• Reframing the requirement for bi-annual work zone process reviews as work zone programmatic reviews to be performed every 5 years, along with additional information on what is to be included in such reviews;

• Revising the definition of what constitutes a ''significant project''; and

• Simplifying the language describing the components of a TMP.

Section-by-Section Discussion of the Proposed Revisions to the Subpart J

§ 630.1004 Definitions and Explanation of Terms

The proposed changes to this section include: defining terms not previously defined; strengthening the definitions of a few terms that were already included in this section; and improving the organization of the regulation.

The FHWA proposes to add definitions of the terms ''Agency'' and ''State'' to this section. The FHWA also proposes to modify the definition of ''Mobility'' in work zones to delete the language about not compromising the safety of highway workers, as the importance of not compromising the safety of highway workers is already emphasized in the definition of ''Safety.'' Next, the definition of ''Safety'' would be revised to remove superfluous language and to strengthen the language pertaining to highway workers by adding the rate of highway worker fatalities and injuries per hours of work activity as a useful performance measure of safety.

The FHWA also proposes to move the definition of ''Transportation Management Plan'' that had been a part of § 630.1012(b) to this Definitions section. This definition includes reference to the temporary traffic control (TTC) plan and a traffic operations (TO) component to the TMP, as needed. The description of a public information component has been expanded to public information and outreach (PIO) to be consistent with the intent of that aspect of the TMP. The definition of a ''Work Zone Crash'' would be revised to make it consistent with the definition of a work zone crash in the Model Minimum Uniform Crash Criteria (MMUCC).[18] The reference to the MMUCC would be updated to the 5th edition published in 2017, and superfluous language describing the development of the MMUCC would be removed.

The FHWA also proposes to revise the definition of ''Work Zone Impacts'' to better list the factors affecting work zone impacts, particularly factors that affect highway worker safety. Examples are provided of traffic and travel characteristics that influence such impacts (volume, speed, vehicle mix and classification, etc.). In addition, revisions to the definition are proposed to better describe that such impacts may extend upstream or downstream of the limits of the work zone in addition to other highway corridors, other modes of transportation, or the regional transportation network.

Finally, FHWA proposes to add a definition for ''Work Zone Programmatic Reviews.'' This definition would replace the term ''Process Review'' to better emphasize the intent of the review upon the State's overall work zone management program. The work zone programmatic review is a data driven, systematic, and holistic analysis that uses quantitative and qualitative data from different sources to assess the safety and mobility performance of work zones under an agency's jurisdiction in order to identify improvements to that agency's work zone processes and procedures.

§ 630.1006 Work Zone Safety and Mobility Policy

A data-driven approach to work zone safety and mobility management requires the definition and use of performance measures. However, when originally published in 2004, the existing regulation did not require States to define the performance measures they would use to monitor and manage work zone impacts as well as their overall work zone management program. As a result, not all States have identified performance measures they plan to monitor, nor have they developed the processes and procedures necessary to compute such measures. Therefore, FHWA proposes to revise this section to add a requirement that the State's work zone safety and mobility policy will identify the safety and mobility performance measures that will be used to monitor and manage performance. The revision suggests the following project-level and programmatic-level performance measure examples: number of fatal and injury crashes occurring in a work zone (project-level measure); percent of projects that exceed a preestablished crash rate in the work zone (programmatic-level measure); number of highway worker fatalities and injuries experienced or highway worker fatality and injury rate per hours worked (project- or programmatic-level measure); percent of projects that experience queues above a predefined threshold (programmatic-level measure); and percent of time when speeds in a work zone drop below a predefined threshold (project-level measure).

§ 630.1008 State-Level Processes and Procedures

When the existing regulation was published in 2004, the idea of work zone safety and mobility management was a new concept. Consequently, the language in the regulation was written to give States significant leeway in how they chose to establish work zone safety and mobility management policies and procedures. The FHWA believes that States have made significant strides in their assessment and management procedures over the past 15 years that the existing regulation has been in place. In addition, analytical tools and data sources are readily available to perform these assessments. Therefore, FHWA proposes to revise § 630.1008(b) on work zone assessment and management procedures to strengthen these requirements. The word ''should'' would be replaced with ''shall'' in the first sentence. Strengthening the requirement to perform these assessments and management efforts will facilitate continued improvement in work zone safety and mobility nationally without unduly burdening the States. Next, the word ''potential'' would be added before ''work zone impacts'' to further indicate that it is an activity that occurs during project development, and the phrase ''to all road users and highway workers'' would be added to emphasize the importance of assessing potential impacts to both groups during project development. Finally, the words ''impacts occurring'' would be added after the phrase ''safety and mobility'' to emphasize the importance of monitoring conditions that occur when a work zone is in place.

Similarly, regulatory language published in 2004 indicated the need to use data and other information to improve agency work zone safety and mobility management processes but did not provide a lot of specifics as to what data or information could or should be used. Thus, FHWA also proposes to revise § 630.1008(c) on work zone data. A description of safety surrogate data and of work zone exposure data would be added to the list of available data sources that States shall use to monitor and manage work zone impacts for specific projects during implementation

[18] ''Model Minimum Uniform Crash Criteria Guideline'' (MMUCC), 5th Ed. (Electronic), 201703, produced by National Center for Statistics and Analysis, NHTSA. Telephone 1–(800)–934–8517. Available at the following internet website: *https://www.nhtsa.gov/mmucc-1.*

and to perform its work zone programmatic reviews. Examples of operational information (speeds, travel times, queue length and duration, etc.) would also be added to this section.

The FHWA proposes to revise § 630.1008(e) to change the description of process reviews to work zone programmatic reviews. The change in terminology emphasizes the importance of the review to look at all aspects of a State's work zone management program. To comply with BIL, the frequency of work zone programmatic reviews is reduced from once every 2 years to once every 5 years. A statement would be added that the review will be shared with FHWA at the end of each 5-year review period.

The FHWA also proposes to strengthen the requirements of the work zone programmatic review with the addition of § 630.1008(e)(1) to indicate that it shall include a data-driven assessment of the safety and mobility performance of either all work zones occurring during the 5-year period of the review, or a representative sample of the State's significant work zones. The proposed regulation further states that the approach used for selecting the representative projects shall be documented in the review and based on factors such as land use, roadway type, type of work zone, and extent of the work zone impacts. Language is added which proposes that each programmatic review shall include an assessment of work zone safety and mobility performance occurring since the last review, systematic identification of the States' work zone management processes and procedures to be improved, action items to be taken to achieve improvement, divisions/offices responsible for implementing the actions, and the estimated timeline for implementation. Language is also added that would require States to monitor work zone performance annually and report that performance to FHWA at the end of the third year after the most recent programmatic review. Given the longer time that would now be allowed between reviews, this proposed requirement emphasizes the need to monitor work zones on a continuous basis rather than simply evaluating a sample of work zones at 5-year intervals.

The regulatory language published in 2004 indicated that appropriate personnel who represent the various stages of project development, and different offices within the State that are involved in work zone management, should participate in the process (now programmatic) review but did not explicitly call out agency functions and offices that should be involved in the review. Therefore, FHWA proposes to add § 630.1008(d)(2) to explicitly identify the various State divisions or offices that shall be examined as part of the programmatic review, including but not limited to project planning, design, project implementation, maintenance activities, transportation operations and management, permitting (*e.g.,* utilities, oversize/overweight, lane closures, sidewalk closures), training, and public information and outreach. The remaining language in this section would be revised as § 630.1008(e)(3). The FHWA proposes to add ''and implementation'' after ''project development'' to keep it consistent with the similar statement in § 630.1006. The FHWA also proposes to remove the last sentence of the remaining language in the existing version of this section since it simply describes the intent of process reviews and is not essential to the implementation of the regulation.

§ 630.1010 Significant Projects

The FHWA proposes to revise § 630.1010(c) in response to directives included in BIL. Specifically, the paragraph would be changed to state that projects on the Interstate System within the boundary of a designated Transportation Management Area (TMA) that require intermittent or continuous lane closures for 3 or more consecutive days shall be considered significant projects.

The FHWA also proposes to add a new § 630.1010(d) to indicate that States shall not be required to develop or implement the TO or PIO components of a TMP for a highway project not on the Interstate System if the project is not deemed significant by the State. Although the existing language appeared to already allow this, this additional paragraph would emphasize that point more directly. This proposed addition would require that the previous paragraph (d) be renumbered as § 630.1010(e).

§ 630.1012 Project-Level Procedures

The FHWA proposes to revise § 630.1012(b) describing the TMP. The first full sentence would be moved to the § 630.1004 definitions and explanation of terms. The second sentence would be edited to utilize the TO and PIO acronyms previously defined § 630.1004.

The FHWA proposes to revise § 630.1012(b)(1) describing a TTC plan. The second sentence of this paragraph is superfluous to the intent of the regulation and would be deleted in its entirety. The American Association of State Highway and Transportation Officials (AASHTO) ''Roadside Design Guide'' that is incorporated by reference would be updated to the 2011 edition. This document was developed by AASHTO to present the concepts of roadside safety (including those in work zones) to designers so that the most practical, appropriate, and beneficial roadside design can be accomplished for each project.

Section 630.1012(b)(3) would be edited slightly to use the term ''PIO'' when discussing the public information and outreach component of a TMP when used.

The FHWA also proposes to delete §§ 630.1012(d)(1) and 630.1012(d)(2) from the regulation. Both paragraphs are informational only and are not needed.

§ 630.1016 Compliance Date

The FHWA proposes that the compliance date be 12 months after publication of the final rule in the **Federal Register**. This would allow States time to implement the proposed changes in requirements. In addition, FHWA proposes to specify that the States' next work zone programmatic review would be due on December 31, 2025, and once every 5 years thereafter.

Subpart K—Temporary Traffic Control Devices

In 2007, at 72 FR 68489, FHWA added a new subpart K to 23 CFR part 630 to facilitate the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations. The intent of the regulation was to reduce both worker and motorist fatalities and injuries in work zones. Overall, work zone fatalities did decrease significantly during the latter half of that decade, from a high of 1,068 work zone fatalities in 2004 to 590 fatalities in 2011.[19] Unfortunately, since then that trend has reversed, growing from 590 fatalities in 2011 to 857 fatalities in 2020 (the most recent year of available national work zone fatality data).

Vehicle collisions with highway workers as a percentage of all highway worker fatalities have also been trending upward in recent years. In 2015, 35 percent of all highway worker fatalities at road construction sites were caused by a vehicle striking a worker; by 2020,

[19] Fatality Analysis Reporting System (FARS) maintained by NHTSA and is available at the following URL: *http://www.fars.nhtsa.dot.gov/*.

that number has increased to 53 percent.[20] [21]

Among other provisions, the initial NPRM for Subpart K, published November 1, 2006, at 71 FR 64173, proposed that ''. . . . positive protective measures shall be required to separate workers from motorized traffic in all work zones conducted under traffic in areas that offer workers no means of escape (*e.g.,* tunnels, bridges, etc.) unless an engineering analysis determines otherwise.'' [22] The FHWA received a substantial number of comments to the NPRM. While overall the responses were supportive of the intent of the proposed rule, several of the respondents noted that the language imposed the requirements without any supporting research indicating that the proposed criteria were appropriate.[23] This created significant concerns with some respondents, who viewed the requirements as arbitrary and overly prescriptive. The FHWA, in response to the comments, acknowledged the lack of available data and research regarding vehicle intrusions, and modified the final rule language to require the need for longitudinal traffic barrier and other positive protection devices to be based on an engineering study. The final rule also required States to consider use of positive protection where such devices offer the highest potential for increased safety for workers and road users. The FHWA retained the conditions listed in the 2006 NPRM as examples of situations where positive protection use shall be considered and added roadside hazards such as drop-offs or unfished bridge decks that will remain overnight or longer as other examples.

Language in the Moving Ahead for Progress in the 21st Century Act (MAP–21) signed into law on July 6, 2012, directed FHWA to modify Subpart K to re-incorporate the original language proposed in the 2006 NPRM related to criteria for requiring positive protection.[24] However, research and data did not support the thresholds stated in the law. A study using the Roadside Safety Analysis Program (RSAP) and available data from New York State regarding work zone intrusion crash severities indicated that positive protection use in work zones could be justified using benefit-cost analyses in many cases, but on higher volume roadways and for longer duration projects than were specified in the law language.[25] [26] The FHWA funded a separate benefit-cost analysis, using a different methodology, to evaluate the efficacy of modifying Subpart K language and also concluded that the thresholds for positive protection use stated in MAP–21 could not be justified.[27] Another study using an updated version of RSAP and updated cost values still resulted in recommendations for positive protection use in work zones that were higher than specified in the MAP–21 language.[28] Despite the lack of research findings supporting the criteria, reference to the MAP–21 language was retained in the Fixing America's Surface Transportation (FAST) Act, signed into law on December 4, 2015.[29]

While the results of the various analyses have not supported the inclusion of the specific thresholds of the 2006 NPRM language into the Subpart K regulation, there is reason to revise the rule at this time. It has been over 15 years since the rule was first published. New technologies, such as work zone intelligent transportation systems (also referred to as smart work zones) and automated flagger assistance devices (AFADs), have become dependable tools that are now readily available to help mitigate the safety and mobility impacts of work zones and should be listed as options to consider within the regulation. Other advanced technologies to support connected and automated vehicle travel through and around work zones continue to be developed and deployed. Conversely, despite sufficient time to develop appropriate procedures to do so, adoption of the requirement to base decisions regarding the need for longitudinal traffic barriers and other positive protection devices on an ''engineering study'' have been uneven across the States. A need exists to strengthen the rule with regard to what constitutes an engineering study. Finally, the rule references guidelines and other documents that have been superseded by newer publications, and the rule needs to be revised to reflect the proper publication references.

Section-by-Section Discussion of the Proposed Revisions to Subpart K

§ 630.1104 Definitions

Proposed revisions to § 630.1106(b) of the rule would specify that States are to perform an engineering study to guide decisions regarding the use of positive protection devices to prevent the intrusion of motorist traffic into the workspace and other potentially hazardous areas in the work zone, use of exposure control measures to avoid or minimize worker exposure to motorized traffic and road user exposure to work activities, and use of other traffic control measures. Therefore, FHWA proposes to add a definition of an engineering study to this section.

Next, NCHRP 350 has been superseded with the Manual of Assessing Safety Hardware (otherwise known as MASH), American Association of State Highway and Transportation Officials, AASHTO. The FHWA's longstanding policy is that all roadside safety hardware installed on the National Highway System (NHS) be crashworthy. As the MASH implementation process moves forward, there no longer is a need to call out the crashworthiness requirements that positive protection devices shall meet. Therefore, FHWA proposes that the text ''. . . National Cooperative Highway Research Program (NCHRP) Report 350, Recommended Procedures for the Safety Performance Evaluation of Highway Features, 1993, Transportation Research Board, National Research Council'' and subsequent language that incorporates by reference that report into the regulation be deleted.

§ 630.1106 Policy and Procedures for Work Zone Safety Management

The FHWA proposes to modify § 630.1106(b) to clarify that agency processes, procedures, or guidance regarding strategies and devices to be used for the management of work zone impacts, including the use of positive protection devices and other strategies, are to be based on an engineering study. In addition, new details are proposed to provide characteristics of an engineering

[20] Census of Fatal Occupational Injuries. Bureau of Labor Statistics, US. Department of Labor, Washington, DC. Accessible at *https://www.bls.gov/iif/overview/cfoi.htm.*

[21] Worker Fatalities and Injuries at Road Construction Sites. National Work Zone Safety Information Clearinghouse. Accessible at *https://workzonesafety.org/work-zone-data/worker-fatalities-and-injuries-at-road-construction-sites/.*

[22] Notice of Proposed Rulemaking 23 CFR part 630 Temporary Traffic Control Devices. **Federal Register**, Vol. 71, No. 211, November 1, 2006.

[23] Final Rule, 23 CFR part 630 Subpart K, Temporary Traffic Control Devices. **Federal Register**, Vol. 72, No. 233, December 5, 2007.

[24] Moving Ahead for Progress in the 21st Century Act (MAP–21). Public Law 112–141, Section 1405, Highway Worker Safety, July 6, 2012.

[25] Ullman, G.L., M.D. Finley, J.E. Bryden, R. Srinivasan, and F.M. Council. *Traffic Safety Evaluation of Nighttime and Daytime Work Zones.* NCHRP Report 627. Transportation Research Board of the National Academies, Washington, DC, 2008.

[26] Ullman, G.L., V. Iragavarapu, and D. Sun. *Work Zone Positive Protection Guidelines.* Report No. FHWA/TX–11/0–6163–1. Texas Transportation Institute, College Station, TX, May 2011.

[27] Support for MAP–21 Section 1405: Cost-Benefit Analysis. Unpublished report prepared for FHWA. March 12, 2013.

[28] Ullman, G.L. and V. Iragavarapu. *Work Zone Positive Protection Guidelines for Idaho.* Report No. FHWA–ID–14–228. Texas A&M Transportation Institute, College Station, TX, November 2014.

[29] Fixing America's Surface Transportation Act (FAST Act). Public Law 114–94. Section 1427, Highway Work Zones, December 4, 2015.

study and examples of the types of engineering decisionmaking tools that could be used in the engineering study.

The FHWA also proposes to modify the text for paragraph (b)(2) from ''Anticipated traffic speeds through the work zone'' to ''Anticipated operating conditions including traffic volume, vehicle mix, and speeds through the work zone.'' Paragraph (b)(3) would then be modified from ''Anticipated traffic volume'' to ''Anticipated traffic safety impacts,'' paragraph (b)(4) would be deleted, and the remaining item list would be renumbered.

§ 630.110 Work Zone Safety Management Measures and Strategies

The FHWA proposes to modify § 630.1108(a), Positive Protection Devices, to remove redundant language indicating that decisions regarding the use of longitudinal traffic barrier and other positive protection devices shall be based on an engineering study, as this was already stated in § 630.1106(b). The FHWA also proposes that this section be revised to require positive protection devices be used in work zones with high anticipated operating speeds that provide workers no means of escape from motorized traffic intruding into the workspace unless an engineering study determines otherwise. This language is consistent with that initially proposed in the 2006 Subpart K NPRM and in MAP–21 for these situations. The remaining portion of this section would retain the existing language requiring positive protection devices to be considered in other situations that place workers at increased risk from motorized traffic, and where positive protection devices offer the highest potential for increased safety for workers and road users.

The FHWA proposes to modify the list of technologies and strategies in § 630.1108(c), Other Traffic Control Measures. Specifically, FHWA proposes that paragraph (c)(7) be modified to include the use of automated flagger assistance devices (AFADs) in addition to enhanced flagger station setups already mentioned. Paragraph (c)(16) would be modified from automated speed enforcement to speed safety cameras, which is the preferred title of the technology as an FHWA proven safety countermeasure.[30] Two additional technologies, protection vehicles and intelligent transportation systems (ITS) and other advanced technology solutions and strategies, are additionally proposed as paragraphs (c)(21) and (c)(22).

§ 630.1110 Maintenance of Temporary Traffic Control Devices

The FHWA proposes to revise the internet website addresses of the American Traffic Safety Services Association's (ATSSA) ''Quality Guidelines for Work Zone Traffic Control Devices,'' the Illinois Department of Transportation ''Quality Standards for Work Zone Traffic Control Devices,'' and the Minnesota Department of Transportation ''Quality Standards—Methods to determine whether the various traffic control devices are Acceptable, Marginal, or Unacceptable.'' These documents are currently available, but the website addresses have changed since subpart K was originally issued in 2007.

Discussion Under 1 CFR Part 51

The FHWA is incorporating by reference the more current versions of the manuals listed herein. Specifically, FHWA incorporates by reference Chapter 9 of the AASHTO ''Roadside Design Guide: Traffic Barriers, Traffic Control Devices, and other Safety Features for Work Zones'' but will incorporate the 2011 edition instead of the 2002 edition. This document was developed by AASHTO to present the concepts of roadside safety (including those in work zones) to designers so that the most practical, appropriate, and beneficial roadside design can be accomplished for each project. In addition, FHWA incorporates by reference its 2009 ''Manual on Uniform Traffic Control Devices for Streets and Highways,'' including Revisions No. 1 and No. 2, dated May 2012, and No. 3 dated August 2022. This document was developed by FHWA to define the standards used by road managers nationwide to install and maintain traffic control devices on all public streets, highways, bikeways, and private roads open to public travel.

The documents that FHWA is incorporating by reference are reasonably available to interested parties, primarily State DOTs, local agencies, and Tribal governments carrying out Federal-aid highway projects. These documents represent the most recent refinements that professional organizations have formally accepted and are currently in use by the transportation industry. The documents incorporated by reference are available on the docket of this rulemaking and at the sources identified in the regulatory text below. The specific standards are discussed in greater detail elsewhere in this preamble.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA has considered the impacts of this rule under Executive Order (E.O.) 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, as amended by E.O. 1314094 (''Modernizing Regulatory Review''), and DOT's regulatory policies and procedures. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) has determined that this rulemaking is not a significant regulatory action under section 3(f) of E.O. 12866. Accordingly, OMB has not reviewed it under that E.O.

It is anticipated that the proposed rule would not be economically significant for purposes of E.O. 12866. The proposed rule would not have an annual effect on the economy of $200 million or more. The proposed rule would not adversely affect in a material way the economy, any sector of the economy, productivity, competition, or jobs. In addition, the proposed changes would not interfere with any action taken or planned by another Agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA has evaluated the effects of this proposed rule on small entities and has determined that it is not anticipated to have a significant economic impact on a substantial number of small entities. This rule applies to all State and local highway agencies that use Federal-aid highway funding in the execution of their highway program. However, the proposed regulatory action would only directly impact State requirements regarding work zone programmatic reviews, and otherwise would clarify the characteristics of a significant project. State governments are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, FHWA certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995

[30] *Speed Safety Cameras.* FHWA–SA–21–070. FHWA, U.S. Department of Transportation, Washington, DC.

(Pub. L. 104–4, 109 Stat. 48). This proposed rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $168 million or more in any one year (2 U.S.C. 1532). In addition, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism Assessment)

This proposed rule has been analyzed in accordance with the principles and criteria contained in E.O. 13132, and FHWA has determined that this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA also has determined that this proposed rule would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that the rule does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

The FHWA has analyzed this proposed rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded under 23 CFR 771.117(c)(20), which applies to the promulgation of rules, regulations, and directives. Categorically excluded actions meet the criteria for categorical exclusions under the Council on Environmental Quality regulations and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA. The FHWA does not anticipate any adverse environmental impacts from this proposed rule.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this proposed regulatory action in accordance with the principles and criteria contained in E.O. 13175, ''Consultation and Coordination with Indian Tribal Governments.'' The purpose of the proposed regulatory action is to improve motorist, worker, and other vulnerable road user safety and mobility on Federal-aid highway projects. The FHWA believes that the proposed action would not have substantial direct effects on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal law. Therefore, the funding and consultation requirements of E.O. 13175 do not apply and a Tribal summary impact statement is not required.

Executive Order 12898 (Environmental Justice)

The E.O. 12898 requires that each Federal Agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has determined that this proposed rule does not raise any environmental justice issues.

Regulation Identifier Number

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 630

Government contracts, Grant programs-transportation, Highway safety, Highways and roads, Incorporation by reference, Reporting and recordkeeping requirements, Traffic regulations.

Issued under authority delegated in 49 CFR 1.81 and 1.85.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

In consideration of the foregoing, FHWA proposes to amend Title 23, Code of Federal Regulations, part 630, as set forth below:

PART 630—PRECONSTRUCTION PROCEDURES

■ 1. The authority citation for part 630 is revised to read as follows:

Authority: 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); Sec. 1110, 1501, and 1503 of Pub. L. 109–59, 119 Stat. 1144; Pub. L. 105–178, 112 Stat. 193; Pub. L. 104–59, 109 Stat. 582; Pub. L. 97–424, 96 Stat. 2106; Pub. L. 90–495, 82 Stat. 828; Pub. L. 85–767, 72 Stat. 896; Pub. L. 84–627, 70 Stat. 380; 23 CFR 1.32 and 49 CFR 1.81 and 1.85, and Pub. L. 112–141, 126 Stat. 405, section 1303.

Subpart J—Work Zone Safety and Mobility

■ 2. Revise subpart J of part 630 to read as follows:

Subpart J—Work Zone Safety and Mobility

Sec.

§ 630.1002 Purpose.

Work zones directly impact the safety and mobility of road users and highway workers. These safety and mobility impacts are exacerbated by an aging highway infrastructure and growing congestion in many locations. Addressing these safety and mobility issues requires considerations that start early in project development and continue through project completion. Part 6 of the MUTCD (incorporated by reference, see § 630.1018) sets forth basic principles and prescribes standards for the design, application, installation, and maintenance of traffic control devices for highway and street construction, maintenance operation, and utility work. In addition to the provisions in the MUTCD, there are other actions that could be taken to further help mitigate the safety and mobility impacts of work zones. This subpart establishes requirements and provides guidance for systematically addressing the safety and mobility impacts of work zones, and for developing strategies to help manage these impacts on all Federal-aid highway projects.

§ 630.1004 Definitions and explanation of terms.

As used in this subpart:

Agency means a State or local highway agency or authority.

Highway workers include, but are not limited to, personnel of the contractor, subcontractor, agency, utilities, and law

enforcement, performing work within the right-of-way of a transportation facility.

Mobility is the ability to move from place to place and is significantly dependent on the availability of transportation facilities and on system operating conditions. With specific reference to work zones, mobility pertains to moving road users efficiently through or around a work zone area with minimum delay compared to baseline travel when no work zone is present. The commonly used performance measures for the assessment of mobility include delay, speed, travel time, and queue lengths.

Safety is a representation of the level of exposure to potential hazards for users of transportation facilities and highway workers. With specific reference to work zones, safety refers to minimizing potential hazards to road users in the vicinity of a work zone and highway workers at the work zone interface with traffic. The commonly used performance measures for highway work zone safety are the number of crashes or the consequences of crashes (fatalities and injuries) at a given location or along a section of highway during a period of time. In terms of highway worker safety performance measures, the number of highway worker fatalities and injuries at a given location or along a section of highway during a period of time, and the rate of highway worker fatalities and injuries per hours of work activity, are commonly used measures.

State refers to a State department of transportation.

Transportation management plan (TMP) consists of strategies to manage the work zone impacts of a project. Its scope, content, and degree of detail may vary based upon the agency's work zone policy and the agency's understanding of the expected work zone impacts of the project.

Work zone [2] is an area of a highway with construction, maintenance, or utility work activities. A work zone is typically marked by signs, channelizing devices, barriers, pavement markings, and/or work vehicles. It extends from the first warning sign or high intensity rotating, flashing, oscillating, or strobe lights on a vehicle to the END ROAD WORK sign or the last temporary traffic control (TTC) device.

Work zone crash [3] is a crash that occurs in or related to a construction, maintenance, or utility work zone, whether or not workers were actually present at the time of the crash. ''Work zone-related'' crashes may also include crashes involving motor vehicles slowed or stopped because of the work zone, even if the first harmful event occurred before the first warning sign.

Work zone impacts refer to work zone-induced deviations from the normal range of transportation system safety and mobility. The extent of the work zone impacts may vary based on factors such as: road classification and geometrics; area type (urban, suburban, and rural); traffic and travel characteristics (volumes, speeds, vehicle mix and classification, etc.); type of work being performed; distance between workers and traffic; availability of escape paths for workers; time of day/night; and complexity and duration of the project. These impacts may extend beyond the physical location of the work zone itself, including upstream or downstream of the work zone location, other highway corridors, other modes of transportation, and/or the regional transportation network.

A *work zone programmatic review* is a data-driven, systematic, and holistic analysis that uses quantitative and qualitative data from different sources to assess the safety and mobility performance of work zones under a State's jurisdiction in order to identify improvements to that agency's work zone processes and procedures.

§ 630.1006 Work zone safety and mobility policy.

(a) Each State shall implement a policy for the systematic consideration and management of work zone impacts on all Federal-aid highway projects. This policy shall address work zone impacts throughout the various stages of the project development and implementation process. This policy may take the form of processes, procedures, or guidance, and may vary based on the characteristics and expected work zone impacts of individual projects or classes of projects.

(b) At a minimum, the policy shall identify safety and mobility performance measures that will be used to manage performance, such as number of fatal and injury crashes occurring in a work zone, percent of projects that exceed a preestablished crash rate in the work zone, number of highway worker fatalities and injuries experienced or highway worker fatality and injury rate per hours worked, percent of projects that experience queues above a predefined threshold, and percent of time when speeds in a work zone drop below a predefined threshold.

(c) The States should institute this policy using a multi-disciplinary team and in partnership with FHWA. The States are encouraged to implement this policy for non-Federal-aid projects as well.

§ 630.1008 State-level processes and procedures.

(a) This section consists of State-level processes and procedures for States to implement and sustain their respective work zone safety and mobility policies. State-level processes and procedures, data and information resources, training, and periodic evaluation enable a systematic approach for addressing and managing the safety and mobility impacts of work zones.

(b) *Work zone assessment and management procedures.* States shall develop and implement systematic procedures to assess potential work zone impacts to all road users and highway workers in project development and to manage safety and mobility impacts occurring during project implementation. The scope of these procedures shall be based on the project characteristics.

(c) *Work zone data.* States shall use field observations, available work zone crash data, safety surrogate data (*e.g.,* speed differentials, hard braking and other data from connected and autonomous vehicles), available operational information (*e.g.,* speeds, travel times, queue length and duration), and available exposure data (*e.g.,* number of projects, number and length of lane closures, vehicle-miles traveled through work zones) to monitor and manage work zone impacts for specific projects during implementation and to perform its work zone programmatic reviews.

(d) *Training.* States shall require that personnel involved in the development, design, implementation, operation, inspection, and enforcement of work zone related transportation management and traffic control be trained, appropriate to the job decisions each individual is required to make. States shall require periodic training updates that reflect changing industry practices and State processes and procedures.

(e) *Work zone programmatic review.* In order to assess the effectiveness of work zone safety and mobility processes and procedures, States shall perform a work zone programmatic review every 5 years and share that review with FHWA by the end of the 5-year review period.

(1) The work zone programmatic review shall include a data-driven assessment of the safety and mobility

[2] *see* MUTCD, Part 6, ''Temporary Traffic Control'' (incorporated elsewhere in this subpart).

[3] *see* ''Model Minimum Uniform Crash Criteria Guideline'' (MMUCC), 5th Ed. (Electronic), 2017, produced by NHTSA. Available at the following internet website: *https://www.nhtsa.gov/mmucc-1.*

performance of all work zones or a representative sample of the State's significant work zones over the 5-year period being reviewed. The approach used for selecting the representative projects shall be documented and should be based on factors such as land use (urban and rural locations), roadway type, type of work zone, and extent of the work zone impacts.

(2) Each programmatic review shall include an assessment of the work zone safety and mobility performance occurring since the last review was performed, systematic identification and assessment of the States' work zone management processes and procedures to be improved, action items to be taken to achieve improvement, divisions or offices responsible for implementing the actions, and estimated timeline for implementation.

(3) States shall use crash data, available safety surrogate data (*e.g.,* speed differentials, hard braking, and other data from connected and autonomous vehicles), operational data, and the performance measures specified in their work zone policy to conduct the assessment. To ensure assessment of the safety and mobility performance of their work zones on a continuous basis, States shall monitor performance annually and report that performance to FHWA at the end of the third year after the most recent programmatic review.

(4) The work zone programmatic review shall include examination of efforts across all State divisions or offices affecting work zone safety and mobility management, including but not limited to: project planning, project design, project implementation, maintenance activities, transportation operations and management, permitting (*e.g.,* utilities, oversize/overweight, lane closures, sidewalk closures), training, and public information and outreach.

(5) Appropriate personnel who represent the project development and implementation stages and the different offices within the State, and FHWA should participate in this review. Other non-State stakeholders may also be included in this review, as appropriate.

§ 630.1010 Significant projects.

(a) A significant project is one that, alone or in combination with other concurrent projects nearby, is anticipated to cause sustained work zone impacts (as defined in § 630.1004) that are greater than what is considered tolerable based on State policy and engineering judgment.

(b) The applicability of the provisions in §§ 630.1012(b)(2) and 630.1012(b)(3) is dependent upon whether a project is determined to be significant. The State shall identify upcoming projects that are expected to be significant. This identification of significant projects should be done as early as possible in the project delivery and development process, and in cooperation with FHWA. The State's work zone policy provisions, the project's characteristics, and the magnitude and extent of the anticipated work zone impacts should be considered when determining if a project is significant or not.

(c) All Interstate system projects within the boundaries of a designated Transportation Management Area that require intermittent or continuous lane closures for 3 or more consecutive days shall be considered as significant projects.

(d) A State shall not be required to develop or implement the TO or PIO components of a TMP (as described in section § 630.1012(b)) for a highway project not on the Interstate System if the project is not deemed significant by the State.

(e) For an Interstate system project or categories of Interstate system projects that are classified as significant through the application of the provisions in § 630.1010(c), but in the judgment of the State do not cause sustained work zone impacts, the State may request from FHWA an exception to §§ 630.1012(b)(2) and 630.1012(b)(3). The FHWA may grant exceptions to these provisions based on the State's ability to show that the specific Interstate system project or categories of Interstate system projects do not have sustained work zone impacts.

§ 630.1012 Project-level procedures.

(a) This section provides guidance and establishes procedures for States to manage the work zone impacts of individual projects.

(b) *Transportation Management Plan (TMP).* For significant projects (as described in § 630.1010), the State shall develop a TMP that consists of a TTC plan and addresses both transportation operations (TO) and public information and outreach (PIO) components. For individual projects or classes of projects that the State determines to have less than significant work zone impacts, the TMP may consist only of a TTC plan. States are encouraged to consider TO and PIO issues for all projects.

(1) A TTC plan describes TTC measures to be used for facilitating road users through a work zone or an incident area. The TTC plan shall be consistent with the provisions under Part 6 of the MUTCD (incorporated by reference, see § 630.1018) and with the work zone hardware recommendations in Chapter 9 of the AASHTO Roadside Design Guide (incorporated by reference, see § 630.1018). In developing and implementing the TTC plan, pre-existing roadside safety hardware shall be maintained at an equivalent or better level than existed prior to project implementation. The scope of the TTC plan is determined by the project characteristics and the traffic safety and control requirements identified by the State for that project. The TTC plan shall either be a reference to specific TTC elements in the MUTCD, approved standard TTC plans, State transportation department TTC manual, or be designed specifically for the project.

(2) The TO component of the TMP shall include the identification of strategies that the State will use to mitigate impacts of the work zone on the operation and management of the transportation system within the work zone impact area. Typical TO strategies may include, but are not limited to, demand management, corridor/network management, safety management and enforcement, and work zone traffic management. The scope of the TO component should be determined by the project characteristics and the transportation operations and safety strategies identified by the State.

(3) The PIO component of the TMP shall include communications strategies that seek to inform affected road users, the general public, area residences and businesses, and appropriate public entities about the project, the expected work zone impacts, and the changing conditions on the project. This may include traveler information strategies. The scope of the PIO component should be determined by the project characteristics and the public information and outreach strategies identified by the State. Public information and outreach should be provided through methods best suited for the project, and may include, but not be limited to, information on the project characteristics, expected impacts, closure details, and commuter alternatives.

(4) States should develop and implement the TMP in sustained consultation with stakeholders (*e.g.,* other transportation agencies, railroad agencies/operators, transit providers, freight movers, utility suppliers, police, fire, emergency medical services, schools, business communities, and regional transportation management centers).

(c) *Inclusion of TMP in Plans, Specification, and Estimates.* The Plans, Specifications, and Estimates (PS&E) shall include either a TMP or provisions for contractors to develop a TMP at the most appropriate project phase as

applicable to the State's chosen contracting methodology for the project. A contractor developed TMP shall be subject to the approval of the State and shall not be implemented before it is approved by the State.

(d) *Inclusion of Pay Item Provisions in Plans, Specification, and Estimates.* The PS&Es shall include appropriate pay item provisions for implementing the TMP, either through method or performance-based specifications.

(e) *Responsible persons.* The State and the contractor shall each designate a trained person, as specified in § 630.1008(d), at the project level who has the primary responsibility and sufficient authority for implementing the TMP and other safety and mobility aspects of the project.

§ 630.1014 Implementation.

Each State shall work in partnership with FHWA in the implementation of its policies and procedures to improve work zone safety and mobility. At a minimum, this shall involve an FHWA review of conformance of the State's policies and procedures with this regulation and reassessment of the State's implementation of its procedures at appropriate intervals. Each State is encouraged to address implementation of this regulation in its stewardship agreement with FHWA.

§ 630.1016 Compliance date.

States shall comply with all the provisions of this rule no later than [DATE ONE YEAR AFTER THE EFFECTIVE DATE]. The next work zone programmatic review will be due December 31, 2025, and once every 5 years thereafter. For projects that are in the later stages of development at or about the compliance date, and if it is determined that the delivery of those projects would be significantly impacted as a result of this rule's provisions, States may request variances for those projects from FHWA on a project-by-project basis.

§ 630.1018 Incorporation by reference.

Certain material is incorporated by reference into this subpart with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the Federal Highway Administration (FHWA) and at the National Archives and Records Administration (NARA). Contact FHWA at: Federal Highway Administration, Office of Transportation Operations, 1200 New Jersey Avenue SE, Washington, DC 20590; (202) 366–8043; *https://ops.fhwa.dot.gov/contactus.htm*. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov*. The material may be obtained from the following sources:

(a) AASHTO, American Association of State Highway and Transportation Officials, 555 12th Street NW, Suite 1000, Washington, DC 20004; (202) 624–5800; website: *https://store.transportation.org/*.

(1) AASHTO Roadside Design Guide: ''Traffic Barriers, Traffic Control Devices, and Other Safety Features for Work Zones'', 2011; approved for § 630.1012.

(2) [Reserved]

(b) FHWA, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–1993; website: *https://mutcd.fhwa.dot.gov*.

(1) Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), as follows; approved for §§ 630.1002; 630.1012:

(i) 2009 edition, November 4, 2009.

(ii) Revision No. 1, dated May 2012.

(iii) Revision No. 2, dated May 2012.

(iv) Revision No. 3, dated June 2022.

(2) [Reserved]

Subpart K—Temporary Traffic Control Devices

■ 3. Amend Subpart K by removing the authority citation.

■ 4. Amend § 630.1104 by adding, in alphabetical order, the definition of ''Engineering Study'' and revising the definition of ''Positive Protection Devices'' to read as follows:

§ 630.1104 Definitions.

* * * * *

Engineering Study means the comprehensive analysis and evaluation of available pertinent information, and the application of appropriate principles, provisions, and practices for the purpose of determining the choice and application of work zone positive protection devices, exposure control measures, or other traffic control measures to safety manage work zones.

* * * * *

Positive Protection Devices means devices that contain or redirect vehicles.

* * * * *

■ 5. Amend § 630.1106 by revising paragraph (b) to read as follows:

§ 630.1106 Policy and procedures for work zone safety management.

* * * * *

(b) Agency processes, procedures, or guidance should be based on consideration of standards or guidance contained in the Manual on Uniform Traffic Control Devices for Streets and Highways and the AASHTO Roadside Design Guide, as well as project characteristics and factors. The strategies and devices to be used may be determined by a project-specific engineering study or determined from agency guidelines developed from an engineering study that indicate when positive protection devices or other strategies and approaches are to be used based on project and highway characteristics and factors. An engineer, or an individual working under the supervision of an engineer shall perform an engineering study through the application of procedures and criteria established by the engineer. The person conducting the engineering study shall document such study. Benefit-cost analyses, decision matrices, decision tree analysis, or other appropriate engineering decisionmaking tools may be used in the engineering study. The types of measures and strategies to be used are not mutually exclusive, and should be considered in combination as appropriate based on characteristics and factors such as those listed below:

(1) Project scope and duration;

(2) Anticipated operating conditions including traffic volume, vehicle mix, and speeds through the work zone;

(3) Anticipated traffic safety impacts;

(4) Type of work (as related to worker exposure and crash risks);

(5) Distance between traffic and workers, and extent of worker exposure;

(6) Escape paths available for workers to avoid a vehicle intrusion into the work space;

(7) Time of day (*e.g.* night work);

(8) Work area restrictions (including impact on worker exposure);

(9) Consequences from/to road users resulting from roadway departure;

(10) Potential hazard to workers and road users presented by device itself and during device placement and removal;

(11) Geometrics that may increase crash risks (*e.g.,* poor sight distance, sharp curves);

(12) Access to/from work space;

(13) Roadway classification; and

(14) Impacts on project cos and duration.

* * * * *

■ 6. Amend § 630.1108 by revising paragraphs (a), (c)(7), (c)(16), and (c)(20), and adding paragraphs (c)(22) and (c)(23) to read as follows:

§ 630.1108 Work zone safety management measures and strategies.

(a) Positive Protection Devices. At a minimum, agencies shall use positive

protection devices in work zones with high anticipated operating speeds that provide workers no means of escape from motorized traffic intruding into the workspace unless an engineering study determines otherwise. Positive protection devices shall be considered in other situations that place workers at increased risk from motorized traffic, and where positive protection devices offer the highest potential for increased safety for workers and road users such as:

* * * * *

(c) * * *

(7) Enhanced flagger station setups or use of automated flagger assistance devices (AFADs);

* * * * *

(16) Speed Safety Cameras (where permitted by State/local laws):

* * * * *

(20) Public information and traveler information;

* * * * *

(22) Protection vehicles; and

(23) Intelligent Transportation Systems (ITS) and other advanced technology solutions and strategies.

* * * * *

■ 7. Amend § 630.1110 by revising footnote 1 to read as follows:

§ 630.1110 Maintenance of temporary traffic control devices.

* * * * *

[1] The American Traffic Safety Services Association's (ATSSA) Quality Guidelines for Work Zone Traffic Control Devices uses photos and written descriptions to help judge when a traffic control device has outlived its usefulness. These guidelines are available for purchase from ATSSA through the following URL: *https://www.atssa.com/ATSSA-Store/Product-Miscellaneous#/storefront/9df4b401-c3e9-e811-a863-000d3a140bb5*. Similar guidelines are available from various State highway agencies. The Illinois Department of Transportation ''Quality Standards for Work Zone Traffic Control Devices'' is available online at *https://idot.illinois.gov/Assets/uploads/files/Doing-Business/Manuals-Guides-&-Handbooks/Highways/Safety-Engineering/Traffic%20Control%20Field%20Manual%20for%20IDOT%20Employees%20(April%202016).pdf*. The Minnesota Department of Transportation ''Quality Standards—Methods to determine whether the various traffic control devices are Acceptable, Marginal, or Unacceptable'' is available online at *http://www.dot.state.mn.us/trafficeng/publ/fieldmanual/qualitystandards.pdf*.

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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2023–0008; Notice No. 226]

RIN 1513–AD00

Proposed Establishment of the Nine Lakes of East Tennessee Viticultural Area

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) proposes establishing the approximately 4,064-square mile ''Nine Lakes of East Tennessee'' viticultural area in northeastern Tennessee. The proposed viticultural area is not within any other established viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase. TTB invites comments on this proposed addition to its regulations.

DATES: Comments must be received by November 20, 2023.

ADDRESSES: You may submit comments to TTB on this proposal electronically using the comment form for this document posted within Docket No. TTB–2023–0008 on the *Regulations.gov* website at *https://www.regulations.gov*. At the same location, you also may view copies of this document, the related petition and selected supporting materials, and any comments TTB receives on this proposal. A direct link to that docket is available on the TTB website at *https://www.ttb.gov/wine/notices-of-proposed-rulemaking* under Notice No. 226. Alternatively, you may submit comments via postal mail to the Director, Regulations and Ruling Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005. Please see the Public Participation section of this document for further information on the comments requested on this proposal and on the submission, confidentiality, and public disclosure of comments.

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

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

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

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

Definition

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

Requirements

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

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

Nine Lakes of East Tennessee Petition

TTB received a petition from the Appalachian Region Wine Producers Association, proposing the establishment of the ''Nine Lakes of East Tennessee'' AVA. The proposed Nine Lakes of East Tennessee AVA is in Anderson, Blount, Campbell, Claiborne, Cocke, Grainger, Hamblen, Jefferson, Knox, Loudon, Monroe, Roane, Sevier, and Union Counties, in Tennessee. The proposed AVA contains approximately 4,064 square miles (2,601,390 acres), with 232 acres of planted vineyards spread throughout the proposed AVA. There are also 29 wineries within the proposed AVA. According to the petition, there is at least one vineyard in each of the counties within the proposed AVA and a winery in all but two of the counties, demonstrating that commercial viticulture and winemaking take place throughout the entire proposed AVA.

According to the petition, the distinguishing features of the proposed Nine Lakes of East Tennessee AVA include its geology, soils, topography, and climate. Unless otherwise noted, all information and data pertaining to the proposed AVA is from the petition and its supporting exhibits.

Name Evidence

The petition states that the proposed Nine Lakes of East Tennessee AVA is located entirely within the watershed of the Tennessee River and its tributaries. Within the region of the proposed AVA are nine lakes formed when the Tennessee Valley Authority (TVA) dammed the rivers to resolve issues with flooding, reforestation, and electricity production. According to the petition, the region has also been historically known as the Great Valley of East Tennessee. However, the petitioners chose not to propose that name as the Great Valley encompasses a much larger region than the proposed AVA. Because the proposed AVA only includes the area around the nine lakes created by the TVA, the petitioners believe that the name ''Nine Lakes of East Tennessee'' is a more appropriate, succinct, and descriptive name for the proposed AVA.

The petition included evidence showing use of the ''Nine Lakes of East Tennessee'' name to describe the region of the proposed AVA. The petition contained a visitor's guide to eastern Tennessee titled ''9 Lakes of East Tennessee.'' A website called ''Nine Lakes Wine Country'' provides information on the vineyards and wineries of the proposed AVA,[1] and the annual ''Nine Lakes Wine Festival'' showcases wines made in the proposed AVA.[2] A tourism website for the region encourages visitors to ''[e]xplore all the 9 Lakes of East Tennessee Region has to offer you.'' [3] Another tourism website's page on pet-friendly activities in Tennessee notes, ''The communities surrounding Norris Lake, Cherokee Lake, Melton Hill Lake, Douglas Lake, Watts Bar Lake, Fort Loudon Lake, Tellico Lake, and Chilhowee & Calderwood Lakes—dubbed the 9 Lakes region—is a dog-friendly area that welcomes furry friends.'' [4] A 2021 Smoky Mountain Living Magazine article notes, ''The 9 Lakes Region of East Tennessee is a road trip destination well known for its winding roads, mountain vistas, sparkling lakes, and beautiful waterfalls.'' [5] The tourism website for the town of Farragut, Tennessee, located within the proposed AVA, features ''The 9 Lakes Region'' on its list of places to visit.[6] An advertisement for a Tennessee plumbing company urges water conservation in the home by noting, ''Between the Mighty Mississippi on the west and the 9 Lakes Region on the east, Tennessee is rich in water resources.'' [7] A 2019 USA Today story about tourism in Tennessee states that the ''9 Lakes Region provide[s] scenic views . . . .'' [8]

Boundary Evidence

According to the petition, Tennessee is divided into three main regions: East, Middle, and West. East Tennessee is further divided into three geographic regions—the Blue Ridge Mountains, the Valley and Ridge Province, and the Cumberland Plateau region. The proposed Nine Lakes of East Tennessee AVA is located entirely within the Valley and Ridge Province and includes all or portions of the 14 counties that surround the nine lakes formed by TVA dams along the Tennessee River. The proposed northern boundary is formed by the Tennessee–Virginia State line to exclude counties in Virginia, which are not associated with the name ''Nine Lakes of East Tennessee.'' The proposed northern boundary also includes a portion of the Cumberland Gap National Historical Park boundary and excludes the park from the proposed AVA. The proposed eastern and southeastern boundaries follow county lines, National Park boundaries, and National Forest boundaries to exclude the Cherokee National Forest and the Great Smoky Mountain National Park, which are not available for commercial viticulture due to their status as public lands. The proposed southwestern and western boundaries generally follow county lines to exclude portions of the counties that are associated with the Cumberland Plateau or Cumberland Escarpment, rather than the Valley and Ridge Province and the nine lakes of the Tennessee River.

Distinguishing Features

The distinguishing features of the proposed Nine Lakes of East Tennessee AVA include its geology, soils, topography, and climate.

Geology

The geology of the proposed Nine Lakes of East Tennessee AVA consists almost entirely of sedimentary rocks initially deposited during the Paleozoic era, when an ocean covered much of eastern North America. The bedrock consists of alternating beds of limestone, dolomite, shale, and sandstone. As the Euro-African tectonic plate and the

[1] *www.ninelakeswinecountry.com.*

[2] *www.ninelakeswinefestival.com.*

[3] *easttnvacations.com.*

[4] *tnvacation.com/articles/pet-friendly-places-explore-tennessee.*

[5] *smliv.com/travel/east-tennessee-road-trips.*

[6] *Visitfarragut.org/stay.*

[7] *https://www.benjaminfranklinplumbing.com/nashville/about-us/blog/2021/august/16-tips-to-conserve-water/.*

[8] *traveltips.usatoday.com/tourism-tennessee-14618.html.*

North American tectonic plate collided, the sediments and rock between them folded and fractured, resulting in the southwest-to-northeast orientation of the ridges and valleys within the proposed AVA. The petition states that this orientation of the ridges and valleys provides vineyard owners the ability to select locations with slope aspects which allow for first light on the vineyards to dry the heavy dew and thus help in disease prevention. Additionally, the slope aspects shade the vines from the evening sun and thus prevent excessive heat on the grape clusters.

The petition states that the geology to the north and south of the proposed AVA is similar to that of the proposed AVA, given that all three locations are within the Valley and Ridge Province. To the east of the proposed AVA is the Appalachian Mountain system, which is comprised of Lower Paleozoic limestone, dolomite, and shale with exposures of Precambrian igneous and metamorphic basement rocks such as tuff, rhyolite, granite, schist, and quartzite, as well as Precambrian sedimentary and metamorphic sandstone, conglomerate, arkose, and siltstone. To the west of the proposed AVA are the Cumberland Plateau and Cumberland Escarpment, which are the results of the continental collisions uplifting highly resistant caprock of Pennsylvanian age sandstone and conglomerate.

Soils

The soils of the proposed Nine Lakes of East Tennessee AVA are categorized in the Ultisols soil order. According to the petition, soils of this order are characterized as ''strongly leached, acid forest soils with low native fertility'' and have clay-enriched subsoil. Because of the acidity and low fertility of the soils, the petition states that timely application of fertilizer and lime in vineyards are important in maximizing grape yields. The depth of these soils ranges from shallow on the sandstone and shale ridges to very deep in the valleys and on large limestone formations. The soils have an udic soil moisture regime, meaning that the amount of stored moisture plus rainfall is approximately equal to or exceeds the amount of evapotranspiration. The soil temperature is predominantly thermic, meaning that at a depth of 20 inches, the soils have an average annual temperature of 59 to 72 degrees Fahrenheit (F).

To the north and south of the proposed AVA, the soils are similar, because all three regions are in the Valley and Ridge Province. To the east of the proposed AVA, in the Blue Ridge Mountains, soils are commonly well-drained and acidic and can be shallow to very deep. The primary soil order is Inceptisols (which lack significant clay accumulation in the subsoils) and, to a significantly lesser extent, Ultisols. The soils have an udic soil moisture regime, and the soil temperature regime is mesic (average annual soil temperature of 47 to 59 degrees F) or frigid (average annual soil temperature lower than 46.4 degrees F). West of the proposed AVA, in the Cumberland Plateau and Cumberland Escarpment, the main soil orders are Inceptisols and Ultisols with a thermic or mesic soil temperature regime and an udic soil moisture regime.

Topography

As previously discussed, the proposed Nine Lakes of East Tennessee AVA is within the Valley and Ridge geologic province and is characterized by very long linear valleys paralleled by ridges, all running northeast to southwest. Within the proposed AVA, elevations range between 1,100 to 1,500 feet in the ridges and 700 to 1,000 feet in the valleys. The Valley and Ridge Province continues to the north and south of the proposed AVA. However, the petition notes that elevations in the northern portion of the Valley and Ridge Province are higher than within the proposed AVA, and elevations in the southern portion of the province are lower. East of the proposed AVA are the Blue Ridge Mountains, with elevations between 1,000 and 6,643 feet. West of the proposed AVA is the Cumberland Plateau and Cumberland Escarpment, which have average elevations between 1,500 and 1,800 feet. According to the petition, the proposed AVA's location between higher elevations to the east and west have an effect on climate, which is discussed in more detail in the following section.

Climate

According to the petition, due to the influence of elevation, the proposed Nine Lakes of East Tennessee AVA is generally warmer than all surrounding regions except the region to the south. The petition states that, in general, temperatures decrease an average of three degrees F for every 1,000 feet in elevation, meaning that the higher-elevation regions to the north, east, and west of the proposed AVA can be expected to have generally cooler climates than the proposed AVA. The regions to the south and southwest of the proposed AVA, which have lower elevations, are generally warmer than the proposed AVA. The petition describes the proposed AVA's climate as ''well-suited to growing a wide variety of wine grapes, including vinifera, hybrid, native, and muscadine varietals.'' The petition notes that grape varietals grown in warm climates, like that of the proposed AVA, generally produce ''bigger, bolder wines with higher alcohol, soft acidity, a fuller body, and more dark or lush fruit flavors.'' By contrast, grapes grown in cooler climates often produce wines ''that are more subtle with lower alcohol, crisp acidity, a lighter body, and typically bright fruit flavors.''

To support the climate claims, the petition includes data on the growing season length, average maximum and minimum temperatures, growing degree days (GDDs),[9] USDA plant hardiness zones, and precipitation amounts for the proposed AVA and each of the surrounding regions. The petition gathered data from 12 weather stations within the proposed AVA and 16 weather stations outside the proposed AVA.[10] The following tables, which were included in the petition, summarize the climate data for the locations within the proposed AVA and the surrounding regions.

[9] *See* Albert J. Winkler, *General Viticulture* (Berkeley: University of California Press, 1974), pages 61–64. In the Winkler climate classification system, annual heat accumulation during the growing season, measured in annual Growing Degree Days (GDDs), defines climatic regions. One GDD accumulates for each degree Fahrenheit that a day's mean temperature is above 50 degrees F, the minimum temperature required for grapevine growth. The Winkler scale regions are as follows: Region Ia, 1,500–2,000 GDDs; Region Ib, 2,000–2,500 GDDs; Region II, 2,500–3,000 GDDs; Region III, 3,000–3,500 GDDs; Region IV, 3,500–4,000 GDDs; Region V, 4,000–4,900 GDDs.

[10] Twelve stations were within the proposed AVA: 4 to the northeast; 2 each to the east, south, and southwest; and 3 each to the west and northeast. For a map showing the location of each weather station, see the map prior to the tables in the petition as well as Table 1 in the petition, which is posted in Docket No. TTB–2023–0008 at *https://www.regulations.gov.*

TABLE 1—MEAN GROWING SEASON [11] LENGTH IN DAYS

Region [12]	Minimum	Maximum	Mean
Within Proposed AVA	188	233	212.8
Northeast	169	220	202
East	190	200	190
South	217	242	229.5
Southwest	227	227	227
West	205	227	212.33
Northwest	194	209	201.5

The growing season data indicates that the average growing season in the proposed Nine Lakes of East Tennessee AVA is longer than the growing seasons in each of the surrounding regions except the regions to the south and southwest.

TABLE 2—AVERAGE GROWING SEASON GROWING DEGREE DAY ACCUMULATIONS [13]

Region	GDD accumulation	Winkler climate region
Within proposed AVA	3,837	IV
Northeast	3,374	III
East	1,905	II
South	4,323	V
Southwest	3,733	IV
West	3,804	IV
Northwest	3,329	III

Although climate of the proposed AVA can be classified as a Winkler Region IV, which is similar to that of the regions to the southwest and west, the proposed AVA accumulates more GDDs overall than each of the surrounding regions except the region to the south.

TABLE 3—AVERAGE MAXIMUM AND MINIMUM ANNUAL TEMPERATURES [14]

Region	Average maximum temperature	Average minimum temperature
Within proposed AVA	69	45
Northeast	67	43
East	60	38
South	71	48
Southwest	66	47
West	68	46
Northwest	66	44

TABLE 4—AVERAGE GROWING SEASON (APRIL–OCTOBER) TEMPERATURES [15] AND PLANT HARDINESS ZONES

Region	Average growing season temperature	Plant hardiness zone
Within proposed AVA	67	7a
Northeast	65	6b
East	58	6b
South	70	7b
Southwest	67	7a
West	67	6b
Northwest	65	6b

[11] Defined as the period between last spring frost and first fall frost.

[12] Growing season data was not available for the Jefferson City and Kingston stations within the proposed AVA, the Mt. LeConte station to the east, the Sewanee station to the southwest, and the Newcomb station to the northwest. For individual station growing season data, see Table 5 in the petition, which is posted in Docket No. TTB–2023–0008 at *https://www.regulations.gov.*

[13] For average monthly and growing season GDD accumulations for each location, see Table 7 in petition, which is posted in Docket No. TTB–2023–0008 at *https://www.regulations.gov.*

[14] For average monthly maximum and minimum temperatures for each location, see Tables 2 and 3 in the petition, which is posted in Docket No. TTB–2023–0008 at *https://www.regulations.gov.*

[15] For average monthly growing season temperatures for each location, see Table 4 in the petition, which is posted in Docket No. TTB–2023–0000 at *https://www.regulations.gov.*

The petition states that temperatures within the proposed AVA will vary due to elevation, with the low valleys being warmer than the higher ridges. Overall, minimum temperatures in the proposed AVA are higher than each of the surrounding regions except the regions to the south, southwest, and west. Maximum temperatures within the proposed AVA are higher than each region except the south. The average growing season temperature within the proposed AVA is the same as in the regions to the southwest and west, lower than the region to the south, and higher than in the regions to the east, northeast, and northwest.

The proposed AVA is categorized in hardiness zone 7a, meaning that annual extreme minimum temperatures are between 5 and 0 degrees F. The higher-elevation regions to the east, northeast, west, and northeast, are in zone 6b, meaning that annual extreme minimum temperatures are lower than within the proposed AVA. The lower-elevation region to the south of the proposed AVA is in zone 7b, which has higher annual extreme minimum temperatures than the proposed AVA.

Finally, the petition provided information on the average annual, growing season, and winter precipitation amounts for locations within the proposed Nine Lakes of East Tennessee AVA and the surrounding regions.

TABLE 5—PRECIPITATION AMOUNTS

[In inches] [16]

Region	Growing season precipitation [17]	Winter precipitation [18]	Annual precipitation [19]
Within proposed AVA	28.57	13.84	51.09
Northeast	25.75	11.15	43.76
East	34.96	13.78	58.12
South	28.56	14.65	53.16
Southwest	33.13	16.09	60.19
West	30.11	14.50	54.48
Northwest	30.66	13.74	53.45

According to the petition, the higher elevations of the Cumberland Plateau to the west and northwest of the proposed AVA and the Blue Ridge Mountains to the east of the proposed AVA act as a shield to block the heaviest rainfall from entering the proposed Nine Lakes of East Tennessee AVA. The proposed AVA receives less rainfall annually and during the growing season than each of the surrounding regions except the region to the northeast. The region to the south of the proposed AVA has similar growing season rainfall amounts, but still has greater annual rainfall amounts. The petition also notes that the lowest rainfall amounts in the proposed AVA occur in August, September, and October, which aids in the ripening and harvest of the grapes; only the region to the northeast has lower precipitation amounts during those three months.

Summary of Distinguishing Features

In summary, the geology, soils, topography, and climate of the proposed Nine Lakes of East Tennessee AVA distinguish it from the surrounding regions. The following table shows the characteristics of the proposed AVA compared to the features of the surrounding regions.

TABLE 6—FEATURES OF PROPOSED AVA AND SURROUNDING REGIONS

Region (location)	Features			
	Geology	Soils	Topography	Climate
Proposed AVA.	Valley and Ridge Province; sedimentary rocks initially deposited during the Paleozoic era; bedrock of alternating beds of limestone, dolomite, shale, and sandstone.	Ultisols soil order; udic soil moisture regime; thermic soil temperature regime; strongly leached, acid forest soils with low native fertility; depth ranges from shallow to very deep.	Elevations between 700 and 1,500 feet; long, linear valleys paralleled by ridges; northeast-to-southwest orientation.	Mean growing season length of 212.8 days; 3,837 GDDs (Region IV); average Maximum temperature 69 degrees F; average minimum temperature 45 degrees F; average growing season temperature 67 degrees F; plant hardiness zone 7a; average growing season precipitation 28.57 inches; average winter precipitation 13.84 inches; average annual precipitation 51.09 inches.
North	Similar to proposed AVA.	Similar to proposed AVA.	Higher elevations	N/A.

[16] For average monthly precipitation amounts for each location, see Table 8 in the petition, which is posted in Docket No. TTB–2023–0008 at *https://www.regulations.gov*.

[17] Defined in the petition as April through October.

[18] Defined in the petition as December, January, and February.

[19] Defined as the total precipitation from all 12 months.

TABLE 6—FEATURES OF PROPOSED AVA AND SURROUNDING REGIONS—Continued

Region (location)	Features			
	Geology	Soils	Topography	Climate
Northeast	N/A	N/A	N/A	Mean growing season length of 202 days; 3,374 GDDs (Region III); Average maximum temperature 67 degrees F; average minimum temperature 43 degrees F; average growing season temperature 65 degrees F; plant hardiness zone 6b; average growing season precipitation 25.75 inches; average winter precipitation 11.15 inches; average annual precipitation 43.76 inches.
East	Appalachian Mountain system; comprised of Lower Paleozoic limestone, dolomite, and shale with exposures of Precambrian igneous and metamorphic basement rocks such as tuff, rhyolite, granite, schist, and quartzite, as well as Precambrian sedimentary and metamorphic sandstone, conglomerate, arkose, and siltstone.	Primarily Inceptisols soil order with some Ultisols; udic soil moisture regime; mesic or frigid soil temperature regime; well-drained, acidic soils.	Elevations between 1,000 and 6,643 feet.	Mean growing season length of 190 days; 1,905 GDDs (Region II); average maximum temperature 60 degrees F; average minimum temperature 38 degrees F; average growing season temperature 58 degrees F; plant hardiness zone 6b; average growing season precipitation 34.96 inches; average winter precipitation 13.78 inches; average annual precipitation 58.12 inches.
South	Similar to proposed AVA.	Similar to proposed AVA.	Lower elevations	Mean growing season length of 229.5 days; 4,323 GDDs (Region V); Average maximum temperature 71 degrees F; average minimum temperature 48 degrees F; average growing season temperature 70 degrees F; plant hardiness zone 7b; average growing season precipitation 28.56; average winter precipitation 14.65 inches; average annual precipitation 53.16 inches.
Southwest ...	N/A	N/A	N/A	Mean growing season length of 227 days; 3,733 GDDs (Region IV); average maximum temperature 66 degrees F; average minimum temperature 47 degrees F; average growing season temperature 67 degrees; plant hardiness zone 7a; average growing season precipitation 33.13 inches; average winter precipitation 16.09 inches; average annual precipitation 60.19 inches.
West	Cumberland Plateau and Cumberland Escarpment; highly resistant caprock of Pennsylvanian age sandstone and conglomerate.	Inceptisols and Ultisols soil orders; thermic or mesic soil temperature regime; udic soil moisture regime.	Elevations between 1,500 and 1,800 feet.	Mean growing season length of 212.33 days; 3,804 GDDs (Region IV); average maximum temperature 68 degrees F; average minimum temperature 46 degrees F; average growing season temperature 67 degrees F; plant hardiness zone 6b; average growing season precipitation 30.11 inches; average winter precipitation 14.50 inches; average annual precipitation 54.48 inches.
Northwest	N/A	N/A	N/A	Mean growing season length of 201.5 days; 3,329 GDDs (Region III); average maximum temperature 66 degrees F; average minimum temperature 44 degrees F; average growing season temperature 65 degrees F; plant hardiness zone 6b; average growing season precipitation 30.66; average winter precipitation 13.74 inches; average annual precipitation 53.45 inches.

TTB Determination

TTB concludes that the petition to establish the proposed Nine Lakes of East Tennessee AVA merits consideration and public comment, as invited in this notice of proposed rulemaking.

Boundary Description

See the narrative description of the boundary of the petitioned-for AVA in the proposed regulatory text published at the end of this proposed rule.

Maps

The petitioner provided the required maps, and TTB lists them below in the proposed regulatory text. You may also view the proposed Nine Lakes of East Tennessee AVA boundary on the AVA Map Explorer on the TTB website, at

https://www.ttb.gov/wine/ava-map-explorer.

Impact on Current Wine Labels

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

If TTB establishes this proposed AVA, its name, ''Nine Lakes of East Tennessee,'' will be recognized as a name of viticultural significance under § 4.39(i)(3) of the TTB regulations (27 CFR 4.39(i)(3)). The text of the proposed regulation clarifies this point. Consequently, wine bottlers using the name ''Nine Lakes of East Tennessee'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, would have to ensure that the product is eligible to use the AVA name as an appellation of origin if TTB adopts this proposed rule as a final rule.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on whether it should establish the proposed Nine Lakes of East Tennessee AVA. TTB is also interested in receiving comments on the sufficiency and accuracy of required information submitted in support of the petition. Please provide specific information in support of your comments.

Because of the potential impact of the establishment of the proposed Nine Lakes of East Tennessee AVA on wine labels that include the term ''Nine Lakes of East Tennessee'' as discussed above under Impact on Current Wine Labels, TTB is particularly interested in comments regarding whether there will be a conflict between the proposed AVA name and currently used brand names. If a commenter believes that a conflict will arise, the comment should describe the nature of that conflict, including any anticipated negative economic impact that approval of the proposed AVA will have on an existing viticultural enterprise. TTB is also interested in receiving suggestions for ways to avoid conflicts, for example, by adopting a modified or different name for the proposed AVA.

Submitting Comments

You may submit comments on this proposal as an individual or on behalf of a business or other organization via the *Regulations.gov* website or via postal mail, as described in the **ADDRESSES** section of this document. Your comment must reference Notice No. 226 and must be submitted or postmarked by the closing date shown in the **DATES** section of this document. You may upload or include attachments with your comment. You also may request a public hearing on this proposal. The TTB Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality and Disclosure of Comments

All submitted comments and attachments are part of the rulemaking record and are subject to public disclosure. Do not enclose any material in your comments that you consider confidential or that is inappropriate for disclosure.

TTB will post, and you may view, copies of this document, the related petition and selected supporting materials, and any comments TTB receives about this proposal within the related *Regulations.gov* docket. In general, TTB will post comments as submitted, and it will not redact any identifying or contact information from the body of a comment or attachment.

Please contact TTB's Regulations and Rulings division by email using the web form available at *https://www.ttb.gov/contact-rrd,* or by telephone at 202–453–2265, if you have any questions about commenting on this proposal or to request copies of this document, the related petition and its supporting materials, or any comments received.

Regulatory Flexibility Act

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

Executive Order 12866

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

List of Subjects in 27 CFR Part 9

Wine.

Proposed Regulatory Amendment

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

PART 9—AMERICAN VITICULTURAL AREAS

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

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.____ to read as follows:

§ 9.____ Nine Lakes of East Tennessee.

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

(b) *Approved maps.* The 6 United States Geological Survey (USGS) 1:100,000 scale topographic maps used to determine the boundary of the Nine Lakes of East Tennessee viticultural area are:

(1) Middlesboro, KY-Tenn.-VA, 1977;

(2) Morristown, Tennessee, 1981;

(3) Knoxville, Tenn.-N.C., 1983;

(4) Oak Ridge, Tennessee, 1979;

(5) Watts Bar Lake, Tennessee, 1981; and

(6) Cleveland, Tennessee-N.C., 1981.

(c) *Boundary.* The Nine Lakes of East Tennessee viticultural area is located in Anderson, Blount, Campbell, Claiborne, Cocke, Grainger, Hamblen, Jefferson, Knox, Loudon, Monroe, Roane, Sevier, and Union Counties, Tennessee. The boundary of the viticultural area is as described as follows:

(1) The beginning point is on the Middlesboro map at the intersection of the shared Hancock-Claiborne County line and the shared Virginia-Tennessee State line. From the beginning point, proceed west along the Virginia-

Tennessee State line for 10.13 miles to the boundary of the Cumberland Gap National Historical Park; then

(2) Proceed southwest, then northwest along the park boundary for approximately 4.78 miles to its intersection with the 500-meter elevation contour on Powell Mountain; then

(3) Proceed southwest, then northeast, then southwest along the meandering 500-meter elevation contour for approximately 11.18 miles, crossing onto the Morristown map, and continuing along the 500-meter elevation contour for approximately 10.38 miles, crossing onto the Oak Ridge map, and continuing along the 500-meter elevation contour for 8.7 miles to the point where it turns sharply northeast just east of Highway 25W and north of Lafollette; then

(4) Proceed west in a straight line for approximately 0.49 mile, crossing over Highway 25W, to the 500-meter elevation contour; then

(5) Proceed southwest, then northeast along the 500-meter elevation contour for approximately 7.46 miles to its intersection with and unnamed tributary of Bruce Creek; then

(6) Proceed west in a straight line to Interstate 75; then

(7) Proceed south in a straight line for approximately 6.34 miles to the intersection of the Campbell and Anderson County lines; then

(8) Proceed south along the shared Campbell-Anderson County line for approximately 6.28 miles, crossing over Stony Fork, to the intersection with an unnamed trail running southwest-to-northeast along Windrock Mountain; then

(9) Proceed southwest in a straight line for 9.26 miles to the intersection with the shared Anderson-Morgan County line; then

(10) Proceed southeast along the Anderson-Morgan County line for approximately 5.59 miles to its intersection with the Roane County line; then

(11) Proceed southwest along the shared Roane-Morgan County line for approximately 5.65 miles, crossing onto the Watts Bar Lake map, and continuing along the Roane-Morgan County line to its intersection with the Cumberland County line; the

(12) Proceed southwest in a straight line for approximately 8.82 miles to the intersection of the Roane and Rhea County lines and State Road 29; then

(13) Proceed southerly along the shared Roane-Rhea County line for approximately 5.47 miles to its intersection with the Meigs County line; then

(14) Proceed south-southeast along the Roane-Meigs County line to its intersection with the McMinn County line; then

(15) Proceed east along the shared Roane-McMinn County line for 1.8 miles to the intersection with the Loudon County line; then

(16) Proceed south, then easterly along the shared Loudon-McMinn County line to its intersection with the Monroe County line; then

(17) Proceed south, then southeast along the shared McMinn-Monroe County line for approximately 10.56 miles, crossing onto the Cleveland, Tennessee-North Carolina map, and continuing along the shared McMinn-Monroe County line for approximately 13.67 miles to the intersection with an unnamed highway known locally as State Road 39/Mecca Highway; then

(18) Proceed southeast along State Road 39 for approximately 3.04 miles to its intersection with the Cherokee National Forest boundary, which is concurrent with Conasauga Creek; then

(19) Proceed southeasterly, then northerly along the Cherokee National Forest boundary for approximately 23.67 miles, crossing onto the Watts Bar Lake map, and continue northeasterly, then easterly along the forest boundary for approximately 15.35 miles as it meanders east through Tellico Lake and becomes concurrent with the Blount-Monroe County line and crosses onto the Knoxville, Tennessee-North Carolina map, to the forest boundary's intersection with Abrams Creek; then

(20) Proceed north in a straight line for approximately 1,500 feet to the Great Smoky Mountains National Park boundary; then

(21) Proceed northeast, then southeast, then northeast along the park boundary line for a total of approximately 51.47 miles to its intersection with the shared Cocke-Sevier County line near Rocky Grove; then

(22) Proceed northeast in a straight line for 6.15 miles to the intersection of the Cherokee National Forest boundary with Highway 321/State Road 32 and Rabbit Branch near Allen Grove; then

(23) Proceed east along the forest boundary for 1.99 miles to its intersection with Interstate 40; then

(24) Proceed north along Interstate 40 for 2.98 miles to its intersection with Highway 321; then

(25) Proceed northeast along the forest boundary for 3.12 miles to its intersection with State Road 73 at Edwina; then

(26) Proceed northeast in a straight line for 9.2 miles, crossing onto the Morristown map, and continuing northeast in a straight line for 4.16 miles to the shared Greene-Cocke County line; then

(27) Proceed northwest along the Greene-Cocke County line to its intersection with the Hamblen County line; then

(28) Proceed northeast along the Hamblen-Greene County line to its intersection with the Hawkins County line; then

(29) Proceed northwest, then southwest along the Hawkins-Hamblen County line to its intersection with the Grainger County line; then

(30) Proceed northwesterly along the Hawkins-Grainger County line to its intersection with the Hancock County line; then

(31) Proceed west along the Grainger-Hancock County line to its intersection with the Claiborne County line; then

(32) Proceed north along the Hancock-Claiborne County line for approximately 8.14 miles, crossing onto the Middlesboro map, and continuing northwest along the Hancock-Claiborne county line for approximately 8.51 miles to return to the beginning point.

Signed: September 8, 2023.

Mary G. Ryan,

Administrator.

Approved: September 11, 2023.

Thomas C. West, Jr.,

Deputy Assistant Secretary (Tax Policy).

[FR Doc. 2023–20346 Filed 9–19–23; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SATS No. MT–042–FOR; Docket ID: OSM–2023–0007; S1D1S SS08011000 SX064A000 222S180110; S2D2S SS08011000 SX064A000 22XS501520]

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period reopening and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are reopening the public comment period due to a request for an extension of the public comment period to a proposed amendment to the Montana regulatory program (hereinafter, the Montana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the

Act). Montana proposed this amendment to OSMRE, on its own initiative, following its passing of Montana House Bill 576 (2023), which amends the Montana Code Annotated and proposes changes to the definition of material damage and changes to permit requirements related to hydrologic information. HB 576 also adds four contingencies to the proposed amendments of the MCA: a severability clause, a contingent voidness clause, an effective date clause, and a retroactive applicability clause. This document gives the times and locations that the Montana program and this revised proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the revised amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., Mountain Daylight Time (MDT), November 6, 2023.

ADDRESSES: You may submit comments, identified by SATS No. MT–042–FOR, by any of the following methods:

- *Mail/Hand Delivery:* 100 East B Street, Room 4100, Casper, WY 82601.
- *Fax:* (307) 421–6552.
- *Federal eRulemaking Portal:* The amendment has been assigned Docket ID: OSM–2023–0007. If you would like to submit comments go to *https://www.regulations.gov.* Follow the instructions for submitting comments.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than the ones listed above will be included in the docket for this rulemaking and considered.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the *Public Comment Procedures* heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Montana program, this amendment, a listing of any scheduled public hearings or meetings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE's Denver Field Division or the full text of the program amendment is available for you to read at *www.regulations.gov.*

Jeffrey Fleischman, Chief, Denver Field Division, Office of Surface Mining Reclamation and Enforcement, Dick Cheney Federal Building, POB 11018, 100 East B Street, Casper, Wyoming 82601, Telephone: (307) 261–6550, Email: *jfleischman@osmre.gov*

In addition, you may review a copy of the amendment during regular business hours at the following location:

Dan Walsh, Chief, Coal and Opencut Mining Bureau, Montana Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620–0901, Telephone: (406) 444–6791, Email: *dwalsh@mt.gov.*

FOR FURTHER INFORMATION CONTACT: Howard Strand, Office of Surface Mining Reclamation and Enforcement, One Denver Federal Center, Building 41, Lakewood, CO 80225–0065, Telephone: (303) 236–2931, Email: *hstrand@osmre.gov.*

SUPPLEMENTARY INFORMATION: On August 7, 2023 (88 FR 52084) we published a proposed rule announcing receipt of a program amendment from Montana. Montana submitted this proposed amendment to us, of its own volition, following the passage of Montana House Bill 576 (HB 756) during the 2023 legislative session. HB 576 amends the Montana Strip and Underground Mine Reclamation Act as well as section 82–4–203 and section 82–4–222 of MCA. HB 576 also adds four contingencies that apply to the proposed amendments. First, Montana proposes several changes to section 82–4–203(32), which defines and describes ''Material Damage.'' Next, Montana proposes to amend its coal mine operation permit requirements related to hydrologic information section 82–4–222(1)(m). Lastly, HB 576 adds four contingencies to the proposed amendments of section 82–4–203(32) and section 82–4–222(1)(m) that are not codified into the MCA but apply to the amended sections: a severability clause, a contingent voidness clause, an effective date clause, and a retroactive applicability clause.

By letter dated August 18, 2023 (FDMS Document ID No. OSM–2023–0007–0008), Multiple conservation groups sent us a letter requesting an extension of the public comment period. The conservation groups cited the controversial nature of the amendment, technical difficulties accessing the comment portal, and scheduling difficulties around a public holiday, as to why OSMRE should grant an extension on the comment period. OSMRE reviewed the request for an extension of the public comment period and agree that the controversial nature of the amendment affords the public more time to submit the fullest and most comprehensive comments possible. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electronic or Written Comments

If you submit written or electronic comments on the proposed rule during the 15-day comment period, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

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.

List of Subjects in 30 CFR Part 926

State-federal cooperative agreement, State regulatory program approval, Required program amendments.

David A. Berry,

Regional Director, Unified Regions 5, 7–11.

[FR Doc. 2023–20350 Filed 9–19–23; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SATS No. MT–043–FOR; Docket ID: OSM–2023–0008 S1D1S SS08011000 SX064A000 231S180110; S2D2S SS08011000 SX064A000 23XS501520]

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; reopening of the public comment period.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are reopening the public comment period due to a request for an extension of the public comment period to a proposed amendment to the Montana regulatory program (hereinafter, the Montana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). During the 2023 legislative session, the Montana legislature passed Senate Bill 392 (SB 392), amending the Montana Strip and Underground Mine Reclamation Act (MSUMRA) as well as the Montana Code Annotated (MCA). Accordingly, Montana submitted this proposed amendment to OSMRE on its own initiative.

This document gives the times and locations that the Montana program and this proposed amendment to the program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00 p.m., M.D.T, until November 6, 2023.

ADDRESSES: You may submit comments, identified by SATS No. MT–043–FOR, by any of the following methods:

- *Mail/Hand Delivery:* OSMRE, Attn: Jeffrey Fleischman, P.O. Box 11018, 100 East B Street, Room 4100, Casper, Wyoming 82602.
- *Fax:* (307) 261–6552.
- *Federal eRulemaking Portal:* The amendment has been assigned Docket ID: OSM–2023–0007. If you would like to submit comments, go to *http://www.regulations.gov*. Follow the instructions for submitting comments.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than the ones listed above will be included in the docket for this rulemaking and considered.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the *Public Comment Procedures* heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Montana program, this amendment, a listing of any scheduled public hearings or meetings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE's Casper Field Office or the full text of the program amendment is available for you to read at *www.regulations.gov*.

Attn: Jeffrey Fleischman, Field Office Director, Office of Surface Mining Reclamation and Enforcement, 100 East B Street, Casper, Wyoming 82602, Telephone: (307) 261–6550, Email: *jfleischman@osmre.gov*.

In addition, you may review a copy of the amendment during regular business hours at the following location:

Attn: Dan Walsh, Mining Bureau Chief, Coal and Opencut Mining Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, MT 59601–0901, Telephone: (406) 444–6791, Email: *dwalsh@mt.gov*.

FOR FURTHER INFORMATION CONTACT: Attn: Jeffrey Fleischman, Field Office Director, Office of Surface Mining Reclamation and Enforcement, 100 East B Street, Casper, Wyoming 82602, Telephone: (307) 261–6550, Email: *jfleischman@osmre.gov*.

SUPPLEMENTARY INFORMATION: On August 7, 2023 (88 FR 52086) we published a proposed rule announcing receipt of a program amendment from Montana. Under section 1 of SB 392 Montana proposes to add a provision to MCA, section 1, for the equal application of court costs to the prevailing party in contested case proceedings by a court or administrative agency that issues a decision pursuant to § 82–4–2. This proposed section allows that a court or administrative agency may award the prevailing party reasonable costs of litigation, including filing fees, attorney fees, and witness costs. Under this proposal a court or administrative agency may not consider the identity of the party when awarding costs. The proposal applies equally to all parties in an action and places the burden of proof and persuasion for awarding court costs on the requesting party. SB 392 does not state where section 1 will be codified in the MCA. This will be done by the legislature later; however, section 1 will be an integral part of the MCA.

The proposal amends § 82–4–251(7) and § 82–4–252(5) to reference the equal application of court costs in section 1. § 82–4–251(7), which discusses the awarding of court costs.

Lastly, SB 392 adds four contingencies to section 1 and the proposed amendments to § 82–4–251 and § 82–4–252. The contingencies will not be codified into the MCA but apply to section 1 as proposed and the amended sections of the MCA. Section 4 of SB 392 contains codification instructions which state that [section 1] is intended to be codified as an integral part of § 82–4–2 and the provisions of § 82–4–2 apply to [section 1]. Section 5 is a severability clause and states that if a part of SB 392 is found to be invalid, any part(s) found valid will remain in effect. Section 6 of SB 392 is an effective date, which states that the act is effective on passage and approval. Lastly, section 7 of SB 392 is an applicability clause, which states that SB 392 applies to court actions filed on or after the effective date of SB 392.

By letter dated August 18, 2023 (FDMS Document ID No. OSM–2023–0008–0008), multiple conservation groups sent us a letter requesting an extension of the public comment period. The conservation groups cited the controversial nature of the amendment, technical difficulties accessing the comment page, and scheduling difficulties around a Public Holiday, as reasons why OSMRE should grant an extension on the comment period. OSMRE reviewed the request for an extension of the public comment period and agree that the controversial nature of the amendment affords the public more time to submit the fullest and most comprehensive comments possible. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**.

Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electronic or Written Comments

If you submit written or electronic comments on the proposed rule during the 30-day comment period, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended

change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

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.

List of Subjects in 30 CFR Part 926

State regulatory program approval, State-Federal cooperative agreement, required program amendments.

David A. Berry,

Regional Director, Unified Regions 5, 7–11.

[FR Doc. 2023–20349 Filed 9–19–23; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2023–0103; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BG31

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for the Miami Cave Crayfish

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the Miami cave crayfish (*Procambarus milleri*), a crayfish species from Miami-Dade County, Florida, as a threatened species under the Endangered Species Act of 1973, as amended (Act). This determination also serves as our 12-month finding on a petition to list the Miami cave crayfish. After a review of the best available scientific and commercial information, we find that listing the species is warranted. Accordingly, we propose to list the Miami cave crayfish as a threatened species with a rule issued under section 4(d) of the Act (''4(d) rule''). If we finalize this proposed rule, it would add this species to the List of Endangered and Threatened Wildlife and extend the Act's protections to the species.

DATES: We will accept comments received or postmarked on or before November 20, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by November 6, 2023.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov*. In the Search box, enter FWS–R4–ES–2023–0103, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R4–ES–2023–0103, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov*. This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: Supporting materials, such as the species status assessment report, are available at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2023–0103.

FOR FURTHER INFORMATION CONTACT: Lourdes Mena, Division Manager, Florida Classification and Recovery, U.S. Fish and Wildlife Service, Florida Ecological Services Field Office, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256–7517; telephone 904–731–3134. 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 ''rule summary document'' in docket FWS–R4–ES–2023–0103 on *https://www.regulations.gov*.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the Miami cave crayfish meets the definition of a threatened species; therefore, we are proposing to list it as such. Listing a species as an endangered or threatened species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose to list the Miami cave crayfish as a threatened species with a rule under section 4(d) of the Act.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the primary threat to Miami cave crayfish is saltwater intrusion caused by sea level rise as a result of climate change.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the

scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns and the locations of any additional populations of this species;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Threats and conservation actions affecting the species, including:

(a) Factors that may be affecting the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(b) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species.

(c) Existing regulations or conservation actions that may be addressing threats to this species.

(3) Additional information concerning the historical and current status of this species.

(4) Information on regulations that may be necessary and advisable to provide for the conservation of the Miami cave crayfish and that we can consider in developing a 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether we should consider any additional exceptions from the prohibitions in the 4(d) rule.

(5) Information on sea level rise and saltwater intrusion future projections in the Biscayne Aquifer.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Our final determination may differ from this proposal because we will consider all comments we receive during the comment period as well as any information that may become available after this proposal. Based on the new information we receive (and, if relevant, any comments on that new information), we may conclude that the species is endangered instead of threatened, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. In addition, we may change the parameters of the prohibitions or the exceptions to those prohibitions in the 4(d) rule if we conclude it is appropriate in light of comments and new information received. For example, we may expand the prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the species. Conversely, we may establish additional exceptions to the prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species. In our final rule, we will clearly explain our rationale and the basis for our final decision, including why we made changes, if any, that differ from this proposal.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

We received a petition from the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, West Virginia Highlands Conservancy, Tierra Curry, and Noah Greenwald on April 20, 2010, to list 404 aquatic, riparian, and wetland species from the southeastern United States as threatened or endangered species and to designate critical habitat under the Endangered Species Act (Act). The Miami cave crayfish was included in this petition. On September 27, 2011, we published a 90-day finding in the **Federal Register** (76 FR 59836), concluding that the petition presented substantial information that indicated listing the Miami cave crayfish may be warranted. This document serves as both our 12-month warranted petition finding and our proposed rule to list this species.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the Miami cave crayfish. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the Miami cave crayfish SSA report. We sent the SSA report to four independent peer reviewers and received three responses. Results of this structured peer review process can be found at *https://regulations.gov.* In preparing this proposed rule, we incorporated the results of these reviews, as appropriate,

into the SSA report, which is the foundation for this proposed rule.

Summary of Peer Reviewer Comments

As discussed in Peer Review above, we received comments from three peer reviewers on the draft SSA report. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the contents of the SSA report. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions, including clarification on our methodology used to determine the quantity of habitat and other editorial suggestions. Two peer reviewers provided additional locations of Miami cave crayfish within the established range of the species that we incorporated into the SSA report. Otherwise, no substantive changes to our analysis and conclusions within the SSA report were deemed necessary, and peer reviewer comments are addressed in version 1.0 of the SSA report.

I. Proposed Listing Determination

Background

A thorough review of the taxonomy, life history, and ecology of the Miami cave crayfish (*Procambarus milleri*) is presented in the SSA report (version 1.1; Service 2022, pp. 3–18).

The Miami cave crayfish is a relatively small, freshwater, subterranean crayfish endemic to southern and central Miami-Dade County, Florida. On an evolutionary timescale, the Miami cave crayfish is recently adapted to the belowground aquifer environment as is indicated by the presence of both pigment and eye facets in some individuals. Miami cave crayfish are opportunistic omnivores, primarily consuming surficial detritus that filters down through the porous limestone into their aquifer habitat (Radice and Loftus 1995, p. 114). Individuals may also consume amphipods and isopods found in the same habitat (Hobbs 1971, p. 114).

The species was first described based on specimens collected from a 22-foot (ft; 6.7-meter (m)) deep well, south of Miami in 1968 (Hobbs 1971, entire). Additional confirmed reports of the species followed in 1992, 2000–2004, 2009, and most recently in 2018. The species has been collected from wells 7.9–36 ft (2.41–11 m) deep in the Miami Limestone and Fort Thompson Formation within the Biscayne Aquifer along the Atlantic Coastal Ridge.

The Atlantic Coastal Ridge is a northeast-to-southwest-trending elevated feature, varying between 1.8–10 miles (mi) (3–16 kilometers (km)) in width and rising 3.2–28.2 ft (1–8.6 m) above sea level between Everglades National Park, Homestead, and North Miami (Fish and Stewart 1991, p. 4; Wacker et al. 2014, p. 26; Whitman and Yeboah-Forson 2015, pp. 782, 790; Meeder and Harlem 2019, pp. 560–561). The Miami Limestone and Fort Thompson Formation on the Atlantic Coastal Ridge are highly porous (containing large holes and cavities), resembling a sponge, whereas those same geologic layers in the surrounding area are partly or completely cemented with mud and sand. The Miami cave crayfish is adapted to the unique porosity of the Atlantic Coastal Ridge, which provides nutrient flow and subterranean space to inhabit. Miami cave crayfish likely occupy the Biscayne Aquifer from the top of the water table in the Miami Limestone to the bottom of the Fort Thompson Formation. The species has not been observed outside of the Atlantic Coastal Ridge, despite surveys done in the surrounding area.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess Miami cave crayfish viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket FWS–R4–ES–2023–0103 on *https://www.regulations.gov* and at *https://ecos.fws.gov/ecp/species/9832.*

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

Species Needs

The SSA report contains a detailed discussion of the Miami cave crayfish individual and population requirements (Service 2022, pp. 23–27); we provide a summary here. Based upon the best available scientific and commercial information, and acknowledging existing ecological uncertainties, the resource and demographic needs for breeding, feeding, sheltering, and dispersal of the Miami cave crayfish are characterized as:

- Sufficient freshwater quality and availability to support a suitable aquatic environment for movement and healthy individuals.
- Sufficient quantities of mega-porous limestone to provide the structure needed for Miami cave crayfish movement and shelter. The Miami cave crayfish has adapted to these mega-porous limestone layers in the Biscayne Aquifer, which provides them with structures through which juvenile and adult Miami cave crayfish can travel between areas within the aquifer system, facilitating connectivity; microhabitats in which individuals can shelter or hide from intra- and interspecific threats; and enhanced groundwater flow for improved water quality and food availability (Loftus and Trexler 2004, p. 49, Hobbs and Means 1972, p. 401; Caine 1978, pp. 323, 325, Fish and Stewart 1991, p. 47; Wacker et al. 2014, pp. 27–40).
- Sufficient quantities of detritus filtering from the surface into the subterranean aquifer to support both the Miami cave crayfish and the amphipods and isopods upon which the crayfish may also feed.

Miami cave crayfish abundance is limited to the availability and condition of these resources in the Biscayne Aquifer along the Atlantic Coastal Ridge. While there is high confidence in these identified species needs, uncertainty exists as to the exact parameters and quantities needed for each of these factors, as no ecological or quantitative studies have been completed on them.

Threats

The main threats affecting the Miami cave crayfish are related to shifts in climate largely as a result of increasing greenhouse gas emissions. Saltwater intrusion into the Biscayne Aquifer as a result of sea level rise, more frequent tidal flooding (increase of tides above the mean high tide), and increasing intensity of storm events (such as hurricanes) are the predominant threats to the Miami cave crayfish and its habitat. Additional threats with greater uncertainty and likely less severity to the Miami cave crayfish include water quality degradation, groundwater pumping, and modification of surface cover resulting from urban development. We also evaluated existing ongoing conservation measures and regulatory mechanisms. In the SSA report, we considered additional threats: modification of subterranean limestone, competition and predation, disease, and overutilization. We concluded that, as indicated by the best available scientific and commercial information, these additional threats are currently having little to no impact on the Miami cave crayfish, and thus their overall effect now is expected to be minimal and the best available information does not indicate this will change in the future.

For full descriptions of all threats and how they impact the Miami cave crayfish, please see the SSA report (Service 2022, pp. 27–78).

Saltwater Intrusion

Although the salinity tolerance of Miami cave crayfish has not been assessed, surrogate species, such as the closely related Everglades crayfish (*Procambarus alleni*), indicate it is highly unlikely that the species could persist in the salinity levels found in areas affected by saltwater intrusion. Surface-dwelling crayfish are able to persist in saline environments in the short-term, but exposure to salinity levels above naturally occurring levels for long periods of time can cause inhibition of growth, limited to no reproduction, lower hatching success, and mortality (Veselý et al. 2017, pp. 4–5). Additionally, when comparing the salinity levels found in the closely related, brackish-water-dwelling Everglades crayfish to salinity levels found in areas of the Biscayne Aquifer affected by saltwater intrusion, the salinity levels in areas affected by saltwater intrusion far exceeded tolerances of the Everglades crayfish (Hendrix and Loftus 2000, p. 194; Service 2022, p. 69). This indicates that a closely related, saline-tolerant species of crayfish would not be able to tolerate the salinity levels that the Miami cave crayfish would be experiencing in areas of saltwater intrusion. Therefore, we concluded the Miami cave crayfish likely cannot persist in areas affected by saltwater intrusion, because it needs sufficient freshwater in order to survive and reproduce.

Saltwater intrusion occurs when saltwater enters into a freshwater aquifer system. Four main processes contribute to the intrusion of saltwater into aquifer systems like the Biscayne Aquifer: (1) the escape of saltwater that had been previously stored in sedimentary rocks, (2) the gradual advance of oceanwater along the base of the aquifer as a result of lowering freshwater levels within the aquifer and sea level rise, (3) seepage of hypersaline (extremely salty) water from coastal saltwater marshes, and (4) leakage of saltwater from canal systems that feed into the ocean (Prinos et al. 2014, pp. 12–16). Processes two and four are of greatest concern to the Biscayne Aquifer within the range of Miami cave crayfish because of large sea level rise projections, the potential effects from the planned construction of a curtain wall west of the Atlantic Coastal Ridge (discussed below), and the extensive canal network in the area. Additionally, the area's low altitude and topographic gradient, high permeability, and the bordering saltwater sources of the Atlantic Ocean, Biscayne Bay, and Florida Bay make it especially susceptible to saltwater intrusion (Prinos et al. 2014, p. 2).

Sea level rise—Regional sea levels could rise between 1.41 ft (0.43 m) and 4.53 ft (1.38 m) by 2070. Temperatures are predicted to rise as well, while dry seasons, droughts, and tropical storms are likely to become more extreme (IPCC 2014, pp. 1452–1456; Infanti et al. 2020, entire; IPCC 2021, pp. 32, 33). The cumulation of all of these climatic factors is highly likely to result in the continued inland migration of the saltwater interface in the Biscayne Aquifer along the Atlantic Coastal Ridge. The loss of habitat along the eastern edge of the Atlantic Coastal Ridge is particularly impactful since these coastal areas exhibit the greatest aquifer depths and, thus, the greatest overall quantity of Miami cave crayfish habitat.

Curtain wall—In the western range of the species, a project started in 2012 that may impact saltwater intrusion is the construction of a 19- to 31-mile (31- to 50-kilometer) curtain wall west of the Atlantic Coastal Ridge. The curtain wall's purpose is to manage waters within the Everglades wetland ecosystem and protect the coastal urbanized area of Miami-Dade County from flooding (Owosina 2020, unpaginated). The project is expected to be completed in five-to-10-mile increments within the next ten years if funding can be secured. The curtain wall will alter the superficial water flow that reaches the Miami-Dade area, but we are not certain of the level of effects or dynamics to the Biscayne Aquifer, particularly to the east of the structure on the Atlantic Coastal Ridge where water flow from the Everglades wetland ecosystem in the east may be reduced. Groundwater will still flow under the curtain wall. The recommended configuration for further study (a 27-mile South scenario) will include gaps in the curtain wall and is seeking to balance restoration and flood control while mitigating impacts to Biscayne Bay, Taylor Slough, and water supply (South Florida Water Management District 2023, p. 9–89–9–92).

Currently, a general eastward and southeastward direction of groundwater flow along the Atlantic Coastal Ridge counters the encroachment of saltwater from the ocean (Prinos et al. 2014, p. 6). Weakening of this eastward and southeastward water flow may cause increased saltwater intrusion and subsequent loss of Miami cave crayfish habitat. In addition, any potential loss of freshwater recharge provided by the Everglades wetland ecosystem may drop the groundwater levels of the Biscayne Aquifer on the Atlantic Coastal Ridge, further contributing to saltwater intrusion.

Canals—Modern water management and its impact on saltwater intrusion has a long history in the Miami area, beginning with the coordinated draining of the Everglades wetland ecosystem in 1845. Historically, canals along the Atlantic Coastal Ridge aided in draining the adjacent wetland systems, which, along with groundwater pumping, led to a permanent drop of about 9.5 ft (2.9 m) in regional groundwater levels within the Biscayne Aquifer (Prinos et al. 2014, pp. 2, 64). As a result, saltwater intrusion began to expand inward from the coast (Prinos et al. 2014, p. 64). Concurrently, saltwater flowed up the expanded canal systems from the ocean and seeped into the surrounding aquifer system (Prinos et al. 2014, p. 64).

Today's water management system is operated by the South Florida Water Management District and includes a complex, interconnected network of water conservation areas, well-fields, water control structures, levees, pumps, and canals. Despite the installation of salinity control structures along most of the tidal canal system in Miami-Dade County, saltwater seepage from canals into the adjacent aquifer system is still one of the primary mechanisms by which saltwater intrusion occurs in the region (Prinos et al. 2014, pp. 42, 43, 47–55, 66).

In summary, saltwater intrusion is the primary threat to the Miami cave crayfish, because it causes complete loss of habitat and is projected to get worse in the future; and the species has no dispersal potential outside of its current, restricted range.

Groundwater Pumping

Residents of Miami-Dade County have been pumping freshwater out of the Biscayne Aquifer for residential, agricultural, industrial, municipal, and recreational use since the first public supply wells were drilled in 1899 (Prinos et al. 2014, p. 18; Hughes and White 2016, pp. 27–29). As the population has grown, so too has the demand for freshwater. Public groundwater withdrawals increased in line with population growth until 2006 when demand on the aquifer was mitigated by stricter water use regulations (Bradner et al. 2005, p. 1; Prinos et al. 2014, p. 7).

Although 90 percent of the freshwater consumed by Miami-Dade County residents is pumped from the Biscayne Aquifer, these are not the only South

Florida populations drawing from the aquifer's groundwater reserves. Over 4 million people in Broward and Palm Beach Counties also rely on the Biscayne Aquifer for their freshwater needs, and groundwater piped from the Biscayne Aquifer to the Florida Keys serves as the main source of potable water for all of Monroe County (Bradner et al. 2005, p. 1; Prinos et al. 2014, p. 7). Consequently, the U.S. Environmental Protection Agency (EPA) has designated the Biscayne Aquifer as a sole-source aquifer (*i.e.,* the only viable groundwater source in the region; EPA 2016, entire).

As mentioned in the Canals discussion above, groundwater pumping was part of what caused an estimated 9.5-ft (2.9-m) drop in water levels compared to levels before the drainage of the Everglades (Prinos et al. 2014, p. 17). This drop in water level roughly equates to an 11 percent loss in potential Miami cave crayfish habitat since the 1840s (Service 2022, pp. 53). An 11 percent loss in habitat from potential historical levels is significant because the species has an already limited range.

In addition to causing direct loss of habitat, groundwater withdrawal can exacerbate the effects of saltwater intrusion. Lower freshwater levels as a result of groundwater withdrawal can cause saltwater intrusion to move further inland (Prinos et al. 2014, pp. 12–16). Lower freshwater levels also act synergistically with sea level rise to increase the rate of saltwater intrusion encroachment into the aquifer.

The most uncertain but potentially most impactful result of groundwater pumping is from the pumping process itself. Mortality events are possible for Miami cave crayfish that get sucked into a water pump system. In fact, the original specimens from which the species was first described were deceased individuals collected from a water pump trap (Hobbs 1971, p. 114). However, public water supply wells may have water pumps that are deep enough to avoid impacting the Miami cave crayfish. For example, the Miami-Dade Water and Sewer Department Northwest Wellfield has wells constructed with 46 feet of casing, meaning water is being pumped deeper than 46 feet (Krupa et al. 2001, p. 3). The deepest Miami cave crayfish have been collected from is 36 feet deep. Therefore, public water supply wells may not have a significant effect on the species depending on the depth of the well. Private water supply, agricultural, or other types of wells that are shallower may have a more significant impact to the species. Overall, the extent of mortality resulting from water pumping is unknown but could be having ongoing impacts on the species.

Water Quality Degradation

The high permeability of the Biscayne Aquifer, particularly along the Atlantic Coastal Ridge, makes its groundwater vulnerable to contamination from surficial inputs, belowground septic tanks, and adjoining water bodies (Bradner et al. 2005, entire; Potter et al. 2007, p. 1306; Florida Department of Environmental Protection 2019, entire). In particular, the sandy soils typical to the Atlantic Coastal Ridge contain relatively small amounts of soil organic matter and exhibit low water retention, increasing the potential for leaching of surface contaminants into groundwater below (Marchi et al 2016, pp. 237–238). Additionally, the high interconnectivity of the Biscayne Aquifer facilitates the relatively rapid and extensive spread of contaminants well beyond their point of origin (Harvey et al. 2008, entire; Shapiro et al. 2008, entire).

Pharmaceuticals, pesticides, volatile organic compounds, excess nutrients, and excess trace elements are introduced into groundwater throughout Miami-Dade County by a variety of land uses associated with development, agriculture, and recreation. These contaminants are concentrated in canals and other water bodies from which they seep into the Biscayne Aquifer. A current and comprehensive regional assessment of groundwater contamination across the endemic range of Miami cave crayfish is not available; however, there are many sources of pollutants including human wastewater, agriculture, and golf courses, among others (Service 2022, pp. 59–61).

Using other crayfish and crustaceans as analogues, we predict that Miami cave crayfish likely experience increased morbidity, mortality, and reproductive loss when exposed to anthropogenic contaminants (Service 2022, p. 58). However, although pollutants may be a significant threat to the species, the scope and magnitude of this threat is not known because of the lack of information on the levels of pollutants across the range of the Miami cave crayfish.

Modification of Surface Cover

The subterranean communities supporting Miami cave crayfish are dependent on the influx of detritus from surficial sources. When surface vegetation is lost or is blocked by impermeable land cover from entering subterranean habitats, the food supply of the species can be compromised. The majority of the surface cover above Miami cave crayfish habitat is impermeable cover (greater than 85 percent). Because of the large amount of impermeable cover above subterranean habitat, there is likely less detritus available for the Miami cave crayfish. However, the best available information does not indicate that the amount of detritus filtering down into Miami cave crayfish habitat has been significantly reduced because of impermeable cover.

Summary of Threats

The primary threat to the Miami cave crayfish is saltwater intrusion as a result of sea level rise, increased high tide flooding, increased intensity of storm events, groundwater pumping, and altered hydrologic flows. Saltwater intrusion results in a complete loss of habitat, which is significant because the Miami cave crayfish has a restricted range. Additional threats with greater uncertainty and likely less severity include mortality from groundwater pumps, water quality degradation, and impermeable surface cover limiting detritus flow into subterranean habitat.

Current Conditions

The current condition of the Miami cave crayfish is described in terms of population resiliency, redundancy, and representation across the species. The analysis of these conservation principles to understand the species' current viability is described in more detail in the Miami cave crayfish SSA report (Service 2022, pp. 78–93).

Historically, all Miami cave crayfish were likely part of one metapopulation that had some degree of connectivity. Currently, the Miami cave crayfish still exists in one population restricted to the Biscayne Aquifer along the Atlantic Coastal Ridge. However, a series of canals cross the Atlantic Coastal ridge reduce connectivity. For the purposes of this assessment, we divided the Atlantic Coastal Ridge into seven analysis units to assess resiliency of the Miami cave crayfish. Reduced connectivity from canals creates semi-isolated areas, which led us to delineating seven analysis units using the network of canals as boundaries (Service 2022, p. 22).

To determine the current resiliency for the seven analysis units, we assessed habitat metrics, such as freshwater availability, detritus availability, freshwater quality, and habitat quantity. For each metric if greater than 79 percent of the measured factor is in a natural, anthropogenically unaltered state it ranked as a high condition, 51–79 percent ranked as a moderate condition, and 50 percent or less ranked as a low condition.

Freshwater Availability

Saltwater intrusion is the primary threat to the Miami cave crayfish because it reduces the amount of freshwater available for the species' habitat. Currently, saltwater intrusion is affecting six of the seven analysis units for the Miami cave crayfish (Service 2022, p. 68; Prinos 2019, entire). Two units have greater than 50 percent of habitat affected by saltwater intrusion, four units have 17 to 26 percent of habitat affected, and two units have 0 to 5 percent of habitat affected (Service 2022, p. 88). Overall, a majority of Miami cave crayfish habitat is currently unaffected by saltwater intrusion and is considered to be in a high condition.

Availability of Detritus and Freshwater Quality

Currently, we have little to no information on whether the amount of detritus filtering down into Miami cave crayfish habitat has been significantly reduced because of impermeable cover; effects of pollution on water quality; or mortality resulting from groundwater pumping or subsurface modification activities, such as mining. While these stressors likely affect the resiliency of the Miami cave crayfish, we do not know the direct effects to the species and its needs.

Because we do not know the direct effects impermeable cover, pollutants, and activities that cause mortality have on the Miami cave crayfish, we estimated the magnitude of these stressors on the species and its needs based on indirect measures.

To assess the availability of detritus, we compared the amount of permeable cover currently above Miami cave crayfish habitat to the amount of permeable cover that was historically present. Each analysis unit has less than 37 percent surface area remaining that is permeable cover (Service 2022, p. 85). Permeable cover is defined as surface cover with vegetation that provides detritus directly into the subterranean habitat. All analysis units are considered in a low condition for the quality of surface cover. We acknowledge that we do not know the amount of detritus needed by the Miami cave crayfish nor the current amount of available detritus in the Biscayne Aquifer; therefore, there is significant uncertainty in this metric.

To assess water quality, we estimated the number of potential sources of pollution within the range of the species. We categorized different land use types, such as agriculture, by the pollutants they may be inputting into the Biscayne Aquifer. Then, we measured the amount of surface cover in each analysis unit that is likely inputting pollutants into the aquifer. Each analysis unit is in a low condition for water quality because of the large number of potential inputs of pollutants into Miami cave crayfish habitat. We acknowledge that we do not know the water quality parameters needed by the Miami cave crayfish nor the amount of pollution within the range of the species; therefore, there is significant uncertainty in this metric.

Habitat Quantity

To assess habitat quantity, we estimated the total physical volumetric habitat available to the species (*i.e.,* the total subterranean karstic limestone that is submerged in the Biscayne aquifer). We used the most recent available data for the depth of the Biscayne Aquifer on the Atlantic Coastal Ridge (Hughes and White 2016, p. 26) and subtracted out certain land uses, like limestone mines, and sewer line infrastructure (Miami-Dade County 2018, entire and Miami-Dade County 2021a, entire). We then compared the amount of subterranean, karstic limestone aquifer habitat currently available to the amount that was historically present. All analysis units are in a high condition relative to habitat quantity (Service 2022, p. 80).

Resiliency, Redundancy, and Representation

Although we found overall resilience to be low in all analysis units, we determined the Miami cave crayfish currently has sufficient resiliency to withstand environmental and demographic stochasticity. A majority of the Miami cave crayfish range is in a high condition for freshwater availability and habitat quantity is in a high condition for all seven analysis units. Our measures of available detritus and water quality are in a low condition across the range. However, we put greater weight on the freshwater availability and habitat quantity metrics because they are direct measures of the species' needs, whereas we put less weight on the availability of detritus and freshwater quality metrics because they are indirect measures of the species' needs with significant assumptions. We then assessed the best available demographic data for the Miami cave crayfish.

Surveys since 2000 indicate the species is present in all analysis units except for the one analysis unit most impacted by saltwater intrusion (Service 2022, p. 21). The most comprehensive surveys were completed in the period 2000–2004, confirming presence of the species distributed throughout the range (Service 2022, p. 21). Subsequently, one anecdotal observation in 2009 along with a survey effort in 2018 confirmed presence in a total of four analysis units spread throughout the range (Service 2022, p. 21). The effects of impermeable land cover and pollution in the Biscayne Aquifer have been impacting the Miami cave crayfish for multiple decades; therefore, the continued presence of the species throughout the range indicates it currently has sufficient resiliency to these stressors.

In summary, the Miami cave crayfish currently has sufficient resiliency to withstand environmental and demographic stochasticity because there is enough freshwater and habitat available. Despite our measures of available detritus and water quality being in low condition, the Miami cave crayfish has consistently been found throughout its range through multiple decades of impermeable land cover and pollution in the Biscayne Aquifer, indicating that it currently has sufficient resiliency to these stressors. We combined our habitat metric analysis with the best available information on the demographics of the species to determine that the Miami cave crayfish currently has sufficient resiliency to withstand environmental and demographic stochasticity.

The Miami cave crayfish currently has limited ability to withstand catastrophic events and adapt to a changing environment because it has naturally low redundancy and representation due to its high level of endemism. The narrowly distributed, isolated nature of the single population of the species indicates it has limited ability to withstand stochastic or catastrophic events through dispersal. Because the species evolved in a unique subterranean aquifer system with little historical variation, we conclude that it has low potential to adapt to environmental changes to its habitat. As a single-aquifer endemic with no dispersal opportunities outside the current range, the species depends entirely on the continued availability of its habitat along the Atlantic Coastal Ridge. Even though redundancy and representation are inherently low for the Miami cave crayfish because of its endemism, they are both similar to historical levels.

Future Condition

In the SSA report, we analyzed four scenarios that incorporated changes in saltwater intrusion caused by sea level rise, urbanization, water quality condition caused by pollution, and water quantity condition caused by groundwater pumping. The main driver

of the future condition of the species is the movement of saltwater intrusion further inland because of sea level rise. Urbanization, pollution levels, and groundwater pumping levels do not change significantly into the future because they are already at high levels and there is limited capacity for more development, though they may increase if the limited available land is developed. Subsequently, we focus on the future effects of saltwater intrusion in this document. Further discussion of future changes in urbanization, water quality condition, and water quantity condition can be found in the SSA report (Service 2022, pp. 94–100).

As sea level rises, more Miami cave crayfish habitat will become unsuitable because saltwater will intrude further inland into the Biscayne Aquifer. The Biscayne Aquifer has varied depth, ranging from 50 ft (15 m) in the most inland extent of the range to 90 ft (27 m) in the most coastal extent of the range (Hughes and White 2016, p. 26). Because the aquifer is deepest closer to the coast, there is more Miami cave crayfish habitat within this area. Coastal habitat will be increasingly impacted by saltwater intrusion, which is significant because the largest volume of habitat will be lost first.

For our evaluation of future condition, we used modeled projections of sea level rise (Sweet et al. 2017, entire; Sweet et al. 2018, entire). We modeled threats to the year 2070, representing a 50-year time horizon, corresponding to the range of available urbanization and climate change model forecasts (Carr and Zwick 2016, entire; Sweet et al. 2017, entire; Sweet et al. 2018, entire). In addition, 50 years represents an appropriate biological timeframe during which responses of the species to potential changes in habitat can be reasonably assessed. Although the lifespan and generation time for Miami cave crayfish are currently unknown, estimates for these measures based on those reported for other subterranean crayfish taxa (Taylor et al. 1996, p. 27; Huryn et al. 2008, pp. 1, 12–15; Longshaw and Stebbing 2016, p. 68) suggest that three generations of the species would likely be represented in a 50-year time span.

No projections currently exist that predict the extent of saltwater intrusion into the Biscayne Aquifer by 2070, so we estimated the inland movement of the saltwater interface from its 2018 position (Prinos 2019, unpaginated) based on the projections of regional sea level rise, the degree of aquifer drawdown, and anthropogenic interventions potentially altering saltwater intrusion. The regional sea level rise scenarios adopted from Sweet et al. (2017 and 2018) (*e.g.,* Intermediate, Intermediate High, and Extreme scenarios) encompass the extent of sea level rise predicted by the low-end and high-end likely ranges for the representative concentration pathway (RCP) 4.5 and RCP 8.5 emissions scenarios for future global temperatures projected by the Intergovernmental Panel on Climate Change assessment report 5 (Sweet et al. 2018, p. 24).

After we had completed our SSA, version 1.0, new sea level rise projections were made publicly available (Sweet et al. 2022, entire). We compared the Sweet et al. (2017, entire) sea level rise projections to the new updated Sweet et al. (2022, entire) projections and added this comparison summary as an appendix to the SSA report (Service 2023, version 1.1). The Sweet et al. (2022, entire) sea level rise scenarios project lower sea level rise in 2070 when compared to projections from Sweet et al. (2017, entire). However, including the additional effects of high tide flooding, similar loss of habitat would be expected as seen in our projections using Sweet et al. 2017.

The intermediate sea level rise scenario (1.41-ft (0.43-m) regional sea level rise projection) is represented in the SSA report by scenario 4; the intermediate-high sea level rise scenario (2.49-ft (0.76-m) regional sea level rise projection) is represented in the SSA report by scenarios 1 and 2; and the extreme sea level rise scenario (4.53-ft (1.38-m) regional sea level rise projection) is represented by scenario 3 (Sweet et al. 2017 and 2018, entire).

In scenario 4, saltwater intrusion will cause increased habitat loss in the two analysis units in a low condition and the one analysis unit in a moderate condition, while also causing one high condition unit to drop to a moderate condition (Service 2022, pp. 106–107; table 1). In scenarios 1 and 2, saltwater intrusion will cause two units to decrease from a high to moderate condition, one unit will decrease from a moderate to a low condition, and one unit will decrease from a low to extirpated condition. In scenario 3, saltwater intrusion will cause three units to be completely extirpated and the remaining four units to drop to a low condition, meaning over 50 percent of the habitat in those units would be lost (Service 2022, pp. 104–105; table 1). In all of our future scenarios, a significant loss of habitat would result from saltwater intrusion (table 1).

TABLE 1—CONDITION OF FRESHWATER AVAILABILITY FOR THE CURRENT CONDITION AND THE FUTURE CONDITION FOR EACH SCENARIO FOR EACH ANALYSIS UNIT OF THE MIAMI CAVE CRAYFISH

Analysis unit	Current condition: freshwater availability	Scenario 4: [1] freshwater availability	Scenario 1: [2] freshwater availability	Scenario 2: [2] freshwater availability	Scenario 3: [3] freshwater availability
1	High	High	Moderate	Moderate	Low.
2	High	High	Moderate	Moderate	Low.
3	High	Moderate	Moderate	Low	Low.
4	High	High	High	High	Low.
5	Low	Low	Extirpated	Extirpated	Extirpated.
6	Moderate	Moderate	Low	Low	Extirpated.
7	Low	Low	Low	Low	Extirpated.

Scenarios 4 and 3 represent the upper and lower bounds of projected scenarios for the future condition of the species:
[1] Scenario 4: Intermediate sea level rise scenario (1.41-ft (0.43-m) regional sea level rise).
[2] Scenarios 1 and 2: Intermediate-high sea level rise scenario (2.49-ft (0.76-m) regional sea level rise).
[3] Scenario 3: Extreme sea level rise scenario (4.53-ft (1.38-m) regional sea level rise).

Resiliency, redundancy, and representation would all be reduced in the future because of habitat loss due to saltwater intrusion. With less habitat available, Miami cave crayfish abundance would likely decline. Fewer Miami cave crayfish in the aquifer and less available habitat reduces the ability of the species to withstand environmental and demographic stochasticity and also its ability to withstand catastrophic events. A lower

population size also reduces the genetic diversity of the species, further limiting its adaptive capacity. Additionally, the Miami cave crayfish has no ability to disperse outside of its current range, also limiting its ability to adapt to changing conditions. Overall, the Miami cave crayfish will likely be significantly more vulnerable to stressors in the future because of habitat loss due to increased impacts of saltwater intrusion due to sea level rise.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have analyzed the cumulative effects of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluate the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Conservation Efforts and Regulatory Mechanisms

Regulations that help to protect Miami cave crayfish habitat include water management regulations that reduce groundwater withdrawal and pollution.

The South Florida Water Management District is responsible for water management in Miami-Dade County and regulates water use and production throughout the region. In 2007, the South Florida Water Management District passed a rule that prevents water consumers from sourcing new or additional supplies of freshwater that are recharged by the Everglades ecosystem. Water users are now required to use alternative sources, such as recycled water, treated wastewater pumped into the Biscayne Aquifer for recharge purposes, groundwater reserves in the Floridan aquifer system, or general water conservation practices (South Florida Water Management District 2008, entire; Hughes and White 2016, pp. 2–3). The measure has already resulted in decreased rates of public water withdrawal from the Biscayne Aquifer (Bradner et al. 2005, p. 1; Prinos et al. 2014, p. 7).

Another key regulation adopted by the South Florida Water Management District that counters freshwater withdrawal from the Biscayne Aquifer is its year-round landscape watering restrictions (Chapter 40E–24, Florida Administrative Code). These restrictions stipulate specific times that landscape watering is permitted, thus restricting the amount of groundwater that can be withdrawn from those using public or privately owned water utility systems or wells. However, some large sources of water consumption are exempted by these regulations, namely athletic play areas (*e.g.,* golf courses, sports facilities, equestrian and livestock arenas), agricultural operations with consumptive use permits, and water users practicing hand watering (*e.g.,* with hoses) (South Florida Water Management District 2021a, unpaginated).

Biscayne Aquifer groundwater has limited protective benefits from pollution under Federal, State, and county regulations. Most regulatory protections focus on surface water quality, which offers indirect benefits to the quality of freshwater within the Biscayne Aquifer system. The primary laws and ordinances pertaining to water quality protection that directly or indirectly affect groundwater quality in the endemic range of Miami cave crayfish include (but are not limited to):

- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (the Superfund law) (42 U.S.C. 9601 *et seq.*): identifies, evaluates, and cleans up sites contaminated with hazardous substances.
- Resource Conservation and Recovery Act (42 U.S.C., ch. 82, sec. 6901 *et seq.*): establishes standards for the treatment, storage, and disposal of hazardous waste from municipal and industrial sources, including that contained in underground storage tanks.
- Safe Drinking Water Act (42 U.S.C. 300f): establishes national primary drinking water regulations for contaminants that may cause adverse public health effects, including mandatory requirements related to maximum contaminant levels and treatments.
- Clean Water Act of 1972 (33 U.S.C. 1251 *et seq.*): indirectly benefits groundwater quality by protecting the quality of surficial waters.
- The Everglades Forever Act (Section 373.4592(4)(f), F.S.): establishes best management practices in the Everglades Agricultural Area, which is underlaid by the Biscayne Aquifer that indirectly benefits from these regulations.
- The Grizzle-Figg Statute (Section 403.086, F.S.): outlines requirements for safe sewage disposal facilities and treatment of discharges from these sewage facilities.
- Identification of Impaired Surface Waters (Section 62–303, F.S.): establishes water quality standards and protocols by which Florida assesses, lists, and delists impaired surface waters, which indirectly protects adjacent aquifer systems.
- Miami-Dade County Ordinance for Florida-Friendly Fertilizer Use for Urban Landscapes: regulates fertilizer application and use in the incorporated and unincorporated areas of the county.
- Miami-Dade County Wellfield Protection Regulations: prohibits or limits activities that use or store hazardous materials, generate hazardous waste, excavate to any depth, or require the installation of septic tanks within a wellfield protection area.

Currently, there are no conservation efforts specific to the Miami cave crayfish.

The Miami cave crayfish is listed in the State Wildlife Action Plan as a species of greatest concern (Florida Fish and Wildlife Conservation Commission 2019, p. 163).

Determination of Miami Cave Crayfish Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we found that impacts from saltwater intrusion caused by rising sea levels is the most substantial threat to the Miami cave crayfish viability. In the foreseeable future, we anticipate that saltwater intrusion will continue to move inland as climate-

change-induced sea level rise continues, causing the loss of Miami cave crayfish habitat and having the greatest influence on Miami cave crayfish viability. We also considered the effects of development, pollution in the Biscayne Aquifer, activities that can cause mortality, and minor threats including modification of subterranean limestone, competition and predation, disease, and overutilization for their cumulative effects.

The Miami cave crayfish exists in one population restricted to the Biscayne Aquifer along the Atlantic Coastal Ridge. Pollution and impermeable surface cover may be negatively affecting resiliency of the species by decreasing water quality and limiting the detritus filtering into the aquifer. However, these impacts are highly uncertain, so we put the greatest weight on habitat availability and available survey data. Currently, two analysis units are significantly (greater than 50 percent) affected by saltwater intrusion with five analysis units not significantly (0 to 26 percent) affected by saltwater intrusion. Overall, a majority of the Miami cave crayfish range is currently unaffected by saltwater intrusion and is considered to be in a high condition. Additionally, survey data indicate the Miami cave crayfish is present throughout the range despite multi-decadal threats impacting the species. We conclude that there is sufficient habitat available to the species and the Miami cave crayfish is still distributed throughout its range; therefore, it currently has a sufficient level of resiliency.

Based on its limited geographical range, redundancy and representation are inherently low for the Miami cave crayfish and likely similar to historical levels. Redundancy has been slightly reduced from historical levels because saltwater intrusion has reduced the available habitat near the coast, negatively impacted the ability of the species to withstand catastrophic events. Similarly, current representation has been slightly reduced from historical levels because habitat loss reduces the population size of the species, decreasing the amount of potential genetic diversity. Overall, redundancy and representation remain similar to historical levels. Given the current resiliency, redundancy, and representation of the Miami cave crayfish across its range, we conclude that the species is not currently in danger of extinction throughout its range.

We next considered whether the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. In considering the foreseeable future for the Miami cave crayfish, we analyzed expected changes in sea level rise and the resulting inland movement of saltwater intrusion out to 2070 (Service 2022, pp. 100–107). We determined that this timeframe represents a period for which we can reliably predict both the threats to the species and the species' response to those threats.

By 2070, the Miami cave crayfish is projected to lose significant amounts of habitat as saltwater encroaches further inland into the Biscayne Aquifer. Projected habitat losses range from losing close to 50 percent of the habitat in one additional analysis unit in the intermediate sea level rise scenario (scenario 4), to losing greater than 50 percent of all available habitat in the extreme sea level rise scenario (scenario 3). Intermediate scenarios 1 and 2 are projected to have only one remaining analysis unit in a high condition, one extirpated unit, and the remaining units being in either a moderate or low condition, meaning a majority of the habitat would be affected by saltwater intrusion. The Miami cave crayfish already has a limited range with naturally low redundancy and representation levels, ultimately making it completely dependent on the availability of its habitat. Therefore, the projected loss of habitat in the foreseeable future would leave the species extremely vulnerable to stochastic or catastrophic events. Additionally, the Miami cave crayfish has no ability to disperse outside of its current range and is unlikely to be able to adapt to a saltwater environment. Thus, after assessing the best available information, we conclude that the Miami cave crayfish is not currently in danger of extinction but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), vacated the provision of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (hereafter ''Final Policy''; 79 FR 37578, July 1, 2014) that provided if the Services determine that a species is threatened throughout all of its range, the Services will not analyze whether the species is endangered in a significant portion of its range.

Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for the Miami cave crayfish, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify portions of the range where the species may be endangered.

We evaluated the range of the Miami cave crayfish to determine if the species is in danger of extinction now in any portion of its range. The range of a species can theoretically be divided into portions in an infinite number of ways. We focused our analysis on portions of the species' range that may meet the definition of an endangered species. For the Miami cave crayfish, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now in that portion.

We examined the following threats: saltwater intrusion, water quality degradation, groundwater pumping, and modification of surface cover resulting from urban development, including cumulative effects. The primary threat to the Miami cave crayfish is saltwater intrusion caused by rising sea levels, which is affecting the coastal analysis units the most currently. The other threats of water quality degradation, groundwater pumping, and modification of surface cover are largely having an effect across the range of the species. Therefore, we focused our evaluation on the threat of saltwater intrusion.

In considering whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range, there are two analysis units affected by saltwater intrusion more than the other units. Currently, these two analysis units (portion) are significantly (greater than 50 percent) affected by saltwater intrusion and the other five analysis units are not significantly (0 to 26 percent) affected by saltwater intrusion. We determined this portion may have a different status than the rest of the range and then considered whether this portion may be significant.

This portion is small in size relative to the entire range of the species; it represents less than 25 percent of the range. In addition, the habitat in this portion is neither unique or better quality compared to the rest of the range and most Miami cave crayfish have been observed farther inland. Therefore, we do not find this portion to be significant.

Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018) and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy, including the definition of ''significant'' that those court decisions held to be invalid.

Determination of Status

Our review of the best available scientific and commercial information indicates that the Miami cave crayfish meets the definition of a threatened species. Therefore, we propose to list the Miami cave crayfish as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (*https://ecos.fws.gov/ecp/species/9832*), or from our Florida Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Florida would be eligible for Federal funds to implement management actions that promote the protection or recovery of the Miami cave crayfish. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance*.

Although the Miami cave crayfish is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7 of the Act is titled Interagency Cooperation and mandates all Federal action agencies to use their existing authorities to further the conservation purposes of the Act and to ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. Regulations implementing section 7 are codified at 50 CFR part 402.

Section 7(a)(2) states that each Federal action agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Each Federal agency shall review its action at the earliest possible time to determine whether it may affect listed species or critical habitat. If a determination is made that the action may affect listed species or critical habitat, formal consultation is required (50 CFR 402.14(a)), unless the Service concurs in writing that the action is not likely to adversely affect listed species or critical

habitat. At the end of a formal consultation, the Service issues a biological opinion, containing its determination of whether the Federal action is likely to result in jeopardy or adverse modification.

In contrast, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action which *is likely* to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. Although the conference procedures are required only when an action is likely to result in jeopardy or adverse modification, action agencies may voluntarily confer with the Service on actions that may affect species proposed for listing or critical habitat proposed to be designated. In the event that the subject species is listed or the relevant critical habitat is designated, a conference opinion may be adopted as a biological opinion and serve as compliance with section 7(a)(2).

Examples of discretionary actions for the Miami cave crayfish that may be subject to conference and consultation procedures under section 7 are land management or other landscape-altering activities on Federal lands administered by the U.S. Army Corps of Engineers, U.S. Coast Guard, U.S. Department of Transportation, and U.S. Department of Housing and Urban Development as well as actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**) with any specific questions on section 7 consultation and conference requirements.

It is the policy of the Services, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9 of the Act. To the extent possible, activities that will be considered likely to result in violation will also be identified in as specific a manner as possible. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. Although most of the prohibitions in section 9 of the Act apply to endangered species, sections 9(a)(1)(G) and 9(a)(2)(E) of the Act prohibit the violation of any regulation under section 4(d) pertaining to any threatened species of fish or wildlife, or threatened species of plant, respectively. Section 4(d) of the Act directs the Secretary to promulgate protective regulations that are necessary and advisable for the conservation of threatened species. As a result, we interpret our policy to mean that, when we list a species as a threatened species, to the extent possible, we identify activities that will or will not be considered likely to result in violation of the protective regulations under section 4(d) for that species.

At this time, we are unable to identify specific activities that will or will not be considered likely to result in violation of section 9 of the Act beyond what is already clear from the descriptions of prohibitions and exceptions established by protective regulation under section 4(d) of the Act.

Questions regarding whether specific activities would constitute violation of section 9 of the Act should be directed to the Florida Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Proposed Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as she deems necessary and advisable to provide for the conservation of species listed as threatened species. The U.S. Supreme Court has noted that statutory language similar to the language in section 4(d) of the Act authorizing the Secretary to take action that she ''deems necessary and advisable'' affords a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592, 600 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting one or more of the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld, as a valid exercise of agency authority, rules developed under section 4(d) that included limited prohibitions against takings (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 WL 2344927 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 WL 511479 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to [her] with regard to the permitted activities for those species. [She] may, for example, permit taking, but not importation of such species, or [she] may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

The provisions of this proposed 4(d) rule would promote conservation of the Miami cave crayfish by encouraging projects and activities that would prevent increased saltwater intrusion into Miami cave crayfish habitat, improve water quality in the aquifer, and promote surface cover permeability. The provisions of this proposed rule are one of many tools that we would use to promote the conservation of the Miami cave crayfish. This proposed 4(d) rule would apply only if and when we make final the listing of the Miami cave crayfish as a threatened species.

As mentioned previously in Available Conservation Measures, section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of

designated critical habitat of such species. In addition, even before the listing of any species or the designation of its critical habitat is finalized, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.

These requirements are the same for a threatened species with a species-specific 4(d) rule. For example, as with an endangered species, if a Federal agency determines that an action is ''not likely to adversely affect'' a threatened species, it will require the Service's written concurrence (50 CFR 402.13(c)). Similarly, if a Federal agency determinates that an action is ''likely to adversely affect'' a threatened species, the action will require formal consultation with the Service and the formulation of a biological opinion (50 CFR 402.14(a)).

Provisions of the Proposed 4(d) Rule

Exercising the Secretary's authority under section 4(d) of the Act, we have developed a proposed rule that is designed to address the Miami cave crayfish's conservation needs. As discussed previously in Summary of Biological Status and Threats, we have concluded that the Miami cave crayfish is likely to become in danger of extinction within the foreseeable future primarily due to saltwater intrusion caused by sea level rise. Section 4(d) requires the Secretary to issue such regulations as she deems necessary and advisable to provide for the conservation of each threatened species and authorizes the Secretary to include among those protective regulations any of the prohibitions that section 9(a)(1) of the Act prescribes for endangered species. We find that, if finalized, the protections, prohibitions, and exceptions in this proposed rule as a whole satisfy the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the Miami cave crayfish.

The protective regulations we are proposing for the Miami cave crayfish incorporate prohibitions from section 9(a)(1) to address the threats to the species. Section 9(a)(1) prohibits the following activities for endangered wildlife: importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce. This proposed protective regulation includes all of these prohibitions because the Miami cave crayfish is at risk of extinction in the foreseeable future and putting these prohibitions in place will help to prevent further degradation of habitat and decrease synergistic, negative effects from other ongoing or future threats.

In particular, this proposed 4(d) rule would provide for the conservation of the Miami cave crayfish by prohibiting the following activities, unless they fall within specific exceptions or are otherwise authorized or permitted: importing or exporting; take (as set forth at 50 CFR 17.21(c)(1) with exceptions as discussed below); possession and other acts with unlawfully taken specimens; delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulations at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating take would help preserve the species' one population and decrease synergistic, negative effects from other ongoing or future threats. Therefore, we propose to prohibit take of the Miami cave crayfish, except for take resulting from those actions and activities specifically excepted by the 4(d) rule.

Exceptions to the prohibition on take would include all of the general exceptions to the prohibition on take of endangered wildlife, as set forth in 50 CFR 17.21 and additional exceptions, as described below.

The proposed 4(d) rule would also provide for the conservation of the species by allowing exceptions that incentivize conservation actions or that, while they may have some minimal level of take of the Miami cave crayfish, are not expected to rise to the level that would have a negative impact (*i.e.,* would have only de minimis impacts) on the species' conservation. The proposed exceptions to these prohibitions include activities that will prevent further saltwater intrusion into the Biscayne Aquifer and water management activities that improve water quality or enhance natural infiltration into the Biscayne Aquifer:

(1) Activities that will prevent further saltwater intrusion into the Biscayne Aquifer include coastal resiliency projects and canal maintenance or construction that prevent backflow of salt water, and

(2) Water management activities or coastal wetland restoration projects that improve freshwater and estuarine habitats; improve salinity distribution and reestablish productive nursery habitat along the shoreline; restore the quantity, quality, timing, and distribution of freshwater to Biscayne Bay and Biscayne National Park; restore the spatial extent of natural coastal glades habitat; or enhance natural infiltration into the Biscayne Aquifer.

Despite these prohibitions regarding threatened species, we may under certain circumstances issue permits to carry out one or more otherwise-prohibited activities, including those described above. The regulations that govern permits for threatened wildlife state that the Director may issue a permit authorizing any activity otherwise prohibited with regard to threatened species. These include permits issued for the following purposes: for scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act (50 CFR 17.32). The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist us in implementing all aspects of the Act. In this regard, section 6 of the Act provides that we must cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with us in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve the Miami cave crayfish that may result in otherwise prohibited take without additional authorization.

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or our ability to enter into partnerships for the management and protection of the Miami cave crayfish. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between us and other Federal agencies, where appropriate. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that we could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

III. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

We have found critical habitat to be prudent and determinable for the Miami cave crayfish and have developed a proposed critical habitat rule for this species. On August 29, 2023, we were informed that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) determined that our proposed critical habitat rule is significant under Executive Order 12866. Therefore, we will publish a proposed critical habitat rule for the Miami cave crayfish following interagency review of the proposed critical habitat rule.

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations and species-specific protective regulations promulgated concurrently with a decision to list or reclassify a species as threatened. The courts have upheld this position (*e.g., Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995) (critical habitat); *Center for Biological Diversity* v. *U.S. Fish and Wildlife Service.,* 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005) (concurrent 4(d) rule)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretaries' Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Florida Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Florida Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11, amend paragraph (h) by adding an entry for ''Crayfish, Miami cave'' to the List of Endangered and Threatened Wildlife in alphabetical order under CRUSTACEANS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
CRUSTACEANS				
*	*	*	*	*
Crayfish, Miami cave	*Procambarus milleri*	Wherever found	T	[**Federal Register** citation when published as a final rule]; 50 CFR 17.46(e); [4d]
*	*	*	*	*

■ 3. Amend § 17.46 by adding paragraph (e) to read as follows:

§ 17.46 Special rules—crustaceans.

* * * * *

(e) Miami cave crish (*Procambarus milleri*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the Miami cave crayfish. Except as provided under paragraph (e)(2) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of a commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to this species, you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (4) for endangered wildlife.

(iii) Take, as set forth at § 17.31(b).

(iv) Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) for endangered wildlife.

(v) Take incidental to an otherwise lawful activity caused by:

(A) Activities that will prevent further saltwater intrusion into the Biscayne Aquifer, such as coastal resiliency projects and canal maintenance or construction that prevent backflow of salt water; or

(B) Water management activities or coastal wetland restoration projects that improve freshwater and estuarine habitats; improve salinity distribution and reestablish productive nursery habitat along the shoreline; restore the quantity, quality, timing, and distribution of freshwater to Biscayne Bay and Biscayne National Park; restore the spatial extent of natural coastal glades habitat; or enhance natural infiltration into the Biscayne Aquifer.

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–20293 Filed 9–19–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

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Endangered and Threatened Wildlife and Plants; One Species Not Warranted for Delisting and Six Species Not Warranted for Listing as Endangered or Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notification of findings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce findings that one species is not warranted for delisting and six species are not warranted for listing as endangered or threatened species under the Endangered Species Act of 1973, as amended (Act). After a thorough review of the best available scientific and commercial information, we find that it is not warranted at this time to delist the southern sea otter (*Enhydra lutris nereis*). We also find that is not warranted at this time to list the Cascades frog (*Rana cascadae*), plains spotted skunk (*Spilogale interrupta,* formerly recognized as one of three subspecies of eastern spotted skunk (*Spilogale putorius interrupta*)), sicklefin chub (*Macrhybopsis meeki*), sturgeon chub (*Macrhybopsis gelida*), Tennessee cave salamander (*Gyrinophilus palleucus*), and Yazoo crayfish (*Faxonius hartfieldi,* formerly *Orconectes hartfieldi*). However, we ask the public to submit to us at any time any new information relevant to the status of any of the species mentioned above or their habitats.

DATES: The findings in this document were made on September 20, 2023.

ADDRESSES: Detailed descriptions of the bases for these findings are available on the internet at *https://www.regulations.gov* under the following docket numbers:

Species	Docket No.
Cascades frog	FWS–R1–ES–2023–0127.
Plains spotted skunk	FWS–R3–ES–2023–0128.
Sicklefin chub	FWS–R6–ES–2023–0130.
Southern sea otter	FWS–R8–ES–2023–0132.
Sturgeon chub	FWS–R6–ES–2023–0131.
Tennessee cave salamander.	FWS–R4–ES–2023–0133.
Yazoo crayfish	FWS–R4–ES–2023–0134.

Those descriptions are also available by contacting the appropriate person as specified under **FOR FURTHER INFORMATION CONTACT**. Please submit any new information, materials, comments, or questions concerning this finding to the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT:

Species	Contact information
Cascades frog	Jeff Dillon, Endangered Species Division Manager, Oregon Fish and Wildlife Office, *jeffrey_dillon@fws.gov,* 503–231–6179.
Plains spotted skunk	John Weber, Field Supervisor, Missouri Field Office, *John_S_Weber@fws.gov,* 573–825–6048.

Species	Contact information
Sicklefin chub and sturgeon chub ..	Amity Bass, Field Supervisor, North and South Dakota Ecological Services, *amity_bass@fws.gov,* 605–222–0228.
Southern sea otter	Steve Henry, Field Supervisor, Ventura Fish and Wildlife Office, *steve_henry@fws.gov,* 805–644–1766.
Tennessee cave salamander	Dan Elbert, Field Supervisor, Tennessee FO, *daniel_elbert@fws.gov,* 571–461–8964.
Yazoo crayfish	James Austin, Field Supervisor, Mississippi Ecological Field Office, 601–321–1129, *james_austin@fws.gov.*

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Under section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*), we are required to make a finding on whether or not a petitioned action is warranted within 12 months after receiving any petition that we have determined contains substantial scientific or commercial information indicating that the petitioned action may be warranted (hereafter a ''12-month finding''). We must make a finding that the petitioned action is: (1) Not warranted; (2) warranted; or (3) warranted but precluded by other listing activity. We must publish a notification of these 12-month findings in the **Federal Register**.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations at part 424 of title 50 of the Code of Federal Regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Lists of Endangered and Threatened Wildlife and Plants (Lists). The Act defines ''species'' as including any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)). The Act defines ''endangered species'' as any species that is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)), and ''threatened species'' as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)). Under section 4(a)(1) of the Act, a species may be determined to be an endangered species or a threatened species because of any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself. However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the Act's definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

In conducting our evaluation of the five factors provided in section 4(a)(1) of the Act to determine whether the Cascades frog, plains spotted skunk, sicklefin chub, southern sea otter, sturgeon chub, Tennessee cave salamander, and Yazoo crayfish meet the Act's definition of ''endangered species'' or ''threatened species,'' we considered and thoroughly evaluated the best scientific and commercial information available regarding the past, present, and future stressors and threats. We reviewed the petitions, information available in our files, and other available published and unpublished

information for all these species. Our evaluation may include information from recognized experts; Federal, State, and Tribal governments; academic institutions; foreign governments; private entities; and other members of the public.

In accordance with the regulations at 50 CFR 424.14(h)(2)(i), this document announces the not-warranted findings on petitions to delist one species and list six species. We have also elected to include brief summaries of the analyses on which these findings are based. We provide the full analyses, including the reasons and data on which the findings are based, in the decisional file for each of the seven actions included in this document. The following is a description of the documents containing these analyses:

The species assessment forms for Cascades frog, plains spotted skunk, sicklefin chub, sturgeon chub, Tennessee cave salamander, and Yazoo crayfish contain more detailed biological information, a thorough analysis of the listing factors, a list of literature cited, and an explanation of why we determined that each species does not meet the Act's definition of an ''endangered species'' or a ''threatened species.'' The species assessment form for the southern sea otter contains more detailed biological information, a thorough analysis of the listing factors, a list of literature cited, and an explanation of why we determined that the species continues to meet the Act's definition of a ''threatened'' species. To inform our status reviews, we completed species status assessment (SSA) reports for the Cascades frog, plains spotted skunk, sicklefin chub, southern sea otter, sturgeon chub, Tennessee cave salamander, and Yazoo crayfish. Each SSA report contains a thorough review of the taxonomy, life history, ecology, current status, and projected future status for each species. This supporting information can be found on the internet at *https://www.regulations.gov* under the appropriate docket number (see **ADDRESSES**, above).

Cascades Frog

Previous Federal Actions

On July 11, 2012, we received a petition from the Center for Biological Diversity to list 53 amphibian and reptile species, including Cascades frog (*Rana cascadae*), as an endangered or threatened species under the Act. On July 1, 2015, we published a 90-day finding (80 FR 37568) that the petition contained substantial information indicating listing may be warranted for the species. This document constitutes our 12-month finding on the July 11, 2012, petition to list Cascades frog under the Act.

Summary of Findings

The Cascades frog is a medium-sized frog typically less than 71 millimeters (mm) (2.8 inches (in)) in length; males are smaller than females. The Cascades frog is greenish brown with variation among frogs in spot appearance. The species is generally associated with middle to high elevations (approximately 400 to 2,500 meters (m) (1,312 to 8,202 feet (ft)); its current and historical range extends along the Cascade Mountain Range from near the United States-Canada border south through Washington and Oregon to California just south of Lassen Peak. The species can also be found within the Klamath Mountains of California and the Olympic Mountains in Washington. The species may be extirpated within Lassen Volcanic National Park.

The Cascades frog is primarily aquatic, using lakes, ponds, wet meadows, and streams, where they are often found along shorelines or on emergent rocks or logs. It uses habitats that are maintained by cold winters with deep snowpack and spring snowmelt. A diversity of aquatic features is needed to support all life stages, breeding, foraging, and dispersal, and to provide areas of refuge from predators. Precipitation is important in supporting aquatic habitats and movement of individuals across the landscape. The Cascades frog overwinters in aerobic sediments at the bottom of aquatic features that have stable thermal conditions and do not completely freeze over.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Cascades frog, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threats affecting the Cascades frog's biological status include climate change, the chytrid fungus *Batrachochytrium dendrobatidis* (*Bd*), and nonnative trout.

We separated the species' range into five representative units (Olympics, Washington Cascades, Oregon Cascades, California North, and California South) to analyze current and future condition. Our current condition analysis finds that resiliency of the Cascades frog is variable across the range, with all representative units having conditions to support healthy populations. However, the California units are less resilient than those in Oregon and Washington. The distribution of healthy (*i.e.,* good to fair resiliency) populations of the species across a broad geographic range ensures that catastrophic events such as volcanic eruptions, presence of *Bd,* and wildfire are not likely to cause risk of Cascades frog extinction. Further, the Cascades frog continues to occupy historical sites throughout all representative units, and factors such as habitat, distribution of occurrences, connectivity, and natural geological and elevational gaps in the range all contribute to the species' overall adaptive capacity. Therefore, we conclude that Cascades frog is not currently in danger of extinction throughout all of its range and does not meet the Act's definition of an endangered species.

In considering the foreseeable future as it relates to the status of the Cascades frog, we considered the relevant risk factors (threats/stressors) acting on the species and whether we could draw reliable predictions about the species' response to these factors. Our analysis in the SSA report of future scenarios over a an approximately 50-year timeframe encompasses the best available information for future projections of habitat suitability based on maximum temperature, minimum temperature, precipitation, snow water equivalent, soil moisture, and potential evapotranspiration under two different climate change futures (representative concentration pathways (RCP) 4.5 and 8.5). We determined that this approximately 50-year timeframe enabled us to consider the threats/stressors acting on the species and draw reliable predictions about the species' response to these factors.

Based on the 3Rs (resiliency, representation, and redundancy) analyzed in the SSA report, the Cascades frog is projected to maintain multiple resilient populations, based on adequate suitable habitat availability, across the landscape for approximately 50 years into the future. The species is expected to withstand both stochastic and catastrophic events and have sufficient adaptive capacity to endure future climate change. Thus, after assessing the best available information, we conclude that Cascades frog is not likely to become endangered within the foreseeable future throughout all of its range.

Having determined that the Cascades frog is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we considered whether it may be in danger of extinction or likely to become so in the foreseeable future in a significant

portion of its range—that is, whether there is any portion of the species' range for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

We identified the Olympics and California South representative units as portions that might have a different status than the species rangewide. We examined the following threats: climate change, *Bd,* and nonnative trout, including cumulative effects.

The Olympics representative unit has fewer analysis units (AUs) (6) than most of the other representative units. However, the largest AU (unit 15) comprises nearly the entire Olympics representative unit and contains the majority of the Cascades frogs in that unit. Currently, this representative unit has populations with sufficient resiliency to withstand stochastic events, and the well-distributed largest population, which can be found across nearly the entire representation unit with good resiliency, is likely to withstand catastrophic events. We, therefore, determine that the Cascades frog is not in danger of extinction in the Olympics part of the range.

The Olympics have more snow-fed aquatic systems, indicating that they could be more sensitive to climate change impacts than habitat in other parts of the Cascades frog's range. However, these climate effects depend on the kind of wetland habitat affected, the distribution of wetland types, and the degree of change in hydrologic patterns under different future climates. We do not know explicit linkages of climate effects to specific Cascades frog habitat. Despite this caveat, our future conditions analysis indicates that the largest AU (unit 15), which covers the majority of the representation unit, will maintain fair habitat suitability across all future scenarios. Further, there does not appear to be widespread adult mortality consistent with *Bd* in the Olympics. While nonnative trout are in wetlands of the Washington Olympics and will likely continue to be a stressor, there are areas within the Olympics range (*e.g.,* national parks) where this stressor is not likely to exacerbate any projected declines. Based on the projected future conditions, we conclude that the Cascades frog is not in danger of extinction within the foreseeable future in the Olympics portion of its range.

Populations within the California South representative unit have experienced declines, local extirpations, and low population viability due in part to *Bd,* droughts, nonnative trout stocking, and lack of connectivity to other habitat. Despite declines in the California South part of the range, 75 percent of the AUs are currently in fair condition, indicative of relatively healthy populations. These fair condition AUs are distributed throughout the representative unit, thus providing redundancy to both stochastic and catastrophic events. We, therefore, determine that the Cascades frog is not in danger of extinction in the California South part of the range.

Our future conditions analysis shows that all AUs within the California South representation unit either maintain fair habitat condition or improve to good habitat condition approximately 50 years into the future. Although habitat suitability is predicted to increase, the potential for the Cascades frog to colonize suitable habitat is dependent on the health of source populations, connectivity, and habitat features to support the species across all life stages, and there is some uncertainty as to the extent that this could happen in the future. The projected future distribution of fair/good condition AUs throughout the California South unit provide redundancy to stochastic and catastrophic events. Based on this assessment, we conclude that the Cascades frog is not in danger of extinction within the foreseeable future in the California South portion of its range.

Because we determined that there are no portions within the species range that are currently in danger of extinction or likely to become so in the foreseeable future, we do not need to consider whether any portion of the range is significant. Nonetheless, we did undertake this further step for California South as a part of our evaluation of significant portion of the range. Considerations for significance can include whether the portion constitutes a large geographic area relative to the rest of the range, whether the portion constitutes habitat of high quality relative to the remaining portions of the range, or whether the portion constitutes high or unique value habitat for the species. California South is not a large representative unit relative to the rest of the range. It does not have unique or high value habitat nor high quality habitat relative to any other habitat throughout the range, and while the Lassen Mountains are different from other mountains in the range, they provide similar habitat features for the frogs, and thus they do not result in a meaningful difference in the ecology of the species. For these reasons, the California South portion is not considered significant. Therefore, the California South portion is not a significant portion of the range.

Thus, after assessing the best available information, we conclude that the Cascades frog is not in danger of extinction or likely to become in danger of extinction within the foreseeable future throughout all of its range or in any significant portion of its range. Therefore, we find that listing the Cascades frog as an endangered species or threatened species under the Act is not warranted.

A detailed discussion of the basis for this finding can be found in the Cascades frog species assessment form and other supporting documents on *https://www.regulations.gov* under Docket No. FWS–R1–ES–2023–0127 (see **ADDRESSES**, above).

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the Cascades frog SSA report. The Service sent the SSA report to three independent peer reviewers and received two responses. Results of this structured peer review process can be found at *https://www.regulations.gov.* We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

Plains Spotted Skunk

Previous Federal Actions

On July 18, 2011, we received a petition from Mr. David Wade and Dr. Thomas Alton, requesting that multiple grassland thicket species or subspecies be listed as endangered or threatened under the Act, including the plains spotted skunk (*Spilogale interrupta,* formerly recognized as one of three subspecies of eastern spotted skunk (*Spilogale putorius interrupta*)). On December 4, 2012, we published a 90-day finding in the **Federal Register** (77 FR 71759) concluding that the petition presented substantial scientific or commercial information indicating that listing the plains spotted skunk may be warranted. This document constitutes our 12-month finding on the July 18,

2011, petition to list the plains spotted skunk under the Act.

Summary of Finding

The plains spotted skunk is a small mammal in the weasel family, most notable for its vivid black and white fur markings, that occurs in a wide range of habitat types across the Great Plains region of the contiguous United States. States with current occurrences (observed from 2000 to the present) include Arkansas, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

This generalist species exhibits relatively high adaptability related to its diet and foraging, habitat use, and activity patterns. The habitat elements that we identified as important to plains spotted skunk individuals at each life stage include freshwater of sufficient quantity, food availability, den availability, and habitat complexity that provides protective cover. Plains spotted skunks are opportunistic omnivores, whose diet varies across seasons and habitats along with the availability and abundance of food items. Adult plains spotted skunks are typically solitary with the exception of mating pairs, females with dependent young, and adults denning during cold weather for thermoregulation. Despite their solitary nature, plains spotted skunks show no signs of territoriality.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the plains spotted skunk, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threats affecting the plains spotted skunk's biological status include habitat loss and fragmentation due to agricultural and urban development, and climate change. Impacts from climate change include exacerbation of drought conditions and a decrease of available habitat along the Gulf Coast due to sea level rise. We also examined a number of other factors, including infectious pathogens, pesticides, invasive species, predation, competition, overexploitation, human-wildlife conflict, and direct mortality from other sources, but these factors did not rise to such a level that affected the species as a whole.

To assess the current condition of plains spotted skunks we analyzed one demographic factor (percent of counties with current location) and two habitat factors (habitat availability and freshwater availability) across six population analysis units that cover the current range of the species. The analysis units cover an extensive range with a wide diversity of habitats distributed across diverse environmental conditions. All analysis units had high habitat availability and at least moderate freshwater availability. The demographic factor scores ranged from low (two units) to moderate (four units). Largely due to their extensive range, plains spotted skunks have a high redundancy and are at a low risk for experiencing rangewide negative impacts from a catastrophic event at a given point in time. Similarly, the species demonstrates great adaptive capacity to adjust to environmental change and, thus, currently exhibits high representation.

We evaluated two scenarios to characterize the full range of uncertainty regarding plausible futures for the plains spotted skunk within a 30-year timeframe. Resiliency of the six analysis units was assessed under each scenario. Scenario 1 assumes intermediate to low sea level rise, RCP 4.5 emissions, and land use changes at 2050 from urbanization and agriculture. Scenario 2 assumes high sea level rise, RCP 8.5 emissions, and the same land use change projections as scenario 1. Considering both scenarios, we projected the effect of the scenarios on two habitat factors important to resiliency in the future: habitat availability and freshwater availability. Under both future scenarios, we projected some reduction in freshwater availability across the range. Under scenario 1, we projected one unit scoring low (unit 1) for freshwater availability, four scoring moderate (units 2–5), and one unit remaining high (unit 6). Under scenario 2, we projected two units scoring low for freshwater availability (units 1 and 3), one scoring moderate (unit 2), and three units remaining high (units 4–6). Under both scenarios, we projected only minimal reduction in current habitat availability across the range. Under both scenarios, we project climate-induced expansion of plains spotted skunks into new habitats and regions, especially for analysis units 1, 2, and 3. For habitat availability under both scenarios, we project five units (units 1–5) to retain high habitat availability and one unit (unit 6) to have moderate habitat availability. This reduction from currently high habitat availability in unit 6 to moderate in the future is attributed to sea level rise on the Gulf Coast of Texas. In either future scenario, we expect most analysis units to have high to moderate resiliency in terms of the habitat factors important to the viability of the plains spotted skunk. Based on an evaluation of the plausible catastrophes likely to adversely impact plains spotted skunk populations in 2050, we predict the species will maintain high redundancy in both future scenarios. Similarly, our analyses of the species' adaptative capacity based on scenarios 1 and 2 support the likelihood that the species will continue to exhibit high representation 30 years into the future.

The plains spotted skunk is a generalist species that eats a wide variety of foods and lives in a wide variety of habitats across six analysis units that extend across many U.S. States. Current resiliency, redundancy, and representation are all ranked as moderate to high. Although there is low distribution in two analysis units, the species' resiliency overall is moderate to high. The species exhibits high redundancy, greatly reducing the potential for catastrophic events to impact the species at the population level, and the species' high representation indicates a high capacity to adapt to changing environments. There are no identified threats currently affecting the species' viability across its range. Based on this information, the plains spotted skunk is not in danger of extinction throughout all of its range.

The 3Rs analysis in the SSA report provides evidence that the 30-year outlook for the species' projected condition under two future scenarios is still moderate to high. For resiliency, there is almost no change in habitat availability except for analysis unit 6 (the smallest unit) due to sea level rise. Freshwater availability drops under both scenarios, but only two analysis units are projected to be in low condition, although one of those is analysis unit 3, the largest unit. No units ranked ''extremely low'' under any future scenarios. Redundancy and representation are projected to be in the moderate to high range under both future scenarios. Based on this analysis, the species is not likely to become endangered in the foreseeable future.

We also evaluated the range of the plains spotted skunk to determine if the species is in danger of extinction now or likely to become so within the foreseeable future in any significant portion of its range. Although there is currently low distribution in two analysis units, the habitat and freshwater availability in those units is high to moderate, and there are no barriers to movement or distribution (other than the Mississippi River on the eastern border of its range). No threats have been identified that are currently

affecting any portion of the species' range. Two units are projected to be in low condition for freshwater availability in the future, and sea level rise is predicted to decrease habitat availability in another unit. However, we do not expect freshwater availability to be low enough to be limiting, and given the retention of high habitat availability, we expect these units to support the species in the foreseeable future, especially in light of the plains spotted skunk's high adaptive capacity. There are no geographic portions of the range in which the species is potentially endangered or threatened.

After assessing the best available information, we concluded that the plains spotted skunk is not in danger of extinction or likely to become in danger of extinction within the foreseeable future throughout all of its range or in any significant portion of its range. Therefore, we find that listing the plains spotted skunk as an endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the plains spotted skunk species assessment form and other supporting documents on *https://www.regulations.gov* under Docket No. FWS–R3–ES–2023–0128 (see **ADDRESSES**, above).

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the plains spotted skunk SSA report. The Service sent the SSA report to four independent peer reviewers and received two responses. Results of this structured peer review process can be found at *https://www.regulations.gov.* We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

Sturgeon Chub and Sicklefin Chub

Previous Federal Actions

On August 15, 2016, we received a petition dated August 11, 2016, from WildEarth Guardians requesting that the sturgeon chub (*Macrhybopsis gelida*) and sicklefin chub (*M. meeki*) be listed as endangered or threatened and that critical habitat be designated for these species under the Act. On December 20, 2017, we published a 90-day finding (82 FR 60362) that the petition contained substantial information indicating that listing may be warranted for these species. We were later challenged by WildEarth Guardians for our failure to complete a 12-month finding for these species. Based on this litigation, we are now required by a September 30, 2021, court order to submit our 12-month finding for these species to the **Federal Register** by September 30, 2023. This document constitutes our 12-month finding on the August 11, 2016, petition to list sturgeon chub and sicklefin chub under the Act.

Summary of Finding

The sturgeon chub is a small minnow adapted to benthic riverine habitats with a slender streamlined body that inhabits turbid mainstem sections of the Missouri River and Mississippi River and some of their tributaries. The species has a widespread distribution and currently occupies 53 percent of its historical range across 12 U.S. States.

The sicklefin chub is a small minnow that inhabits large, turbid rivers, including the mainstem Missouri and Mississippi Rivers. Like sturgeon chub, sicklefin chub have also evolved specific adaptations to turbid, riverine habitats. It is distinguished from the sturgeon chub by long, sickle-shaped pectoral fins and the absence of ridge-like projections on its scales. This species also has a widespread distribution and currently occupies 75 percent of its historical range across 13 U.S. States.

Sicklefin chub primarily utilize mainstem river habitats, whereas sturgeon chub utilize both mainstem river and tributary habitat in both the Missouri and Mississippi River basins. Populations of both species need large enough areas of connected riverine habitat to fulfill their life-history needs (*e.g.,* spawning, egg/larval drift distances, suitable water temperatures, feeding/sheltering habitat) and provide refugia from habitat-altering stochastic events (*e.g.,* extreme flows from intense, sustained drought or increased variability in precipitation). Eggs are spawned in the water column during the summer months and develop (mediated by water temperature) into larva. Larval chubs continue to drift in river currents and swim vertically in the water column with energy provided by the egg yolk sac. Length of unfragmented reaches needed for larval development varies and is dependent on water temperature, flow velocity, and habitat complexity, among other variables. If larvae drift into a reservoir or still water habitat before they become a horizontal swimmer, it is presumed they settle to the bottom and experience high mortality. Neither species occupies the large stretches of reservoir habitat produced by dams along the Missouri River system.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the sturgeon chub and sicklefin chub, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The past construction of mainstem Missouri River dams and associated reservoirs is the main threat that led to the largest reduction in habitat for both species. In the future, changes in stream discharge from climate change is the only threat identified that could potentially lead to population-level impacts. We also evaluated the effects of channel modification, water quality, tributary barriers, pollutants, impingement and entrainment, predation, and hybridization. These threats are likely impacting both species at an individual level and not occurring at a scope or scale that would impact entire populations of these species.

Both sturgeon and sicklefin chubs have high effective population sizes. Given the amount of habitat fragmentation that occurred historically, the presence of robust genetics and effective population estimates, despite the level of fragmentation, is indicative of highly resilient populations. Current occupancy and abundance information indicates that populations are in moderate to high condition. Furthermore, populations of both species currently occupy habitats with one or more stream fragments meeting or exceeding the minimum thresholds to meet life-history needs. Sturgeon and sicklefin chubs currently exhibit high resiliency in multiple populations spread throughout a large portion of their historical ranges, providing redundancy against potential catastrophic events. There are no identified threats currently affecting these species' viability across their ranges at a population level. Thus, after assessing the best available information, we conclude that the sturgeon and sicklefin chub are not in danger of extinction throughout all of their ranges.

When looking to the future, we have no indication that the construction of additional dams, the demolition of existing dams, or major differences in dam operations are likely to occur. Similarly, we have no information to indicate that any of the other potential stressors identified are going to change in the future at levels that would impact sturgeon and sicklefin chub populations. The primary stressor to these species in the future is the

potential for habitat loss and degradation from climate change. In the future, we project populations of both species to be relatively unchanged from their highly resilient current condition. These populations largely occupy mainstem river habitat, which is not likely to experience significant impacts from the effects of climate change on stream discharge. Here, we predict effective population size, occupancy and abundance, and unfragmented stream length to remain largely stable in light of potential changes to stream discharge. After assessing the best available information, we conclude that the sturgeon and sicklefin chub are not likely to become endangered within the foreseeable future throughout all of their ranges.

We also evaluated the range of the sturgeon and sicklefin chub to determine if these species are in danger of extinction now or likely to become so within the foreseeable future in any portion of their ranges. For the sturgeon chub, we examined the following threats: Missouri River mainstem dams and reservoir operations, tributary barriers and habitat fragmentation, channel modifications, water quality, climate change, pollutants, impingement/entrainment, predation, and hybridization, including cumulative effects of the stressors. Except for climate change, these threats are ubiquitous across the range of the species and acting on the sturgeon chub more or less equally rangewide. Although the effect of climate change will impact the entire range of the species as well, the future impact of climate change on stream discharge may be more pronounced in the upper reaches of secondary tributary habitat in two sturgeon chub populations. These stream reaches are much smaller and as a result less buffered from future changes in stream discharge resulting from climate change than the much larger and more stable mainstem river reaches that this species inhabits. These are the only portions we identified as potentially having a difference in status than the rangewide status, and therefore worth considering further for the purposes of this analysis.

The secondary tributary habitats in the two sturgeon chub populations mentioned above that may be subject to higher impacts from climate change constitute approximately 348 stream km (216 mi) out of 5,455 km (3,390 mi) of currently occupied stream km, or approximately 6 percent of the occupied range. These areas are smaller in wetted area and overall stream discharge than the mainstem river sections occupied by this species, and as a result may experience larger climate related swings in stream discharge which could negatively impact chubs living in those sections. These areas may be used opportunistically by the species when conditions allow, but these areas offer nothing ecologically unique and are not required by the sturgeon chub for any particular point of their life history. The mainstem river sections in these populations contain more sturgeon chub individuals and contain all of the same habitat features needed to meet the species' needs, including sufficient unfragmented stream length for the sturgeon chub to complete their life cycle and maintain resilient populations into the future. Based on the small size of this portion relative to the rest of the range, and the lack of unique habitat features, we do not consider secondary tributary habitats to be significant for the purposes of this analysis.

For the sicklefin chub, we examined the following threats: Missouri River mainstem dams and reservoir operations, tributary barriers and habitat fragmentation, channel modifications, water quality, climate change, pollutants, impingement/entrainment, predation, and hybridization, including cumulative effects. These threats are ubiquitous across the range of the species and acting on the sicklefin chub more or less equally rangewide. There are no areas with disproportionate impacts on sicklefin chub from these threats. Both sicklefin chub populations are currently high in resiliency and expected to continue to be so into the future despite the potential impact of the threats considered. Neither of the two populations considered as portions on their own meets the definition of an endangered or threatened species. We found no biologically meaningful portion of the sicklefin chub's range where threats are impacting individuals differently from how they are affecting the species elsewhere in its range, or where the biological condition of the species differs from its condition elsewhere in its range such that the status of the species in that portion differs from its status in any other portion of the species' range. We found no portion of either species' range that was both significant and in danger of extinction now or likely to become so within the foreseeable future in that portion. Therefore, we find that these species are not in danger of extinction now or likely to become so within the foreseeable future in any significant portion of their ranges.

After assessing the best available information, we concluded that sturgeon chub and sicklefin chub are not in danger of extinction or likely to become in danger of extinction within the foreseeable future throughout all of their ranges or in any significant portion of their ranges. Therefore, we find that listing the sturgeon chub and sicklefin chub as endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the sturgeon chub and sicklefin chub species assessment form and other supporting documents on *https://www.regulations.gov* under Docket No. FWS–R6–ES–2023–0131 for the sturgeon chub and Docket No. FWS–R6–ES–2023–0130 for the sicklefin chub (see **ADDRESSES**, above).

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited appropriate and independent scientific reviews of the information contained in the sturgeon chub and sicklefin chub SSA report. The Service sent the SSA report to five independent peer reviewers and received three responses. Results of this structured peer review process can be found at *https://www.regulations.gov gov.* We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for these findings.

Tennessee Cave Salamander

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, and West Virginia Highlands Conservancy to list 404 aquatic, riparian, and wetland species, including the Tennessee cave salamander (*Gyrinophilus palleucus*), as an endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding in the **Federal Register** (76 FR 59836) concluding that the petition presented substantial scientific or commercial information indicating that listing may be warranted. This document constitutes our 12-month finding on the April 20, 2010, petition to list the Tennessee cave salamander under the Act.

Summary of Finding

The Tennessee cave salamander is a large, obligate subterranean aquatic salamander that currently occurs in 89 caves in central and southern middle Tennessee, northern Alabama, and

northwestern Georgia and one spring in Tennessee. Distribution of the Tennessee cave salamander has not changed significantly since its discovery in the mid-1940s and extirpation is only known from one site. Two historical sites were rediscovered with increased survey efforts in 2018.

Little information is available on many aspects of the Tennessee cave salamander's life history, including egg deposition sites, incubation, larval habitat and diet, and breeding behavior. The Tennessee cave salamander requires sufficient water quality and availability, low sediment load, suitable substrate and cover, and adequate food sources in a cave ecosystem. The extent of suitable habitat in occupied cave systems is not mapped, but the three-dimensional nature of the habitat includes extensive areas that cannot be accessed and surveyed.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Tennessee cave salamander and evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threats affecting the Tennessee cave salamander's biological status include habitat destruction or modification (*e.g.,* groundwater pollution from a variety of sources, sedimentation, mining and quarrying, groundwater extraction, and cave disturbance), disease, and climate change as well as the cumulative effects of the various threats on the landscape. Of the known threats, habitat destruction or modification currently is the primary threat rangewide to the species' current and future viability. Impacts to the species' habitat rangewide are caused by groundwater pollution from contaminants, and sedimentation associated with urbanization, agriculture, and silviculture. Impacts to individuals and populations may occur as a result of mining and quarrying, human visitation, and disease. The best available information does not indicate that the influence of climate change alone on the species' current condition is significant, but the effects of climate change may act synergistically with other threats to exacerbate the effects of urbanization, drought, and water withdrawal, particularly in the future.

Although the Tennessee cave salamander is a cryptic species that occurs in relatively inaccessible subterranean habitat, the best available information indicates that the species is present in all 12 historically occupied AUs. The Tennessee cave salamander currently exhibits high resiliency in two AUs and moderate resiliency in eight AUs. The two AUs in high resiliency make up the stronghold of the species' range. The two low resiliency AUs occur on the periphery of the species' range, and each is characterized by relatively few sites with species occurrence. Approximately 33 percent of known sites and over 50 percent of sites in the two AUs that make up the stronghold of the range occur on protected lands that confer some degree of protection to the species from threats caused by land use. Representation and redundancy have not declined from historical levels and are sufficient to support current Tennessee cave salamander viability. Overall, no threat is acting to an extent or severity such that the Tennessee cave salamander is at risk of extinction throughout its range.

The Tennessee cave salamander is expected to remain extant in all 12 AUs in all future scenarios. Our future condition analysis projected slight declines or declines in resiliency in one to nine AUs depending on the scenario and time step. There are minor projected increases in some threats that may affect the availability of suitable habitat across the species' range. We expect the loss of forest cover to have a negative impact on the habitat conditions for the species, but there is limited information quantitatively linking changes in forest cover surface condition and cave environments in the species' range. The species' response to projected changes also has not been observed or quantified.

In the future, the impacts under scenario 1 (status quo minimum) projected very minor changes to resiliency with only a slight decrease in one unit in 2040 and three units in 2060. Under scenario 2 (status quo maximum), with incorporation of a greater magnitude of forest loss, nine AUs are projected to exhibit no change in resiliency while only two units are projected to decrease by 2060 (only one unit by 2040). Under scenario 3 (increased impacts scenario), the magnitude of impact is greatest, with 5 of 12 AUs projected to exhibit decreased resiliency in both 2040 and 2060. Nevertheless, even in the greatest impact scenario, 6 of 12 AUs are projected to exhibit moderate or high resiliency. The resiliency of the two AUs that make up the stronghold of the range is not projected to change under any scenario and time step. No analysis unit-level extirpations are projected. Although representation and redundancy are projected to decline as a function of resiliency decreases under some scenarios and time steps, the species maintains sufficient adaptive capacity and ability to withstand catastrophic events to support future viability.

Although threats are similar throughout the range of the species, some local sites may be more affected by specific threats. For example, the species' response to threats is more pronounced in the Lower Tennessee and Lower Elk AUs. These AUs currently exhibit low resiliency driven primarily by low abundance, a lower degree of forest, and a higher degree of agricultural land use surrounding the low number of known sites in each AU (three sites in the Lower Tennessee and one site in the Lower Elk). Given the species' condition within the Lower Tennessee and Lower Elk AUs, we have identified the two units on the periphery of the species' range as areas that may be in danger of extinction now or within the foreseeable future due to the low current resiliency. Both AUs are projected to decline in resiliency in the future.

We then proceeded to the question of significance, asking whether the Lower Tennessee or Lower Elk AU meets the current understanding of significance. Although the Lower Tennessee and Lower Elk AUs contribute to the overall species-level representation and redundancy, the two AUs do not contain any high quality or high value habitat or any habitat or resources unique to the area and necessary to the Tennessee cave salamander's life history. In addition, the AUs encompass a low number of known sites with species' occurrences and do not make up a large geographic area of the species' range or contain a high proportion of its habitat or populations. Accordingly, we do not find the Lower Tennessee or Lower Elk AU, singly or collectively, to be a significant portion of the range.

After assessing the best available information, we conclude that the Tennessee cave salamander is not in danger of extinction or likely to become in danger of extinction within the foreseeable future throughout all of its range or in any significant portion of its range. Therefore, we find that listing the Tennessee cave salamander as an endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the Tennessee cave salamander species assessment form and other supporting documents on *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0133 (see **ADDRESSES**, above).

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memorandum on the Peer Review Process, we solicited independent scientific reviews of the information contained in the Tennessee cave salamander SSA report. The Service sent the SSA report to five independent peer reviewers and received four responses. Results of this structured peer review process can be found at *https://www.regulations.gov.* We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

Yazoo Crayfish

Previous Federal Actions

The Yazoo crayfish (*Faxonius hartfieldi,* formerly *Orconectes hartfieldi*) was included in a listing petition from the Center for Biological Diversity et al. (CBD 2010, pp. 792–793) in April 2010. The petition requested that the Service list 404 aquatic, riparian, and wetland species as endangered or threatened under the Act. In 2011, the Service found that this petition presented substantial scientific or commercial information indicating that listing may be warranted for the Yazoo crayfish (76 FR 59836; September 27, 2011). This document constitutes our 12-month finding on the April 2010 petition to list the Yazoo crayfish under the Act.

Summary of Finding

The Yazoo crayfish is a stream-dwelling species distributed among scattered locations in the Yazoo and Big Black River drainages in Mississippi. The species is small growing to 50 to 70 mm (2 to 3 in) in total length. Historically, the Yazoo crayfish was known from the Yazoo to the Big Black River drainage in Mississippi. The Yazoo crayfish currently occupies a wide range of stream sizes from small headwater streams such as the first order Little Mouse Creek (watershed area: 11 square kilometers (km^2) (4.25 square miles (m^2))) to large streams such as Fourteen mile Creek (watershed area: 644 km^2 (249 m^2)). Occupied streams have moderate gradients and are located in the Lower and Upper Gulf Coastal Plain ecoregions.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Yazoo crayfish and evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threat identified for the Yazoo crayfish is habitat fragmentation resulting from a number of factors such as stream channelization, sedimentation, road crossings, impoundments, and development. Other primary stressors affecting the species' biological status include regulated river flows, pollution, and climate change. Sedimentation in streams is often a result of within channel erosion of banks, head cutting, and stream incisement, which are usually the result of past land cover and land use practices (*e.g.,* channelization). Increased sedimentation from a variety of sources (*e.g.,* timber harvest that does not use best management practices, row crop agriculture, and urbanization) is detrimental to stream habitats for a variety of reasons.

Currently, the Yazoo crayfish occupies 12 analytical units across 20 hydrologic unit code (HUC)–12 watersheds in four HUC 8 watersheds and three level IV ecoregions. Five analytical units are considered to be high resiliency, three to be moderate resiliency, and four to be low resiliency. The highest resiliency analytical units are those with a higher number of occupied watersheds, lower channelization, lower fragmentation, and higher forest cover. In general, current land use practices do not appear to have an appreciable negative impact on the resiliency, redundancy, and representation. Moreover, habitat conditions for the species have been improving over the past 10–20 years (reduction in agriculture, increase in forested habitat within occupied watersheds, developed landcover has decreased). Lingering effects of prior land uses and management practices continue to impact the species, but there is evidence that streams are recovering from these land uses and habitat may be improving. Although threats are present on the landscape, the Yazoo crayfish has multiple moderate and high resilient populations distributed across the landscape, providing the species with adequate redundancy and representation. Therefore, the threats appear to have low imminence and magnitude such that they currently are not significantly affecting the species' viability. The SSA report describes some of the uncertainties in the species' occurrence, populations, and response to threats; however, considering the available data, the risk of extinction is low due to the distribution of multiple high and moderate resiliency units across the species' range. Thus, after assessing the best available information, we conclude that the Yazoo crayfish is not in danger of extinction throughout all of its range.

Land use patterns are projected to continue over the next 30 years. Human population density is low in most of the range, so impacts related to urbanization and development are generally low and show minimal change under future scenarios B1 and A2 in 2040. Future scenarios in 2060 demonstrate an increase of urbanization in some analytical units, resulting in a decrease in resiliency of four analytical units under scenario B1 and five analytical units under scenario A2; however, seven analytical units remain in moderate or high condition in scenario B1, while eight units remain in moderate or high condition in scenario A2. Although change is predicted to occur due to threats on the landscape, our analysis indicates that the magnitude of change under both scenarios and timesteps does not indicate a significant risk to future viability of the Yazoo crayfish. The species is expected to experience slight reductions in resiliency by 2060, but moderate and high resiliency populations are expected to remain across the species' range. In addition, recent increases in sampling efforts have resulted in significant expansion of the species' current range, and it is predicted that future increases in sampling efforts will produce similar results. After assessing the best available information, we conclude that the Yazoo crayfish is not likely to become endangered within the foreseeable future throughout all of its range.

We evaluated the range of the Yazoo crayfish to determine if it is in danger of extinction now or likely to become so within the foreseeable future in any portion of its range. The species is a range-limited, stream-dwelling species that occurs within a very small area distributed among scattered locations in the Yazoo and Big Black River drainages of Mississippi. The range of a species theoretically can be divided into portions in an infinite number of ways. We focused our analysis on portions of the species' range that may meet the Act's definition of an ''endangered species'' or a ''threatened species.'' We considered whether the threats or their effects on the Yazoo crayfish are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now or likely to become so within the foreseeable future in that portion. Based on the best available science, these factors are not concentrated within a specific portion

of the species' range but spread throughout its range.

Currently, there are moderate and high resiliency populations occurring in each ecoregion. In Northern Hilly Gulf Coastal Plain, there are two moderate resiliency populations and one low resiliency population. In Southern Hilly Gulf Coastal Plain, there are two low resiliency populations and one high resiliency population. In Loess Plain, there are two moderate resiliency populations and four high resiliency populations. We project in the future at least one moderate and/or high resiliency population occurring in each ecoregion: In Northern Hilly Gulf Coastal Plain, there are projected to be two low resiliency populations and one moderate resiliency population; in Southern Hilly Gulf Coastal Plain, there are projected to be two very low resiliency populations and one moderate resiliency population; and in Loess Plain, there are projected to be three moderate resiliency populations and three high resiliency populations. The current and future condition analyses of the Yazoo crayfish indicate sufficient resiliency, representation, and redundancy in each ecoregion. As a result, there are no portions of the species' range where the species has a different biological status from its rangewide biological status. Therefore, we conclude that there are no portions of the species' range that warrant further consideration, and the species is not in danger of extinction or likely to become so within the foreseeable future in any significant portion of its range.

After assessing the best available information, we conclude that the Yazoo crayfish is not in danger of extinction or likely to become in danger of extinction within the foreseeable future throughout all of its range or in any significant portion of its range. Therefore, we find that listing the Yazoo crayfish as an ''endangered species'' or ''threatened species'' under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the Yazoo crayfish species assessment form and other supporting documents on *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0134 (see **ADDRESSES**, above).

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the Yazoo crayfish SSA report. The Service sent the SSA report to five independent peer reviewers and received two responses. Results of this structured peer review process can be found at *https://www.regulations.gov.* We incorporated the results of these reviews, as appropriate, in the SSA report, which is the foundation for this finding.

Southern Sea Otter

Previous Federal Actions

On January 14, 1977, we published a final rule (*42 FR 2965*) to list the southern sea otter as a threatened species. On March 10, 2021, we received a November 2020 petition from the Pacific Legal Foundation, counsel for California Sea Urchin Commission and Commercial Fishermen of Santa Barbara, requesting that the southern sea otter (*Enhydra lutris nereis*) be removed from the Federal List of Endangered and Threatened Wildlife (*i.e.,* ''delisted'') because the species does not meet the Act's definition of an endangered or a threatened species. On August 23, 2022, we published a 90-day finding (87 FR 51635) that the petition presented substantial scientific or commercial information indicating that delisting the southern sea otter may be warranted. This document constitutes our 12-month finding on the March 10, 2021, petition to delist southern sea otter.

Summary of Finding

The southern sea otter historically ranged from Oregon in the United States (which is thought to have been a transition zone between the northern and southern subspecies), to the species' southern range terminus near Punta Abreojos, Baja California, Mexico. The maritime fur trade of the 18th and 19th centuries caused the near-extinction of sea otters throughout their North Pacific range. All present-day southern sea otters descended from a small remnant population that survived the fur trade near Bixby Creek in Monterey County, California. Currently, the subspecies occurs only in portions of California: along roughly 500 km (310 mi) of the mainland coastline from San Mateo County to Santa Barbara County, and in the waters surrounding San Nicolas Island, Ventura County, although occasionally individuals are documented in other areas.

Southern sea otters occupy a variety of coastal marine habitats, including rocky exposed coastline, sandy embayments, and estuaries. Sea otter habitat in California is typically defined by the 40 m (131 ft) or 60 m (197 ft) depth contour. Depending on local bathymetry, most sea otters in California reside within 2 km (1.2 mi) of shore. At the individual level, sea otters need benthic invertebrate prey, coastal marine waters less than 40 m (131 ft) in depth, and sheltered resting habitat consisting of canopy-forming kelp, shallow protected waters (*e.g.,* estuaries), or haul out areas. At the population level, sea otters need sufficient abundance and adequate rates of survival, recruitment, and dispersal to rebound from disturbance and persist at the population or metapopulation scale. At the species level, sea otters need adequate redundancy to spread the risk of large-scale, high-impact (*i.e.,* catastrophic) events among multiple populations or areas; they also need adequate genetic and environmental diversity to be able to adapt to changing environmental conditions.

For additional information on the physical characteristics, genetics, taxonomy, habitat, life history, and historical and current distribution, see chapter 3 of the SSA report (Service 2023, pp. 12–26. For additional information on population and species needs, see chapter 3 of the SSA report (Service 2023, pp. 22–23).

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the southern sea otter, and we evaluated all relevant factors under the five listing factors including any regulatory mechanisms and conservation measures addressing these threats. We examined the following threats: curtailment of its range; harmful algal or cyanobacterial bloom intoxication; shark bite mortality; end-lactation syndrome; cardiac disease; protozoal infection; acanthocephalan peritonitis; infections (other); natural causes (other); human causes (shootings, boat strikes, and entanglements); human causes (oil spills); loss of genetic diversity; and climate change, including synergistic and cumulative effects. Of these threats, the southern sea otter is currently most imperiled by high shark bite mortality, curtailment of its range, and changes related to climate.

Due in part to listing under the Act in 1977 and ongoing conservation efforts, the range-wide population index for southern sea otters has increased to 2,962 as of 2019 (the most recent year a full census was completed); the mainland range has increased by approximately 210 km (130 mi) to encompass roughly 500 km (310 mi) of linear coastline; and a translocated subpopulation has taken hold at San Nicolas Island. Although current numbers and range remain restricted, the southern sea otter is likely to sustain populations in the wild in the near term. The current abundance of 2,962

otters is far below estimated carrying capacity of California, but above the roughly 50 animals that remained in 1914. Seven of 29+ subpopulations are currently extant. However, the results of population projections based on three plausible future scenarios indicated that meaningful improvements in resiliency, redundancy, and representation are unlikely to occur within the foreseeable future.

As noted above, the southern sea otter remains most imperiled by high shark bite mortality, the curtailment of its range, and climate change and associated effects. Based on our projections of future conditions for the species, and the existing and increased threats in the future on the species from shark bite mortality, range curtailment, and impacts of climate change, the species will experience continued and increasing impacts on its abundance and connectivity between populations that will most likely cause the species to be increasingly less able to support itself into the future. Additionally, existing regulatory mechanisms and conservation measures do not appear to be sufficient to protect the southern sea otter from emerging or intensifying threats.

After assessing the best available information, we concluded that southern sea otter is likely to become in danger of extinction within the foreseeable future throughout all of its range. Therefore, we find that delisting the southern sea otter under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the southern sea otter species assessment form and other supporting documents on *https://www.regulations.gov* under Docket No. FWS–R8–ES–2023–0132 (see **ADDRESSES**, above).

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the southern sea otter SSA report. The Service sent the SSA report to three independent peer reviewers and three partner reviewers. We received responses back from one peer reviewer and one partner reviewer. Results of this structured peer review process can be found at *https://www.regulations.gov.* We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

New Information

We request that you submit any new information concerning the taxonomy, biology, ecology, status of, or stressors to the Cascades frog, plains spotted skunk, sicklefin chub, southern sea otter, sturgeon chub, Tennessee cave salamander, or Yazoo crayfish to the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**, whenever it becomes available. New information will help us monitor these species and make appropriate decisions about their conservation and status. We encourage local agencies and stakeholders to continue cooperative monitoring and conservation efforts.

References Cited

A list of the references cited in each petition finding is available in the relevant species assessment form, which is available on the internet at *https://www.regulations.gov* in the appropriate docket (see **ADDRESSES**, above) and upon request from the appropriate person (see **FOR FURTHER INFORMATION CONTACT**, above).

Authors

The primary authors of this document are the staff members of the Species Assessment Team, Ecological Services Program.

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–20296 Filed 9–19–23; 8:45 am]

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Notices

Federal Register
Vol. 88, No. 181
Wednesday, September 20, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by October 20, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Foreign Agricultural Service

Title: International Agricultural Education Fellowship Program.

OMB Control Number: 0551–New.

Summary of Collection: The International Agricultural Education Fellowship Program (IAEFP) is authorized by the Agriculture Improvement Act of 2018, Public Law 115–334, sec. 3307, 7 U.S.C. 3295 and the National Agricultural Research, Extension, and Teaching Policy Act of 1977, Public Law 95–113, as amended, 7 U.S.C. 3291 and 3319a.

Established in 2018, IAEFP has provided fellowships to eligible U.S. citizens to assist developing countries in establishing school-based agricultural education and youth extension programs. The primary purpose for this information collection is to implement the International Agricultural Education Fellowship Program (IAEFP). The intention of the IAEFP is to develop globally minded United States agriculturalists with experience living abroad, focus on meeting the food and fiber needs of the domestic population of eligible countries, and strengthen and enhance trade linkages between eligible countries and the United States agricultural industry.

Need and Use of the Information: Under the International Agricultural Education Fellowship Program, the information collected in response to solicitations for grant applications will be used by FAS to evaluate applications in order to issue grants to applicants most suited for fulfilling the mission of the program.

Description of Respondents: Domestic private voluntary organizations, cooperatives, domestic nonprofit agricultural organizations or cooperatives, domestic nongovernmental organizations or other domestic private entities.

Number of Respondents: 16.

Frequency of Responses: Reporting; Annually; Semi-annually.

Total Burden Hours: 3,144.

Foreign Agricultural Service

Title: Scientific Cooperation Research Program.

OMB Control Number: 0551–New.

Summary of Collection: The Scientific Cooperation Research Program (SCRP) is authorized by the National Agricultural Research, Extension, and Teaching Policy Act of 1977, Public Law 95–113, as amended, 7 U.S.C. 3291 and 3319a.

SCRP supports fellows and scientific corporations in joint research, extension, and education projects between U.S. researchers and researchers from selected emerging market economies. The projects address issues including agricultural trade and market access, climate-smart agriculture, animal and plant health, biotechnology, food safety and security, and sustainable natural resource management. Since 1980, the program has supported hundreds of projects, enhanced technical skills of agricultural professionals, and helped beneficiary countries to be more competitive consumers of U.S. agricultural products. The primary goals of SCRP are to support applied research, extension and education that create practical solutions to challenges faced by small farmers and build regional and global trade capacities in partner countries. This develops in-country expertise to build regional and international trade capacities in accordance with international rules and regulations.

Need and Use of the Information: The information collected under the Scientific Cooperation Research Program, will be used by FAS to evaluate applications to determine whether participants meet the eligibility requirements to be a recipient of grant funds.

Description of Respondents: State cooperative institutions or other colleges and universities.

Number of Respondents: 40.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 4,544.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–20330 Filed 9–19–23; 8:45 am]

BILLING CODE 3410–10–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Ohio Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Ohio Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom. The purpose of the meeting is to discuss major themes that have emerged from panel briefings I through IV on the source of income discrimination in Ohio housing.

DATES: Tuesday, October 10, 2023, from 3:00 p.m.–4:00 p.m. Eastern Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1603744255.

Join by Phone (Audio Only): 1–833–435–1820 USA Toll Free; Meeting ID: 160 374 4255#.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 1–202–618–4158.

SUPPLEMENTARY INFORMATION: This Committee meeting is available to the public through the registration link above. Any interested member of the public may attend this meeting. An open comment period will be provided to allow members of the public to make oral statements as time allows. Pursuant to the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning is available by selecting ''CC'' in the meeting platform. To request additional accommodations, please email *svillanueva@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the scheduled meeting. Written comments may be emailed to Sarah Villanueva at *svillanueva@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–202–618–4158.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Ohio Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *svillanueva@usccr.gov.*

Agenda

I. Welcome and Roll Call
II. Approval of Minutes
III. Announcements and Updates
IV. Committee Discussion
V. Next Steps
VI. Public Comment
VII. Adjournment

Dated: September 15, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–20376 Filed 9–19–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Nevada Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Nevada Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a virtual business meeting via ZoomGov at 1 p.m. Pacific on Thursday, September 28, 2023. The purpose of the meeting is to review the Committee's report on teacher shortages in Nevada.

DATES: Thursday, September 28, 2023, from 1 p.m.–2 p.m. PT.

ADDRESSES:

Zoom Link to Join (Audio/Visual): https://www.zoomgov.com/meeting/register/vJIsce6hqz8pGRZ0jNnsp1ORbY6yGmt00ag.

Telephone (Audio Only): Dial (833) 435–1820 USA Toll Free; Meeting ID: 161 679 5433#.

FOR FURTHER INFORMATION CONTACT: Ana Fortes, Designated Federal Officer, at *afortes@usccr.gov* or (202) 519–2938.

SUPPLEMENTARY INFORMATION: Committee meetings are available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Angelica Trevino, Support Services Specialist, at *atrevino@usccr.gov* at least ten (10) days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received within 30 days following the meeting. Written comments may be emailed to Ana Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlJAAQ.*

Please click on the ''Committee Meetings'' tab. Records generated from these meetings may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meetings. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at (312) 353–8311.

Agenda

I. Welcome and Roll Call
II. Approval of Minutes for August 8th Committee Meeting
III. Discussion of Draft Report
IV. Public Comment
V. Adjournment

Dated: September 14, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–20288 Filed 9–19–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the U.S. Virgin Islands Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the U.S. Virgin Islands Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom. The purpose of the meeting is to discuss, plan, and vote as needed on matters related to the Committee's inaugural civil rights project.

DATES: Thursday, October 5, 2023, from 11:00 a.m.–12:30 p.m. Atlantic Time.

ADDRESSES: The meeting will be held via Zoom.

Meeting Link (Audio/Visual): https://www.zoomgov.com/j/1618230846.

Join by Phone (Audio Only): 1–833–435–1820 USA Toll Free; Meeting ID: 161 823 0846#.

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or 1–202–656–8937.

SUPPLEMENTARY INFORMATION: This Committee meeting is available to the public through the meeting link above. Any interested member of the public may attend this meeting. An open comment period will be provided to allow members of the public to make oral statements as time allows. Pursuant to the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning is available by selecting ''CC'' in the meeting platform. To request additional accommodations, please email *svillanueva@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the scheduled meeting. Written comments may be emailed to Sarah Villanueva at *svillanueva@usccr.gov*. Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–202–656–8937.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, U.S. Virgin Islands Advisory Committee Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *svillanueva@usccr.gov*.

Agenda

I. Welcome and Roll Call
II. Annoucements and Updates
III. Committee Discussion
IV. Next Steps
V. Public Comment
VI. Adjournment

Dated: September 15, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–20374 Filed 9–19–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the New York Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the New York Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom. The purpose of the meeting is to discuss draft findings in the Committee's draft report on the New York child welfare system and its impact on Black children and families.

DATES: Friday, October 20, 2023, from 1:00 p.m.–3:00 p.m. Eastern Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://bit.ly/3PbvgdX.

Join by Phone (Audio Only): 1–833–435–1820 USA Toll Free; Webinar ID: 161 785 2445#.

FOR FURTHER INFORMATION CONTACT: Mallory Trachtenberg, DFO, at *mtrachtenberg@usccr.gov* or 1–202–809–9618.

SUPPLEMENTARY INFORMATION: This Committee meeting is available to the public through the registration link above. Any interested member of the public may attend this meeting. An open comment period will be provided to allow members of the public to make oral statements as time allows. Pursuant to the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning is available by selecting ''CC'' in the meeting platform. To request additional accommodations, please email *svillanueva@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the scheduled meeting. Written comments may be emailed to Mallory Trachtenberg at *mtrachtenberg@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–202–809–9618.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, New York Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *svillanueva@usccr.gov.*

Agenda

I. Welcome and Roll Call
II. Approval of Minutes
III. Discussion: Draft Findings
IV. Public Comment
V. Next Steps
VI. Adjournment

Dated: September 15, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–20365 Filed 9–19–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Adoption of Department of Energy Categorical Exclusions Under the National Environmental Policy Act

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) has identified categorical exclusions (CEs) established by the Department of Energy (DOE) that cover categories of actions that NIST proposes to take. This notice identifies the DOE CEs and NIST's categories of proposed actions for which it intends to use DOE's CEs and describes the consultation between the agencies.

DATES: The CEs identified below are available for NIST to use for its proposed actions effective September 20, 2023.

FOR FURTHER INFORMATION CONTACT: Jennifer Nist, NIST, telephone number 202–302–9541, email *jennifer.nist@nist.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

NEPA and CEs

Congress enacted the National Environmental Policy Act, 42 U.S.C. 4321–4347, (NEPA) in order to encourage productive and enjoyable harmony between humans and the environment, recognizing the profound impact of human activity and the critical importance of restoring and maintaining environmental quality to the overall welfare of humankind. 42 U.S.C. 4321, 4331. NEPA seeks to ensure that agencies consider the environmental effects of their proposed major actions in their decision-making processes and inform and involve the public in that process. NEPA created the Council on Environmental Quality (CEQ), which promulgated NEPA implementing regulations, 40 CFR parts 1500 through 1508 (CEQ regulations).

To comply with NEPA, agencies determine the appropriate level of review of any major federal action—an environmental impact statement (EIS), environmental assessment (EA), or categorical exclusion (CE). 40 CFR 1501.3. If a proposed action is likely to have significant environmental effects, the agency must prepare an EIS and document its decision in a record of decision. 40 CFR part 1502, 1505.2. If the proposed action is not likely to have significant environmental effects or the effects are unknown, the agency may instead prepare an environmental assessment (EA), which involves a more concise analysis and process than an EIS. 40 CFR 1501.5. Following the EA, the agency may conclude that the action will have no significant effects and document that conclusion in a finding of no significant impact. 40 CFR 1501.6. If the analysis concludes that the action is likely to have significant effects, however, then an EIS is required.

Under NEPA and the CEQ regulations, a Federal agency also can establish CEs—categories of actions that the agency has determined normally do not significantly affect the quality of the human environment—in their agency NEPA procedures. 42 U.S.C. 4336e(1); 40 CFR 1501.4, 1507.3(e)(2)(ii), 1508.1(d). If an agency determines that a CE covers a proposed action, it then evaluates the proposed action for extraordinary circumstances in which a normally excluded action may have a significant effect. 40 CFR 1501.4(b). If no extraordinary circumstances are present, the agency may apply the CE to the proposed action without preparing an EA or EIS. 42 U.S.C. 4336(a)(2), 40 CFR 1501.4. If extraordinary circumstances are present, the agency nevertheless may still categorically exclude the proposed action if it determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.

Section 109 of NEPA, enacted as part of the Fiscal Responsibility Act of 2023, allows a Federal agency to ''adopt'' another Federal agency's CEs for proposed actions. 42 U.S.C. 4336c. To use another agency's CEs under section 109, the borrowing agency must identify the relevant CEs listed in another agency's (''establishing agency'') NEPA procedures that covers the borrowing agency's category of proposed actions or related actions; consult with the establishing agency to ensure that the proposed adoption of the CE for a category of actions is appropriate; identify to the public the CE that the borrowing agency plans to use for its proposed actions; and document adoption of the CE. 42 U.S.C. 4336c. NIST has prepared this notice to meet these statutory requirements.

NIST's Programs

Founded in 1901, NIST's mission is to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our quality of life. Historically, NIST has carried out this mission through, for example, operation of the NIST Laboratories, conducting world-class research, often in close collaboration with industry, that advances the nation's technology infrastructure and helps U.S. companies continually improve products and services.

In August 2022, the Congress passed the CHIPS Act of 2022, which amended Title XCIX of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, 15 U.S.C. 4651 *et seq.,* also known as the Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Act. The law provides the Department of Commerce with $50 billion for a suite of programs to strengthen and revitalize the U.S. position in semiconductor research, development, and manufacturing. CHIPS for America encompasses two offices within NIST responsible for implementing the law: the CHIPS Research and Development Office is investing $11 billion into developing a robust domestic R&D ecosystem, while the CHIPS Program Office is dedicating $39 billion to provide incentives for investment in facilities and equipment in the United States. NIST is uniquely positioned to successfully administer the CHIPS for America program because of the bureau's strong relationships with U.S. industries, its deep understanding of the semiconductor ecosystem, and its reputation as fair and trusted.

II. DOE Categorical Exclusions

NIST has identified the following CEs listed in appendices A and B to subpart D of DOE's NEPA regulations, 10 CFR part 1021. Each of the DOE CEs includes conditions on the scope or application of the CE within the text of the numbered paragraphs listed below and within the integral elements in DOE's regulations (10 CFR part 1021, subpart D, appendix B (1)–(5)). Under each CE, NIST has described categories of proposed actions for which NIST may use the CE. The list of categories comprises the categories of actions for which NIST contemplates using the CE at this time; NIST may expand use of the CEs identified below to other activities where appropriate.

1. A9: Information Gathering, Analysis, and Dissemination

Potential application to NIST activities:

- Prize challenges under 15 U.S.C. 2719;
- NIST Technical Series Publications;
- Financial assistance that funds preparation of reports or analysis; and
- Other activities conducted under 15 U.S.C. 272, including hosting and support for scientific and technical workshops; dissemination of data; and development of computer standards and privacy measures.

2. A11: Technical Advice and Assistance to Organizations

Potential application to NIST activities:

- Activities conducted under 15 U.S.C. 272(b) & (c), including technical advice and planning assistance to international, national, state, and local organizations.

3. B1.5: Existing Steam Plants and Cooling Water Systems

Potential application to NIST activities:

- Financial assistance for extramural construction, including at semiconductor facilities; and
- Upgrades to steam plants and cooling water systems at NIST facilities.

4. B1.23: Demolition and Disposal of Buildings

Potential application to NIST activities:

- Financial assistance for extramural construction, including at semiconductor facilities; and
- Demolition and disposal of buildings at NIST facilities.

5. B1.24: Property Transfers

Potential application to NIST activities:

- Financial assistance for internal expansion, including at semiconductor facilities, where the change in use of space does not materially alter the footprint of a building or facility;
- Lease of temporary space;
- Changes to use of property at NIST facilities; and
- Disposition of personal property.

6. B1.31: Installation or Relocation of Machinery and Equipment

Potential application to NIST activities:

- Financial assistance for facility modernization and installation of equipment, including semiconductor facilities, that would not require increased emission limits or create new types of pollution discharges or releases; and
- Installation or relocation of machinery and equipment at NIST facilities.

7. B2.5: Facility Safety and Environmental Improvements

Potential application to NIST activities:

- Financial assistance for facility safety and environmental improvements, including at semiconductor facilities;
- Safety and environmental improvements at NIST facilities.

8. B3.1: Site Characterization and Environmental Monitoring

Potential application to NIST activities:

- Site characterization and environmental monitoring at NIST facilities or performed by NIST;
- Financial assistance for site characterization and environmental monitoring.

9. B3.6: Small-Scale Research and Development, Laboratory Operations, and Pilot Projects

Potential application to NIST activities:

- Small-scale research and development, laboratory operations, and pilot projects at NIST facilities; and
- Financial assistance for small-scale research and development, laboratory operations, and pilot projects, including semiconductor facilities.

10. B3.15: Small-Scale Indoor Research and Development Projects Using Nanoscale Materials

Potential application to NIST activities:

- Small-scale indoor research and development projects using nanoscale materials at NIST facilities; and
- Financial assistance for small-scale indoor research and development projects using nanoscale materials, including at semiconductor facilities.

11. B5.1: Actions To Conserve Energy or Water

Potential application to NIST activities:

- Actions to conserve energy or water at NIST facilities; and
- Financial assistance for actions to conserve energy or water, including at semiconductor facilities.

NIST will develop procedures regarding documentation of its use of these CEs.

III. Consideration of Extraordinary Circumstances

If an agency determines that a CE covers a proposed action, the agency must evaluate the proposed action for extraordinary circumstances in which a normally excluded action may have a significant effect. 40 CFR 1501.4(b). NIST does not currently have its own NEPA implementing procedures to guide its application of extraordinary circumstances. Until NIST establishes NEPA implementing procedures, for purposes of considering extraordinary circumstances in connection with the DOE CEs discussed in this notice, NIST will consider whether the proposed action has the potential to result in significant effects, including by considering the factors listed in DOE's definition of extraordinary circumstances, which include scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; and unresolved conflicts concerning alternative uses of available resources. 10 CFR 1021.410(b)(2). NIST will then assess whether an extraordinary circumstance is present, and if so, whether there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects, consistent with 40 CFR 1501.4(b). If NIST cannot apply a CE to a particular proposed action due to extraordinary circumstances, NIST will prepare an EA or EIS, consistent with 40 CFR 1501.4(b)(2), or determine if the action is covered under an existing NEPA document.

IV. Consultation With DOE and Determination of Appropriateness

NIST worked with DOE to identify DOE CEs that could apply to NIST proposed actions and began consultation in June 2023. During this consultation, the agencies discussed whether the categories of NIST proposed actions would be appropriately covered by the DOE CEs; the extraordinary circumstances that NIST should consider before applying these CEs to NIST's proposed actions; the requirement to evaluate, before use of any DOE appendix B CE, the conditions listed as integral elements in DOE's regulations (10 CFR 1021, subpart D, appendix B (1)–(5)); and what documentation NIST should complete when applying these CEs. The agencies also considered DOE's past use of the CEs, including how often DOE has modified a proposed action or prepared an EA or EIS for a proposed action otherwise covered by the CEs.

At the conclusion of that process, the agencies determined that NIST's proposed use of the CEs as described in this notice would be appropriate because the categories of actions for

which NIST plans to use the CEs are covered by the DOE CEs.

V. Conclusion

This notice documents adoption of the DOE CEs listed above in accordance with 42 U.S.C. 4336c(4), and they are available for use by NIST, effective immediately.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–20303 Filed 9–19–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; National Environmental Policy Act (NEPA) Disclosure Statement

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before November 20, 2023.

ADDRESSES: Interested persons are invited to submit written comments by mail to Maureen O'Reilly, Management Analyst, at *PRAcomments@doc.gov.* Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Cierra Bean, Business Operations Analyst, CHIPS Program Office, *askchips@chips.gov* or (202) 815–2677.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Environmental Policy Act (NEPA) requires Federal agencies to interpret and administer Federal policies, regulations, and laws in accordance with NEPA's policies and to consider environmental values in their decision making, including through preparation of environmental review documents such as environmental impact statements and environmental assessments. On June 3, 2023, President Biden signed the Fiscal Responsibility Act of 2023 (FRA) into law, which included amendments to NEPA. Specifically, the FRA added section 107, which addresses, in part, timely preparation of environmental review documents. Section 107(f) of NEPA requires agencies to ''prescribe procedures to allow a project sponsor to prepare an environmental assessment or an environmental impact statement under the supervision of the agency.'' 42 U.S.C. 4336a(f).

Additionally, the NEPA implementing regulations state, ''Contractors or applicants preparing environmental assessments or environmental impact statements shall submit a disclosure statement to the lead agency that specifies any financial or other interest in the outcome of the action. Such statement need not include privileged or confidential trade secrets or other confidential business information.'' 40 CFR 1506.5. As part of its procedures, NIST has therefore developed a NEPA disclosure statement for project sponsors to use in conjunction with preparation of environmental review documents under the agency's supervision. This statement may be used by in a variety of contexts at NIST. NIST may request recipients of funds for extramural construction to prepare environmental review documents and to submit the NEPA disclosure statement.

This statement may also be used by the CHIPS Incentives Program. The CHIPS Incentives Program is authorized by Title XCIX—Creating Helpful Incentives to Produce Semiconductors for America of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283, referred to as the CHIPS Act or Act), as amended by the CHIPS Act of 2022 (Division A of Pub. L. 117–167). The CHIPS Incentives Program is administered by the CHIPS Program Office (CPO) within the National Institute of Standards and Technology (NIST) of the United States Department of Commerce (Department). CPO may request recipients of CHIPS incentives prepare environmental review documents and submit the NEPA disclosure statement.

II. Method of Collection

Information will be collected electronically.

III. Data

OMB Control Number: 0693–XXXX.

Form Number(s): None.

Type of Review: Regular submission—new information collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 20.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 5 hours.

Estimated Total Annual Cost to Public: 0.

Respondent's Obligation: Mandatory to obtain benefits.

Legal Authority: 42 U.S.C. 4336a(f), 40 CFR 1506.5 and 1507.3.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–20388 Filed 9–19–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of New Hampshire Coastal Management Program; Notice of Public Meeting; Request for Comments

AGENCY: Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA), Office for Coastal Management, will hold a public meeting to solicit input on the performance evaluation of the New Hampshire Coastal Management Program. NOAA also invites the public to submit written comments.

DATES: A hybrid (*i.e.,* virtual and in-person) public meeting will be held on Monday, November 6, 2023, from 6 to 7 p.m. Eastern Standard Time (EST). NOAA may close the meeting 10 minutes after the conclusion of public testimony and after responding to any clarifying questions from participants. NOAA will consider all written comments received by Friday, November 17, 2023.

ADDRESSES: Comments may be submitted by one of the following methods:

Public Meeting: Provide oral comments during the virtual and in-person public meeting on Monday, November 6, 2023, from 6 to 7 p.m. EST. Both in-person and virtual participants should register if they wish to provide public comment. Virtual participants must register in order to receive an emailed link to the public meeting. The lineup of speakers will be based on the date and time of registration. As time allows, public comment will then be opened to all participants.

- *For virtual participation,* register as an attendee or speaker at *https://forms.gle/xfVFRSALXdMPSgfd6.* We request that participants register by Monday, November 6, 2023, at 4 p.m. EST. Please indicate on the registration form whether you intend to provide oral comments during the virtual public meeting by clicking ''Yes'' or ''No'' in the box that reads, ''Do you plan to make oral comments during this meeting?'' Upon registration, NOAA will send a confirmation email. One hour prior to the start of the virtual public meeting on November 6, 2023, NOAA will send an email to all registrants with a link to the public meeting and information about participating. While advance registration is requested, registration will remain open until the meeting closes and any participant may provide oral comment after the registered speakers conclude. Meeting registrants may remain anonymous by typing ''Anonymous'' in the ''First Name'' and ''Last Name'' fields on the registration form.
- *For in-person participation,* you may attend the public meeting on-site on Monday, November 6, 2023, 6 p.m. to 7 p.m. EST at 222 International Drive #175, Portsmouth, NH 03801. Advance registration to attend on-site is not required. Sign-in registration for providing public comment in person will be available at the meeting venue.

To Submit Comments Via Email: Contact Carrie Hall, Evaluator, NOAA Office for Coastal Management, at *czma.evaluations@noaa.gov.* Include ''Comments on Performance Evaluation of the New Hampshire Coastal Management Program'' in the subject line of the message.

NOAA will accept anonymous comments; however, the written comments NOAA receives are considered part of the public record, and the entirety of the comment, including the name of the commenter, email address, attachments, and other supporting materials, will be publicly accessible. Sensitive personally identifiable information, such as account numbers and social security numbers, should not be included with the comment. Comments that are not related to the performance evaluation of the New Hampshire Coastal Management Program, or that contain profanity, vulgarity, threats, or other inappropriate language will not be considered.

FOR FURTHER INFORMATION CONTACT: Carrie Hall, Evaluator, NOAA Office for Coastal Management, by email at *Carrie.Hall@noaa.gov* or by phone at (240) 410–3422. Copies of the previous evaluation findings and assessment and strategies may be viewed and downloaded at *https://coast.noaa.gov/czm/evaluations/.* A copy of the evaluation notification letter and most recent progress report may be obtained upon request by contacting Carrie Hall.

SUPPLEMENTARY INFORMATION: Section 312 of the Coastal Zone Management Act (CZMA) requires NOAA to conduct periodic evaluations of federally approved coastal management programs. The evaluation process includes holding one or more public meetings, considering public comments, and consulting with interested Federal, State, and local agencies and members of the public. During the evaluation, NOAA will consider the extent to which the State of New Hampshire has met the national objectives, adhered to the management program approved by the Secretary of Commerce, and adhered to the terms of financial assistance under the CZMA. When the evaluation is complete, NOAA's Office for Coastal Management will place a notice in the **Federal Register** announcing the availability of the final evaluation findings.

(Authority: 16 U.S.C. 1458.)

Keelin S. Kuipers,

Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2023–20295 Filed 9–19–23; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD182]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Columbia East Lateral XPRESS Project; Correction

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

ACTION: Notice; correction.

SUMMARY: NMFS published a notice in the **Federal Register** of September 7, 2023, concerning the proposed incidental harassment authorization (IHA) for take of marine mammals incidental to construction activities, including pile driving, to install a point of delivery metering station and a tie-in facility in Barataria Bay, Louisiana. That notice included an incorrect email address for submitting public comments. This notice provides a correction to that email address; all other information is unchanged.

FOR FURTHER INFORMATION CONTACT: Steve Tucker, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of September 7, 2023, in FR Doc. 2023–19310, on page 61530, in the third column, correct the **ADDRESSES** caption to read:

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division,

Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to *ITP.Tucker@noaa.gov.*

Dated: September 14, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–20297 Filed 9–15–23; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD378]

Advisory Committee Open Session on Management Strategy Evaluation for North Atlantic Swordfish

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

ACTION: Notice of meeting.

SUMMARY: The Advisory Committee to the U.S. Section to the International Commission for the Conservation of Atlantic Tunas (ICCAT), supported by NMFS, is holding a public meeting via webinar session to receive an update and provide input on the development of a management strategy evaluation (MSE) for North Atlantic swordfish. The meeting is open to all interested stakeholders.

DATES: A virtual meeting that is open to the public will be held by webinar session on October 5, 2023, from 3 p.m. to 5 p.m. EDT.

ADDRESSES: Please register to attend the meeting at: *https://forms.gle/2wkHbTstzFDkHpYu9.* Registration will close on October 3, 2023, at 5 p.m. EDT. Instructions for accessing the webinar session will be emailed to registered participants.

FOR FURTHER INFORMATION CONTACT: Bryan Keller, Office of International Affairs, Trade, and Commerce, (301) 427–7725, *Bryan.Keller@noaa.gov.*

SUPPLEMENTARY INFORMATION: MSE is a process that allows fishery managers and stakeholders (*e.g.,* industry, scientists, and non-governmental organizations) to assess how well different strategies achieve specified management objectives for a fishery. ICCAT expects to finalize its North Atlantic swordfish MSE in 2023 and anticipates adopting a management procedure in November 2023 to set the total allowable catch (TAC) for 2024 and future years for the stock. NMFS, and the U.S. Government more broadly, has been fully engaged in the MSE development process, an important part of which involves considering stakeholder input, including through periodic consultations with the Advisory Committee to the U.S. Section to ICCAT. The United States is also participating in the development of the North Atlantic swordfish MSE through the active involvement of U.S. scientists in the work carried out by ICCAT's Standing Committee on Research and Statistics (SCRS).

The October 5 meeting is primarily informational in nature. It is intended to update U.S. stakeholders on the progress of the North Atlantic swordfish MSE process and increase awareness and understanding of that process. NMFS will provide information on the progress of the SCRS in developing initial candidate management procedures (CMPs) and testing them based on the input provided to-date by ICCAT's Panel 4 on management objectives and other relevant matters. CMPs illustrate tradeoffs associated with achieving identified management objectives related to stock status, stock safety, yield, and TAC stability over time. CMP testing assists ICCAT in refining management objectives and narrowing the number of viable CMPs for possible adoption by the Commission.

There will also be an opportunity for the Advisory Committee and other stakeholders to provide input on the North Atlantic swordfish MSE. Such input helps inform U.S. scientists who are participating in the MSE work of the SCRS as well as U.S. managers participating in North Atlantic swordfish MSE meetings at the Commission level later in 2023.

(Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*)

Dated: September 14, 2023.

Alexa Cole,

Director, Office of International Affairs, Trade, and Commerce, National Marine Fisheries Service.

[FR Doc. 2023–20292 Filed 9–19–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Alaska Region Crab Permits

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before November 20, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0514 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Gabrielle Aberle, 709 W 9th Street, Juneau, AK 9980, 907–586–7356, *gabrielle.aberle@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS), Alaska Regional Office, is requesting extension of a currently approved information collection for the Crab Rationalization Program (CR Program).

This information collection is necessary for NMFS to manage the CR Program. The CR Program was implemented on April 1, 2005 (70 FR 10174, March 2, 2005). The CR Program is a limited access privilege program that allocates the harvest of crab fisheries managed under the Fishery Management Plan for Bering Sea and Aleutian Islands King and Tanner Crabs

(FMP) among harvesters, processors, and coastal communities. Regulations implementing the FMP and the CR Program are at 50 CFR part 680. Information on the CR Program is posted on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/alaska/sustainable-fisheries/bering-sea-and-aleutian-islands-crab-rationalization-program.*

This information collection includes the forms used by participants in the CR Program to apply for or renew permits; transfer or lease individual fishing quota (IFQ), individual processor quota (IPQ), quota share (QS), or processor quota share (PQS); and apply for exemption from regional delivery requirements. This information collection also includes the following reports for which no collection forms are used:

- The North or South Region Delivery Exemption Report is submitted by IFQ holders who signed a preseason application. This report provides NMFS with the means to assess how the industry is exercising the exemption opportunity and whether implementing regulations are sufficient to meet the North Pacific Fishery Management Council's Statement of Intent for Amendment 41 to the FMP.
- The Community Impact Report or IPQ Holder Report is submitted by a community entity or IPQ holder, respectively, and provides documentation needed by NMFS to evaluate the efficacy of privately administered contracts.
- The CDQ Group Notification of Community Representative is submitted by the Western Alaska Community Development Quota (CDQ) groups representing Saint Paul and Saint George to designate to NMFS a single entity as the regional representative for these two communities.
- The Eligible Crab Community Organization (ECCO) Annual Report is submitted by the ECCO. It details the use of the crab QS and IFQ and is intended to ensure that the ECCO maintains the QS and IFQ to benefit residents of eligible communities.

II. Method of Collection

The information is collected primarily by mail and fax. The following may be submitted online through eFISH on the NMFS Alaska Region website: The Application for Transfer (Lease) of Crab IPQ, the Application for Transfer (Lease) of Crab IFQ, the Application for Transfer of IFQ between Crab Harvesting Cooperatives, and renewals of registered crab receiver permits and Federal crab vessel permits. Applications are available as fillable pdfs on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/permit/bering-sea-and-aleutian-islands-crab-rationalization-applications-and-reporting-forms.*

III. Data

OMB Control Number: 0648–0514.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals or households; business or other for-profit organizations; not-for-profit institutions.

Estimated Number of Respondents: 496.

Estimated Time per Response: Application for Annual Crab IFQ Permit: 2.5 hours; Application for Annual Crab IPQ Permit: 2 hours; Application for Annual Crab Harvesting Cooperative IFQ Permit: 23 hours; Application for Registered Crab Receiver (RCR) Permit: 30 minutes; Application for BSAI Crab Hired Master (skipper) Permit: 1 hour; Application for Federal Crab Vessel Permit (FCVP): 20 minutes; Application for Transfer of Crab QS: 2 hours; Application for Transfer of Crab PQS: 2.5 hours; Application for Transfer (lease) of Crab IFQ: 2.5 hours; Application for Transfer of IFQ between Crab Harvesting Cooperatives; 2 hours; Application for Transfer (Lease) of Crab IPQ: 2.5 hours; Application for Converted CPO QS and CPO IFQ: 30 minutes; Application for CR Program Eligibility to Receive QS/PQS or IFQ/IPQ by Transfer: 2 hours; Application for Annual Exemption from Western Aleutian Islands Golden King Crab West Region Delivery Requirements: 2 hours; Application for Exemption from CR Crab North or South Region Delivery Requirements: 20 hours; North or South Region Delivery Exemption Report: 20 hours; Voluntary Community Impact Report or IPQ Holder Report (N or S Response Report): 2 hours; CDQ Group Notification of Community Representative: 5 hours; Application to Become an ECCO: 2.5 hours; Application for Transfer of Crab QS/IFQ to or from an ECCO: 2 hours; ECCO Annual Report: 4 hours; BSAI Crab Rationalization Program QS Beneficiary Designation Form: 30 minutes; File an Appeal to NMFS Decisions: 4 hours.

Estimated Total Annual Burden Hours: 3,597 hours.

Estimated Total Annual Cost to Public: $11,430 in recordkeeping and reporting costs.

Respondent's Obligation: Voluntary; Required to Obtain or Retain Benefits; Mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–20377 Filed 9–19–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2023–0008]

Elimination of the Postal Postcard in the Patent Center Electronic Office Action Program

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) transitioned to the Patent Center Electronic Office (e-Office) Action program in April 2023. The Patent Center e-Office Action program is designed to modernize the e-Office

action process and further streamline the USPTO's service delivery processes. The USPTO furnishes a courtesy postcard to Patent Center e-Office Action program users as a reminder when there are available USPTO communications that have not been viewed or downloaded after a period of time. With the transition, the USPTO introduced a new option to receive the courtesy postcard by email (e-postcards) rather than by postal mail (postal postcards). In view of the new option to receive e-postcards, the USPTO requested public comments on eliminating the postal postcard for all Patent Center e-Office Action program users. The USPTO is now eliminating the postal postcard as an option for all Patent Center e-Office Action program users.

DATES: The option to receive a courtesy postal postcard under the Patent Center e-Office Action program will no longer be available as of October 20, 2023. Patent Center e-Office Action program users may manually opt in to receiving e-postcards prior to that date. As of October 20, 2023, e-postcards will be the only option for the courtesy postcard, and the USPTO will automatically switch over any Patent Center e-Office Action program users who have not already opted in to receiving e-postcards. The USPTO will continue to mail postal postcards for seven days after October 20, 2023 for any unviewed correspondence in the queue as of October 20, 2023 for those program users who were receiving postal postcards prior to that date.

FOR FURTHER INFORMATION CONTACT: Eugenia A. Jones, Senior Legal Advisor, Office of Patent Legal Administration, at 571–272–7727; or Kristie A. Mahone, Senior Legal Advisor, Office of Patent Legal Administration, at 571–272–9016; or *patentpractice@uspto.gov*. For technical questions, please contact the Patent Electronic Business Center (EBC) at 1–866–217–9197 (toll-free), 571–272–4100 (local), or *ebc@uspto.gov*. The Patent EBC is open from 6 a.m. to midnight ET, Monday–Friday.

SUPPLEMENTARY INFORMATION: In April 2023, the USPTO migrated all participants from the Private PAIR e-Office Action program to the Patent Center e-Office Action program. The USPTO informed the public of the migration in advance. *See* Patent Center Electronic Office Action Program, 88 FR 20138 (Apr. 5, 2023) (April 2023 Notice).

Under the current Patent Center e-Office Action program, users have the option to receive either a courtesy postal postcard through the United States Postal Service or a courtesy e-postcard by email. Courtesy reminder postcards are sent when none of the Office communications listed in the email notification have been viewed or downloaded in Patent Center within seven calendar days after the date of the notification and at least one of the listed Office communications requires the applicant's reply. In the April 2023 Notice, the USPTO requested comments on eliminating the courtesy postal postcard as an option. The USPTO received one comment in response to the request for comments. The commenter did not express any views on eliminating the postal postcard and only made a general comment about Patent Center.

The USPTO has determined that maintaining postal postcards is not necessary. Eliminating the postal postcard will reduce paper waste and mitigate the impact of potential postal delays. Furthermore, exclusively using e-postcards will enable the USPTO to continue to furnish courtesy reminders while more effectively streamlining service delivery processes. Therefore, the USPTO is eliminating the postal postcard as an option for all Patent Center e-Office Action program users. Instead, the USPTO will send a courtesy e-postcard notifying Patent Center e-Office Action program users if none of the Office communications listed in the email notification are viewed or downloaded through Patent Center within seven calendar days after the date of the email notification and at least one of the Office communications requires an applicant's reply. The USPTO will email courtesy e-postcards to the same email addresses assigned to the Customer Number for the correspondence address.

Participation in the Patent Center e-Office Action program will continue to be optional. Additional information on the Patent Center e-Office Action Program is available at *www.uspto.gov/patents/apply/checking-application-status/e-office-action-program*.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–20351 Filed 9–19–23; 8:45 am]

BILLING CODE 3510–16–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2023–0033]

Per- and Polyfluoroalkyl Substances (PFAS) in Consumer Products

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of availability and request for information.

SUMMARY: The Consumer Product Safety Commission (Commission or CPSC) is publishing this notice to request information on per- and polyfluoroalkyl substances (PFAS) used in commerce or potentially used in consumer products, potential exposures associated with the use of PFAS in consumer products, and potential human health effects associated with exposures to PFAS from their use in consumer products. This notice also includes the availability information of a related contractor report.

DATES: Written comments must be submitted by November 20, 2023.

ADDRESSES: You can submit comments, identified by Docket No. CPSC–2023–0033, by any of the following methods:

Electronic Submissions: Submit electronic comments to *www.regulations.gov*. Follow the instructions for submitting comments. Do not submit through this website: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. CPSC typically does not accept comments submitted by email, except as described below.

Mail/Hand Delivery/Courier/Confidential Written Submissions: CPSC encourages you to submit electronic comments by using *www.regulations.gov*. You may, however, submit comments by mail, hand delivery, or courier to: Office of the Secretary, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814; telephone: (301) 504–7479.

Instructions: All submissions must include the agency name and docket number. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided to *www.regulations.gov*. If you wish to submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public, you may submit such comments by mail, hand delivery, or

courier, or you may email them to: *cpsc-os@cpsc.gov.*

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov,* and insert the docket number, CPSC–2023–0033, into the ''Search'' box, and follow the prompts. The report (Characterizing PFAS Chemistries, Sources, Uses, and Regulatory Trends in U.S. and International Markets) is available in the docket, under ''Supporting and Related Material'' on the Commission's website at *https://www.cpsc.gov/content/CPSC-PFAS-WhitePaper,* and from the CPSC's Office of the Secretary.

FOR FURTHER INFORMATION CONTACT: Charles Bevington, Directorate for Health Sciences, U.S. Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone: (301) 987–2009; email: *cbevington@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

PFAS are manufactured chemicals that contain multiple fluorine atoms attached to carbon chains. There is no single, universally accepted definition of PFAS or authoritative list of substances, although some researchers and organizations have published preferred definitions or have generated such lists. The U.S. Environmental Protection Agency (EPA) and other data sources indicate that there are thousands of different PFAS that could be registered on U.S. or global chemical inventories and are potentially in commerce, hundreds of PFAS with reported use information from the U.S. or international sources, and several dozen PFAS that are more commonly measured in consumer products, the environment, or in people. PFAS have a variety of applications, including in non-stick cookware; water-repellent and stain resistant clothing, carpets and other fabrics; some cosmetics; some firefighting foams; and common home products such as cleaning supplies, waxes, coatings, adhesives, paints, and sealants. This Request for Information concerns ''consumer products'' which includes products used in or around the home or school that are subject to CPSC jurisdiction under the Consumer Product Safety Act (CPSA), 15 U.S.C. 2051 *et seq.,* Federal Hazardous Substances Act, 15 U.S.C. 1261 *et seq.,* and other statutes administered by CPSC. Cosmetics, drugs, and pesticides generally are not within CPSC's jurisdiction under the CPSA.

PFAS can move through the environment, and they break down very slowly. They are commonly referred to as ''forever chemicals.'' [1] Consumer products containing PFAS contribute to aggregate exposures through mediated (*e.g.,* ingestion of indoor dust and inhalation of indoor air) and contact (*e.g.,* mouthing of products and direct dermal transfer) exposure pathways. Consumer products containing PFAS also contribute to aggregate exposures through releases to the environment from manufacturing and processing of PFAS and formulation and disposal of consumer products containing PFAS (*e.g.,* ingestion of drinking water).

Currently in the United States, local jurisdictions, states, and other federal agencies, including the EPA, U.S. Food and Drug Administration (FDA), and U.S. Department of Agriculture are studying PFAS occurrences, human exposures, and health effects that are largely associated with environmental exposures (*e.g.,* contaminated drinking water, food chain). In March 2023, the White House Office of Science and Technology Policy (OSTP) released a PFAS Report informed by a Request for Information and developed in collaboration with many federal agencies.[2] That report provides a comprehensive and recent summary of known data and research gaps in four areas: removal, destruction, or degradation of PFAS, safer alternatives, source and pathways of exposure, and toxicity. This request for information by CPSC is solely focused on potential use or presence of PFAS in consumer products, potential human exposures associated with consumer product use, and potential adverse human health effects associated with consumer product use.

CPSC contracted with RTI International (Contract No. GS–00F–354CA, Order No. 61320622F0078) to complete an overview of PFAS with a focus on PFAS that are potentially used or present in consumer products. The main objectives of the contract were to (1) broadly characterize PFAS and identify the uses and applications of PFAS in consumer products, identify significant individual PFAS with known or potential consumer product applications, and identify trends associated with production and use of PFAS in consumer products; (2) identify international, federal, state, and local regulations or restrictions for individual or grouped PFAS; and (3) summarize recent hazard (toxicity), exposure, or risk assessments that have been completed by authoritative bodies.

The completed RTI report,[3] CPSC staff's statement on the report,[4] and the accompanying appendices and database files [5] provide this information, describe some data gaps, limitations, and uncertainties, and identify possible next steps.

The completed contractor report and associated materials are available at: *https://www.regulations.gov* under docket number CPSC–2023–0033, on the Commission's website at *https://www.cpsc.gov/Research--Statistics/Chemicals* under the heading ''Per- and Polyfluoroalkyl Substances (PFAS''), and from the CPSC's Office of the Secretary at the location listed in the **ADDRESSES** section of this notice.

This request for information (RFI) seeks input from the public on PFAS and potential uses or presence of PFAS in consumer products, potential human exposures associated with consumer product use, and potential adverse human health effects associated with consumer product use. This RFI does not constitute or propose regulatory action, but rather is intended to inform the Commission and the public.

II. Information Requested

CPSC is requesting information from all stakeholders such as consumers, manufacturers and importers, government agencies, non-governmental organizations, and researchers. Please provide information focused on consumer products and with consideration for the information already available to CPSC in the contract report and associated supporting files. The contractor report is not a risk assessment and did not identify all potential data sources that could be used for risk assessment.

CPSC is particularly requesting information on PFAS and potential use or presence of PFAS in consumer products, potential human exposures to

[1] PFAS are persistent in the environment and can bioaccumulate in organisms. There is variability in the persistence of different PFAS in various environmental media and biological matrices.

[2] The report (Per- and Polyfluoroalkyl Substances (PFAS) Report | A Report by the Joint Subcommittee on Environment, Innovation, and Public Health) is available at *https://www.whitehouse.gov/wp-content/uploads/2023/03/OSTP-March-2023-PFAS-Report.pdf.*

[3] The report (Characterizing PFAS Chemistries, Sources, Uses, and Regulatory Trends in U.S. and International Markets) is available in the docket and at *https://www.cpsc.gov/content/CPSC-PFAS-WhitePaper.*

[4] The statement (CPSC Staff Statement on: Characterizing PFAS Chemistries, Sources, Uses, and Regulatory Trends in the U.S. and International Markets) is available in the docket and at *https://www.cpsc.gov/content/PFAS-Market-Use-Cover-Memo.*

[5] The file names and descriptions of appendices and databases contained in supporting files are described in CPSC Staff's Statement. Appendices and supporting files are available in the docket and at *https://www.cpsc.gov/Research--Statistics/Chemicals.*

PFAS associated with consumer product use including information about potentially highly exposed population groups, and potential adverse human health effects informed by toxicological data sources. The Commission seeks comment on all significant aspects of this issue, including but not limited to the following questions.

Use or Potential Use of PFAS in Consumer Products

1. Please provide information about the definition of PFAS, including which chemical substances should be considered a perfluoroalkyl or polyfluoroalkyl substance, which chemical substances should be excluded from consideration as a PFAS, and which PFAS are considered in commerce.

2. Please identify specific PFAS potentially used or present in consumer products that are not already included in the contract report and related supporting files. For each PFAS chemical identified, specify relevant consumer product(s) and/or use categories.

3. Please provide information about which specific PFAS the CPSC should prioritize in assessments of potential uses or presence of PFAS in consumer products.

4. Please provide information about which specific consumer products CPSC should prioritize in assessments of potential uses or presence of PFAS.

5. Please provide information about consumer products or materials used in consumer products that may be sources of PFAS.

5a. For intentional uses of PFAS, please provide information on: Chemical identity and physical form (solid, liquid, gas, semi-solid); Functional purpose of the PFAS; and measurements or estimates of levels/concentration of PFAS used in consumer products.

5b. Where PFAS may be present in consumer products other than for intentional, functional uses (such as manufacturing or environmental contaminants), please provide information on sources of contaminants; chemical identity and physical form; degradation of substances or materials in consumer products to PFAS; and measurements or estimates of levels/concentration of PFAS in consumer products other than from intentional uses.

Potential Human Exposures to PFAS Associated With Consumer Products Use, Including Information About Potentially Highly Exposed Population Groups

6. Please provide information related to the emission of PFAS from consumer products into the indoor environment. For example, studies or data that estimate emission rates or mass transfer parameters of PFAS chemicals from consumer products or materials.

7. Please provide information related to the migration of PFAS from consumer products into saliva, gastrointestinal fluid, or skin. For example, studies or data that estimate migration rates into biological fluids or surfaces based on sustained contact time.

8. Please provide information about the potential for exposure and risk from presence of PFAS in consumer products (including contact exposures from direct use of consumer products and mediated exposures such as through emission of PFAS from products to surfaces, indoor dust, or indoor air). Please provide:

8a. Data related to specific exposure pathways from consumer product sources and associated data or estimates of occurrence of PFAS in environmental media;

8b. Data on measurements or estimates of PFAS intake, uptake, clearance, half-life, or occurrence in people (biomonitoring); and

8c. Data on the relative source contribution of consumer product(s) or ingestion of indoor dust, or inhalation of indoor air compared with other relevant sources such as ingestion of drinking water or ingestion of food associated with estimates of aggregate exposures.

9. Please provide information about population groups that may use certain consumer products for a greater than average magnitude, frequency, or duration based on habits, practices, and characteristics specific to that population group.

Potential Adverse Human Health Effects Informed by Toxicological Data

10. Please provide reports and underlying data for data sources that could inform whether individual PFAS or subclasses or categories of PFAS have potential for adverse human health effects. This includes human or animal studies that report the relationship between known exposures and observed effects. This also includes new approach methodology studies such as in-vitro assays or in-silico predictions that report the relationship between known exposures and observed biological activities related to health effects.

11. Please provide information on additional sources of data and other information that CPSC should consider that are not already included or mentioned in the contract report and associated data files.

If you wish to submit confidential information in response to this RFI, please follow the instructions in the **ADDRESSES** section above.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2023–20332 Filed 9–19–23; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Army, U.S. Army Corps of Engineers

Notice of Funding Availability for Applications for Credit Assistance Under the Corps Water Infrastructure Financing Program

AGENCY: U.S. Army Corps of Engineers, Department of Defense (DoD).

ACTION: Notice of funding availability.

SUMMARY: The Corps Water Infrastructure Financing Program (CWIFP) is the U.S. Army Corps of Engineers' (Corps) new credit assistance program for non-federal dam safety projects. Through the Consolidated Appropriations Act of 2021, the Infrastructure Investment and Jobs Act, and the Consolidated Appropriations Act of 2022, CWIFP has been provided $81 million in budget authority. The purpose of this Notice of Funding Availability (NOFA) is to solicit preliminary applications from prospective borrowers seeking credit assistance from the Corps under CWIFP. The Corps will evaluate and select projects using selection criteria as further described in this NOFA.

DATES: The preliminary application submittal period begins today and ends at 11:59 p.m. Eastern Standard Time on December 19, 2023.

ADDRESSES: Prospective borrowers should submit all preliminary applications (OMB Control Number 0710–0026) electronically via the Corps online application portal, located at: *https://CWIFPapp.usace.army.mil.* After registering within the application portal, prospective borrowers will be able to securely provide all required information for the preliminary application. If a prospective borrower has any questions or needs assistance, they should contact *CWIFP@usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: Nathan Campbell at 651–219–2963 or by

email at *nathan.j.campbell@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This NOFA discusses threshold and selection criteria for the funding announced by this NOFA, explains factors for budgetary screening criteria, and outlines the process that prospective borrowers should follow to be considered for credit assistance made available for this funding round.

For a project to be considered during a selection round, CWIFP application materials must be submitted via the online application portal prior to the corresponding deadline listed in the Dates section. Section V. Preliminary Applications and Applications of this NOFA provides additional details on the preliminary application's content. CWIFP has recently held webinars to give interested parties the opportunity to ask CWIFP staff questions about the preliminary application and the program. A video recording and copy of the webinar, as well as the schedule and registration instructions for any future webinars, can be found on the CWIFP website: *http://www.usace.army.mil/CWIFP.*

Prospective borrowers with questions about the program or who have interest in meeting with the CWIFP staff may send a request to *CWIFP@usace.army.mil.* The Corps intends to meet with all prospective borrowers interested in discussing the program, but only prior to submission of a request under this NOFA.

Table of Contents

I. Background

Congress enacted the Water Infrastructure Finance and Innovation Act (WIFIA) statute as part of the Water Resources Reform and Development Act of 2014 (WRRDA). Codified in Chapter 52 of Title 33, U.S. Code (Sections 3901–3914), the WIFIA statute authorizes a federal credit program for water infrastructure projects to be administered by the Corps. The WIFIA statute authorizes the Corps to provide federal credit assistance in the form of secured (direct) loans or loan guarantees for eligible water infrastructure projects.

CWIFP has been developed to accelerate non-federal investments in water resources infrastructure by providing credit assistance to creditworthy borrowers. CWIFP facilitates local investment in non-federal dam safety projects that enhance community resilience to flooding, promotes economic prosperity, and improves environmental quality.

II. Program Funding

Congress appropriated $81 million in funding to cover the subsidy cost of providing WIFIA credit assistance. The subsidy is the estimated present value of the cash flows to and from the Government, adjusted for deviations such as defaults, prepayments, and other factors.

III. Eligibility Requirements

The WIFIA statute (33 U.S.C. Ch. 52) [1] and CWIFP implementing rules (33 CFR 386) [2] set forth eligibility requirements for prospective borrowers, projects, and project costs.

A. Eligible Entities Who May Apply

Prospective borrowers must be one of the following in order to be eligible for CWIFP credit assistance:

(i) A corporation;

(ii) A partnership;

(iii) A joint venture;

(iv) A trust;

(v) A State, or local governmental entity, agency, or instrumentality;

(vi) A Tribal government or consortium of Tribal governments; or

(vii) A state infrastructure financing authority.

B. Project Eligibility

Funding appropriated by Congress and made available under this NOFA is limited to safety projects to maintain, upgrade, and repair dams identified in the National Inventory of Dams (*https://nid.sec.usace.army.mil/*) with a primary owner type of State, Tribal government, local government, public utility, or private (referred to here after as ''non-Federal dams'').

Dam removals are eligible to receive CWIFP credit assistance. Requests may also be made for a combination of projects described above, provided that a single application is submitted for the combination of projects and that the requested credit assistance is secured by a common security pledge.

C. Eligible Costs

As defined under 33 U.S.C. 3906 eligible project costs are costs associated with the following activities:

(i) Development-phase activities, including planning, feasibility analysis (including any related analysis necessary to carry out an eligible project), revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other pre-construction activities.

(ii) Construction, reconstruction, rehabilitation, and replacement activities.

(iii) Acquisition of real property or an interest in real property (including water rights, land relating to the project, and improvements to land), environmental mitigation, construction contingencies, and acquisition of equipment; and

(iv) Capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.

Fees charged by the Corps to the borrower in connection with obtaining CWIFP credit assistance may be considered as part of eligible project costs as permitted under 33 U.S.C. 3908(b)(7).

Proceeds from the CWIFP credit assistance shall not be utilized to provide cash contributions to the Corps for project-related costs, except for such fees described in Section VI Fees.

D. Threshold Requirements

(i) To be eligible to receive Federal credit assistance under this part, a project shall meet the following threshold criteria:

a. The project and obligor shall be creditworthy; the Corps will assess the financing plan to ensure that the project and borrower are creditworthy. Considerations will include relevant factors such as the dedicated revenue sources that will secure or fund the project obligations; the financial assumptions upon which the project is based; and the financial soundness and credit history of the obligor.

b. The project sponsor shall submit a project application to the Secretary;

c. A project shall have eligible project costs that are reasonably anticipated to equal or exceed $20 million;

d. Project financing shall be repayable, in whole or in part, from State or local taxes, user fees, or other dedicated revenue sources that also secure the senior project obligations of the project; shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and may have a lien on revenues subject to any lien securing project obligations;

[1] *https://uscode.house.gov/view.xhtml?path=/prelim@title33/chapter52&edition=prelim.*

[2] *https://www.federalregister.gov/documents/2023/05/22/2023-10520/credit-assistance-and-related-fees-for-water-resources-infrastructure-projects.*

e. In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, or a Tribal government or consortium of Tribal governments, the project that the entity is undertaking shall be publicly sponsored;

f. The applicant shall have developed an operations and maintenance plan that identifies adequate revenues to operate, maintain, and repair the project during its useful life; and

g. Be a non-federal dam safety project, including dam removal, and be for flood damage reduction, hurricane and storm damage reduction, environmental restoration, coastal or inland harbor navigation improvement, or inland and intracoastal waterways navigation improvement that the Secretary determines is technically sound, economically justified, and environmentally acceptable.

E. Federal Requirements

All projects receiving credit assistance under this part shall comply with all applicable laws and regulations, including but not limited to the following:

(i) Environmental authorities:

a. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.;*

b. Archeological and Historic Preservation Act, 16 U.S.C. 469–469c;

c. Clean Air Act, 42 U.S.C. 7401 *et seq.;*

d. Clean Water Act, 33 U.S.C. 1251 *et seq.;*

e. Coastal Barrier Resources Act, 16 U.S.C. 3501 *et seq.;*

f. Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.;*

g. Endangered Species Act, 16 U.S.C. 1531 *et seq.;*

h. Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, Executive Order 12898, 59 FR 7629, February 16, 1994;

i. Floodplain Management, Executive Order 11988, as amended by Executive Order 13690;

j. Protection of Wetlands, Executive Order 11990, 3 CFR, 1977 Comp., p. 121, as amended by Executive Order 12608, 3 CFR, 1987 Comp., p. 245

k. Farmland Protection Policy Act, 7 U.S.C. 4201 *et seq.;*

l. Fish and Wildlife Coordination Act, 16 U.S.C. 661–666c, as amended;

m. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.;*

n. National Historic Preservation Act, 54 U.S.C. 300101 *et seq.;*

o. Safe Drinking Water Act, 42 U.S.C. 300f *et seq.;* and

p. Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*

(ii) Economic and miscellaneous authorities:

a. Debarment and Suspension, Executive Order 12549, 51 FR 6370, February 21, 1986;

b. New Restrictions on Lobbying, 31 U.S.C. 1352;

c. Prohibitions relating to violations of the Clean Water Act or Clean Air Act with respect to Federal contracts, grants, or loans under 42 U.S.C. 7606 and 33 U.S.C. 1368, and Executive Order 11738, 3 CFR, 1971–1975 Comp., p. 799; and

d. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*

(iii) Civil Rights, Nondiscrimination, Equal Employment Opportunity Authorities:

a. Age Discrimination Act, 42 U.S.C. 6101 *et seq.;*

b. Equal Employment Opportunity, Executive Order 11246, 30 FR 12319, September 28, 1965;

c. Section 504 of the Rehabilitation Act, 29 U.S.C. 794, supplemented by Executive Orders 11914, 3 CFR, 1976 Comp., p. 117, and 11250, 3 CFR, 1964–1965 Comp., p. 351; and

d. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*

(iv) Budgetary Screening Criteria:

To comply with Water Infrastructure Finance and Innovation Program Account heading in the Energy and Water Development and Related Agencies Appropriations Act, 2021 (Pub. L. 116–260 [3]), a project seeking CWIFP financing will be assessed using two initial screening questions and sixteen scoring factors. These questions will help the Office of Management and Budget (OMB) and the Army Corps of Engineers certify compliance with budgetary scoring rules for lending to non-Federal entities, a process that will be conducted in parallel to the Corps' pre-application evaluation process outlined in this NOFA. As articulated in Public Law 116–260, only projects that are certified in advance in writing by the Director of OMB and the Secretary of the Army as complying with these criteria are eligible to receive CWIFP credit assistance. For example, a project authorized by an Act of Congress to be built by the Army Corps of Engineers of the Bureau of Reclamation is ineligible for WIFIA financing. However, a project that may connect to, or be tangentially related, to such a project, may be eligible depending on the factual circumstances. Furthermore, a project at a local municipal dam might not be deemed ineligible simply because it was originally built by the Army Corps of Engineers or Bureau of Reclamation. Such questions will need to be resolved on a case-by-case basis. The questions may be found in **Federal Register** publication: Water Infrastructure Finance and Innovation Act Program (WIFIA) Criteria Pursuant to Public Law 116–94 [4] 85 FR 39189,[5] June 30, 2020. The Corps encourages prospective borrowers to review the screening criteria and provide sufficient information in the preliminary application to facilitate OMB and Army review of the prospective project considering the screening criteria.

IV. Types of Credit Assistance and Maximum Credit Assistance

Two types of credit instruments are permitted under the WIFIA statue: secured (direct) loans and loan guarantees. General rules concerning the terms governing these credit instruments appear at 33 U.S.C. 3908 and 3909. The maximum amount of CWIFP credit assistance to a project is 49 percent of eligible project costs or up to 80 percent for projects serving economically disadvantaged communities.

V. Preliminary Applications and Applications

This section primarily describes the preliminary application.

A. Preliminary Application

Prospective borrowers seeking CWIFP credit assistance must submit a preliminary application describing the project fundamentals and addressing the CWIFP selection criteria.

In the preliminary application, prospective borrowers provide CWIFP with enough information to do the following:

(i) Validate the eligibility of the prospective borrower and the proposed project,

(ii) Perform a preliminary creditworthiness assessment,

(iii) Perform a preliminary technical feasibility analysis, and

(iv) Evaluate the project against the selection criteria defined in Section VII of this NOFA.

Prospective borrowers should complete the preliminary application electronically via the Corps online application portal, located at *https://*

[3] *https://www.govinfo.gov/content/pkg/PLAW-116publ260/pdf/PLAW-116publ260.pdf.*

[4] *https://www.govinfo.gov/content/pkg/PLAW-116publ94/pdf/PLAW-116publ94.pdf.*

[5] *https://www.federalregister.gov/documents/2020/06/30/2020-13889/water-infrastructure-finance-and-innovation-act-program-wifia-criteria-pursuant-to-the-further.*

CWIFPapp.usace.army.mil. The Corps will notify prospective borrowers via email that their preliminary application has been received via the online application portal.

Prospective borrowers can access additional information about the online platform on the CWIFP website: *http://www.usace.army.mil/CWIFP.*

All submitted application materials should stand alone, and additional research by CWIFP will only be conducted in extenuating circumstances.

The preliminary application contains the following six (6) sections:

1. Prospective Borrower Information

In this section of the preliminary application, the prospective borrower describes the entity seeking CWIFP assistance, including its legal name, address, website, employer identification number (EIN), unique entity ID number created in *SAM.gov,* verification of active registration in System for Award Management (SAM) number, and a brief summary of organizational structure.

The prospective borrower must provide a description of the legal authority used to carry out the project and to receive and pledge the revenue stream proposed as their source of repayment. Prospective borrowers must also identify the statutory types under which the project and loan obligor can be categorized. In the case of a project that is undertaken by an entity that is not a Tribal government or consortium of Tribal governments, or a State or local government or an agency or instrumentality of a State or local government, the project that the entity is undertaking must be publicly sponsored. Public sponsorship means that the prospective borrower can demonstrate, to the satisfaction of the Corps, that it has consulted with the affected Tribal, State, or local government in which the project is located, or is otherwise affected by the project, and that such government supports the proposed project. A prospective borrower can show support by including a certified letter signed by the approving Tribal, State, or municipal department or similar agency; governor, mayor or other similar designated authority; statute or local ordinance, or any other means by which government approval can be evidenced.

At the end of this section, prospective borrowers will be asked to provide anticipated dates for (1) the completion of a full application (in the event they were invited to apply after review of their preliminary application, and (2) loan closure (in the event the full application was approved).

2. Project Plan

In this section of the preliminary application, the prospective borrower provides a general description of the project and its purpose, location, the localities and population served, environmental impacts, delivery method, project completion schedule, eligible costs, and the requested loan amount.

The prospective borrower must specify whether the project has been federally authorized by Congress and whether the project team has previously consulted with any Corps Districts and/or Divisions. If so, the prospective borrower must specify the Corps point of contact(s). Consistent with FR 39189, a project authorized by an Act of Congress to be built by the Army Corps of Engineers or Bureau of Reclamation is ineligible for WIFIA financing. However, a project that may connect to, or be tangentially related to, such a project, may be eligible depending on the factual circumstances (*e.g.,* a project to upgrade a water distribution system that is connected to an Army Corps of Engineers or Bureau of Reclamation constructed water source may be eligible for WIFIA financing in some circumstances). Furthermore, a project at a local municipal facility might not be deemed ineligible simply because it was originally built by the Army Corps of Engineers or Bureau of Reclamation. Such questions will need to be resolved on a case-by-case basis.

The prospective borrower should summarize other relevant information that could affect the development of the project, such as community outreach, environmental review, permits, operations and maintenance agreement plan, and other approvals or issues that are integral to the project's development.

The prospective borrower also should provide the following as attachments: (1) A map of the project location, and (2) all applicable technical reports for each project, addressing the project(s) scope, cost, schedule, contingency plans, and status of project design (including consideration for cost overruns).

3. Financing Plan

In this section of the preliminary application, the prospective borrower indicates the amount and terms of the requested CWIFP credit assistance, including the assumed disbursement period and repayment term of the loan, the anticipated amortization structure, and whether interest is expected to capitalize during construction.

In addition, the prospective borrower should detail the proposed sources and uses of funds for the project. The discussion of proposed financing should identify the source(s) of revenue or other security that would be pledged to the CWIFP assistance. As part of the description of its financial condition, the prospective borrower should include its year-end audited financial statements for the past two years, as available, or comprehensive financial reports, as applicable.

Additionally, the prospective borrower must describe the credit characteristics of the proposed credit assistance, how the CWIFP assistance will receive an investment grade rating, as well as the anticipated rating on the CWIFP assistance. Whenever possible, the prospective borrower should include existing credit ratings on the proposed source of repayment.

The prospective borrower should also include a summary financial pro forma, presented in a formula-based Microsoft Excel document, which presents key revenue, expense, and debt repayment assumptions for the revenue pledged to repay the CWIFP loan for the tenor of the proposed credit assistance. The financial pro forma should include all the following items:

- Sources of revenue
- Operation & Maintenance expenses
- Dedicated source(s) of repayment
- Capital expenditures
- Debt service payments and reserve transfers by funding source (including the CWIFP credit assistance)
- Debt balances by funding source
- Projected debt service coverage ratios for total existing debt and the CWIFP debt

4. Selection Criteria

In this section of the preliminary application, the prospective borrower describes the potential policy benefits achieved using CWIFP assistance with respect to each of the CWIFP selection criteria. These criteria are described in Section VII. Selection Criteria of this NOFA.

5. Contact Information

In this section of the preliminary application, the prospective borrower identifies primary and secondary points of contact with whom CWIFP should communicate regarding the preliminary application. To complete the Corps' evaluation, CWIFP staff may contact a prospective borrower regarding specific information in the preliminary application.

6. Federal Requirements and Certification

In this section of the preliminary application, the prospective borrower certifies that it will abide by all applicable laws and regulations, including NEPA, the American Iron and Steel requirements, the Build America, Buy America Act, and Federal labor standards, among others, if selected to receive funding. The prospective borrower also certifies that the information provided in the preliminary application is true, to the best of the prospective borrower's knowledge and belief after due inquiry, and that the prospective borrower has not omitted any material facts.

B. Application

After the Corps concludes its evaluation of the preliminary application, prospective borrowers will be invited to apply based on the scoring of the selection criteria and preliminary evaluation of creditworthiness and feasibility, while taking into consideration geographic and project type diversity.

The purpose of the Corps' preliminary application review is to pre-screen prospective borrowers to the extent practicable. An invitation to apply for CWIFP credit assistance does not guarantee the Corps' approval or represent an obligation by the Corps to enter into a credit agreement, which remains subject to a project's continued eligibility, including creditworthiness, the successful negotiation of terms acceptable to the Corps, and the availability of funds at the time at which all necessary recommendations and evaluations have been completed. Detailed informational needs for the application are listed in the application form (OMB Control Number 0710–0026).

Final and completed applications should be received by CWIFP within 365 days of the invitation to apply, but the Corps may extend the deadline on a case-by-case basis if the project schedule in the preliminary application or other applicable factors signal that additional time might be needed.

VI. Fees

There is no fee to submit a preliminary application.

For projects invited to apply for credit assistance, the Corps incurs both internal administrative costs (staffing, program support contracts, etc.) as well as costs associated with conducting engineering reviews and retaining expert firms, including financial and legal services in the field of municipal and project finance, to assist in the underwriting of the federal credit instrument.

As a result, each invited applicant will be required to submit, concurrent with its application, an application fee of $25,000, this application fee will be waived for public entities serving small communities or economically disadvantaged communities. Applications will not be evaluated until the application fee is paid, if applicable. This fee will be credited toward final payment of a Transaction Processing Fee, which is used to pay the remaining portion of the Corps' cost of processing the application for credit assistance. In the event a final credit agreement is not executed, the borrower will be required to reimburse the Corps for the costs incurred.

As noted above, the Corps will only invite projects to apply if it anticipates a high probability of proceeding to closing.

VII. Selection Criteria

Prior to consideration under the Selection Criteria, a project must first satisfy all of the threshold criteria (also outlined in Section III(D)):

a. The project and obligor shall be creditworthy; the Corps will assess the financing plan to ensure that the project and borrower are creditworthy. Considerations will include relevant factors such as the dedicated revenue sources that will secure or fund the project obligations; the financial assumptions upon which the project is based; and the financial soundness and credit history of the obligor.

b. The project sponsor shall submit a project application to the Secretary;

c. A project shall have eligible project costs that are reasonably anticipated to equal or exceed $20 million;

d. Project financing shall be repayable, in whole or in part, from State or local taxes, user fees, or other dedicated revenue sources that also secure the senior project obligations of the project; shall include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and may have a lien on revenues subject to any lien securing project obligations;

e. In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, or a Tribal government or consortium of Tribal governments, the project that the entity is undertaking shall be publicly sponsored;

f. The applicant shall have developed an operations and maintenance plan that identifies adequate revenues to operate, maintain, and repair the project during its useful life; and

g. Be a non-federal dam safety project, including dam removal, and be for flood damage reduction, hurricane and storm damage reduction, environmental restoration, coastal or inland harbor navigation improvement, or inland and intracoastal waterways navigation improvement that the Secretary determines is technically sound, economically justified, and environmentally acceptable.

CWIFP Priorities

This section specifies the process that the Corps will use to evaluate preliminary applications, (only after satisfaction of the threshold criteria as described in the section above are met) and select projects to apply for CWIFP credit assistance.

There are 14 total CWIFP selection criteria that will be considered with this NOFA. 12 are identified in the implementation rules (33 CFR 386 Section O); criterion (L) was added to ensure compliance with FR 39189 and criterion (N) was added to reflect proper consideration for dam removal projects in the selection process. The following criteria contain weights that combine to make up a total score out of 100 points: (A), (C), (D), (E), (F), (G), (H), (I), (J), (K), and (N). Overall scores will help inform the selection committee's deliberations within the overall program framework. Criterion (B), Extent of Public or Private Financing, is not assigned a selection criteria weight as it is considered part of the threshold criteria. Criterion (L), Project is Non-Federally Owned, Operated or Maintained, is not assigned a weight as it is considered part of the threshold criteria. Criterion (M), Amount of Budget Authority, is evaluated in the context of an entire cohort or NOFA round given the amount of funding available, thus is not provided a weight.

(A) *40 points:* The extent to which the project is nationally or regionally significant, with respect to the generation of economic and public benefits, such as—(i) the reduction of flood risk; (ii) the improvement of water quality and quantity, including aquifer recharge; (iii) the protection of drinking water, including source water protection; (iv) the support of domestic or international commerce; and (v) the restoration of aquatic ecosystem structures.

The Corps will assess the risk associated with the dam by considering the consequences (*e.g.,* the extent of the loss of life, economic losses, and damage to important environmental resources or cultural sites) and the

likelihood of dam failure as defined below; projects at higher risk will receive a greater score:

Low risk: low or significant hazard potential combined with a low likelihood of failure; or low hazard potential combined with a medium likelihood of failure.

Moderate Risk: low hazard potential combined with a high likelihood of failure; or significant hazard potential combined with medium likelihood of failure; or high hazard potential combined with a Low likelihood of failure.

High Risk: high or significant hazard potential combined with a high likelihood of failure; or high hazard potential combined with a medium likelihood of failure.

(B) *0 points:* The extent to which the project financing plan includes public or private financing in addition to WIFIA credit assistance. The Corps will assess this as a threshold criterion for creditworthiness and will assess the financing plan to ensure that the project and borrower are creditworthy. Considerations will include relevant factors such as the dedicated revenue sources that will secure or fund the project obligations; the financial assumptions upon which the project is based; and the financial soundness and credit history of the obligor.

(C) *5 points:* The likelihood that WIFIA credit assistance would enable the project to proceed at an earlier date than the project would otherwise be able to proceed

(D) *1 point:* The extent to which the project uses new or innovative approaches.

(E) *10 points:* The extent to which the project—(i) protects against extreme weather events, such as floods or hurricanes; or (ii) helps maintain or protect the environment. The Corps will assess the risk associated with the dam and how the proposed project minimizes that risk by considering the ability of the dam to pass the Inflow Design Flood (IDF) which is used as a proxy to evaluate the probability of an event occurring (*i.e.,* dams not able to pass the IDF are more likely to have failures). The scoring will favor those projects that are increasing their capacity to successfully pass the IDF, which includes dam removal.

(F) *1 point:* The extent to which a project serves regions with significant clean energy exploration, development, or production areas.

(G) *5 points:* The extent to which a project serves regions with significant water resource challenges, including the need to address—(i) water quality concerns in areas of regional, national, or international significance; (ii) water quantity concerns related to groundwater, surface water, or other water sources; (iii) significant flood risk; (iv) water resource challenges identified in existing regional, State, or multistate agreements; or (v) water resources with exceptional recreational value or ecological importance.

(H) *1 point:* The extent to which the project addresses identified municipal, State, or regional priorities.

(I) *5 points:* The readiness of the project to proceed toward development, including a demonstration by the obligor that there is a reasonable expectation that the contracting process for construction of the project can commence by not later than 90 days after the date on which a Federal credit instrument is obligated for the project under WIFIA.

(J) *1 point:* The extent to which WIFIA credit assistance reduces the overall Federal contributions to the project. As noted above, a project is not eligible to receive CWIFP credit assistance if it is a congressionally authorized federal project authorized by an Act of Congress to be built by the Army Corps of Engineers or the Bureau of Reclamation.

(K) *17 points:* The extent to which the project serves economically disadvantaged communities and spurs economic opportunity for, and minimally adversely impacts, disadvantaged communities and their populations, which meet at least one of the following criteria: (i) low-income (the area has a per capita income of 80 percent or less of the national average), (ii) unemployment rate above national average (the area has an unemployment rate that is, for the most recent 24-month period for which data are available, at least 1 percent greater than the national average unemployment rate), (iii) Indian country as defined in 18 U.S.C. 1151 or in the proximity of an Alaska Native Village, (iv) U.S. Territories, or (v) identified as disadvantaged by the Climate and Economic Justice Screening Tool (developed by the Council on Environmental Quality and currently available at *https://screeningtool.geoplatform.gov*).

(L) *0 points:* The project is non-federally owned, operated or maintained. This criterion, which is being treated as a threshold criterion, was added for the purposes of this NOFA to be consistent with FR 39189. FR 39189 indicates that a project authorized by an Act of Congress to be built by the Army Corps of Engineers or Bureau of Reclamation is ineligible for WIFIA financing. However, a project that may connect to, or be tangentially related to, such a project, may be eligible depending on the factual circumstances (*e.g.,* a project to upgrade a water distribution system that is connected to an Army Corps of Engineers or Bureau of Reclamation constructed water source may be eligible for WIFIA financing in some circumstances). Furthermore, a project at a local municipal facility might not be deemed ineligible simply because it was originally built by the Army Corps of Engineers or Bureau of Reclamation. Such questions will need to be resolved on a case-by-case basis.

(M): *0 points:* The amount of budget authority required to fund the Federal credit instrument made available under this chapter. *Note:* Corps will use this to verify that there will be sufficient budget authority to invite an applicant to apply for credit assistance.

(N) *14 points:* The project is for dam removal. This selection criterion was added for the purposes of this NOFA to ensure proper consideration for dam removal projects in the selection process.

In addition to the selection criteria score, the Corps is required by 33 U.S.C. 3902(a) to ''ensure a diversity of project types and geographical locations.''

Following analysis by the Corps staff, a final score is calculated for each project. Projects will be selected in order of score, subject to the requirement to ensure a diversity of project types and geographical locations.

(Authority: 33 U.S.C. 3901–3914, 33 CFR 386)

Michael L. Connor,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2023–20286 Filed 9–19–23; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF ENERGY

Notice of Availability of Interim Guidance on Packaging, Transportation, Receipt, Management, Short-Term and Long-Term Storage of Elemental Mercury

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Notice of availability of guidance.

SUMMARY: The U.S. Department of Energy (DOE or the Department) gives notice of interim guidance *U.S. Department of Energy Interim Guidance on Packaging, Transportation, Receipt, Management, Short-Term and Long-Term Storage of Elemental Mercury.* The

interim guidance updates DOE's 2009 *U.S. Department of Energy Interim Guidance on Packaging, Receipt, Management, and Long-Term Storage of Elemental Mercury* (2009 Long-Term Storage Guidance) and 2019 *Guidance for Short-Term Storage of Elemental Mercury by Ore Processors* (2019 Short-Term Storage Guidance).

DATES: A 30-day public comment period began on May 2, 2023, with the issuance of the Notice of Availability of the Interim Guidance (88 FR 27495) and following a request to extend the comment period, was later extended to July 3, 2023 (88 FR 34491).

FOR FURTHER INFORMATION CONTACT: David Haught, U.S. Department of Energy, Office of Environmental Management, Office of Waste Disposal (EM–4.22), 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–5000, or by email at *david.haught@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background

The *Mercury Export Ban Act of 2008* (Pub. L. 110–414) (MEBA of 2008) as amended by the *Frank R. Lautenberg Chemical Safety for the 21st Century Act* (Pub. L. 114–182) (Chemical Safety Act of 2016) banned the export of elemental mercury and certain mercury compounds and provided for long-term and interim (*i.e.,* short-term) management and storage of elemental mercury. Specifically, MEBA of 2008 required the U.S. Department of Energy (DOE) to designate a facility or facilities for the long-term management and storage of elemental mercury (referred to herein as the Long-Term Elemental Mercury Storage Facility (LTEMSF)) and to issue guidance on recommended standards and procedures for receipt, management, and long-term storage of elemental mercury. 42 U.S.C. 6939f(a)(1), (d)(1). In accordance with these requirements, DOE, after consultation with the EPA and appropriate State agencies in potentially affected States, issued the 2009 Long-Term Storage Guidance on November 13, 2009. The Chemical Safety Act of 2016 provided for interim onsite storage of elemental mercury for certain generators, while awaiting availability of the DOE-designated LTEMSF. 42 U.S.C. 6939f(g)(2)(D). It further required DOE to issue guidance on recommended standards and procedures for management and short-term onsite storage. 42 U.S.C. 6939f(g)(2)(E). In accordance with this requirement, DOE issued the 2019 Short-Term Storage Guidance.

Interim Guidance Document

Both the 2009 Long-Term and 2019 Short-Term Storage Guidance documents were based on certain planning assumptions. However, in recognition that some key underlying assumptions of the guidance documents had changed since the issuance of those documents, DOE decided to revise both documents in a new, combined guidance document. On May 2, 2023, after both consultation with EPA and DOT and an opportunity for consultation with potentially affected States, DOE issued draft *U.S. Department of Energy Interim Guidance on Packaging, Transportation, Receipt, Management, Short-Term and Long-Term Storage of Elemental Mercury* and requested comments on that draft guidance (88 FR 27495). Following a request to extend the comment period, DOE extended the period for public comment to July 3, 2023 (88 FR 34491).

DOE received a total of about 50 comments from eight entities, including EPA, DOT, and potentially affected States, and has made certain changes in the interim guidance to reflect responses to the comments received. The interim guidance document, *U.S. Department of Energy Interim Guidance on Packaging, Transportation, Receipt, Management, Short-Term and Long-Term Storage of Elemental Mercury,* may be found at: *https://www.energy.gov/em/long-term-management-and-storage-elemental-mercury.* This interim guidance document supersedes and rescinds the 2009 Long-Term Storage Guidance and the 2019 Short-Term Storage Guidance.

Signing Authority

This document of the Department of Energy was signed on September 14, 2023, by Kristin G. Ellis, Acting Associate Principal Deputy Assistant Secretary for Regulatory and Policy Affairs, Office of Environmental Management, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on September 15, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–20319 Filed 9–19–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology (PCAST)

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of closed meeting.

SUMMARY: This notice announces a closed meeting of the President's Council of Advisors on Science and Technology (PCAST). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, September 26, 2023; 1:30 p.m. PT.

ADDRESSES: San Francisco, CA

FOR FURTHER INFORMATION CONTACT: Dr. Reba Bandyopadhyay, Designated Federal Officer, PCAST, email: *PCAST@ostp.eop.gov;* telephone: (202) 881–7163.

SUPPLEMENTARY INFORMATION: PCAST is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from the White House, cabinet departments, and other Federal agencies. See the Executive Order at *www.whitehouse.gov.* PCAST is consulted on and provides analyses and recommendations concerning a wide range of issues where understanding of science, technology, and innovation may bear on the policy choices before the President. The Designated Federal Officer is Dr. Reba Bandyopadhyay. Information about PCAST can be found at: *www.whitehouse.gov/PCAST.*

Tentative Agenda

Closed portion of the meeting: PCAST may hold a closed meeting of approximately one hour with the President on September 26, 2023, which must take place at the scheduling convenience of the President and to maintain Secret Service protection. This meeting will be closed to the public because the meeting is likely to disclose matters that are to be kept secret in the interest of national defense or foreign policy under 5 U.S.C. 552b(c)(1).

This notice is being published less than 15 days prior to the meeting due to scheduling difficulties.

PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST website at: *www.whitehouse.gov/PCAST/meetings.*

Minutes: Minutes will be available within 45 days at: *www.whitehouse.gov/PCAST/meetings.*

Signed in Washington, DC, on September 15, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–20383 Filed 9–19–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2826–000]

Sparta Northstar Ltd.; 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 Sparta Northstar Ltd.'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 October 4, 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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–20366 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1858–000]

Beaver City Corporation; Notice of Authorization for Continued Project Operation

The license for the Beaver City Canyon Plant No. 2 Project No. 1858 was issued for a period ending July 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 1858 is issued to Beaver City Corporation for a period effective August 1, 2023, through July 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before July 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Beaver City Corporation is authorized to continue operation of the Beaver City Canyon Plant No. 2 Hydroelectric Project under the terms and conditions of the prior license until the issuance of a new license for the project or other disposition under the FPA, whichever comes first.

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20347 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2490–031]

Green Mountain Power Corporation; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 2490–031.

c. *Date filed:* August 30, 2022.

d. *Applicant:* Green Mountain Power Corporation (GMP).

e. *Name of Project:* Taftsville Hydroelectric Project (Taftsville Project).

f. *Location:* On the Ottauquechee River, in the Village of Taftsville, Windsor County, Vermont.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Jason Lisai, Green Mountain Power Corporation, 163 Acorn Lane, Colchester VT 05446–6611; (802) 730–2468; or *jason.lisai@greenmountainpower.com.*

i. *FERC Contact:* Monte TerHaar at (202) 502–6035; or email *monte.terhaar@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Taftsville Hydroelectric Project (P–2490–031).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted, but is not ready for environmental analysis.

The Council on Environmental Quality (CEQ) issued a final rule on April 20, 2022, revising the regulations under 40 CFR parts 1502, 1507, and 1508 that Federal agencies use to implement the National Environmental Policy Act (NEPA) (*see* National Environmental Policy Act Implementing Regulations Revisions, 87 FR 23453–70). The final rule became effective on May 20, 2022. Commission staff intends to conduct its NEPA review in accordance with CEQ's new regulations.

l. *Project Description:* The existing Taftsville Project consists of: (1) an existing 220-foot-long by 16-foot-high concrete gravity dam; (2) a 194-foot-long spillway section with a crest elevation of 637.12 feet National Geodetic Vertical Datum of 1929 (NGVD 29), topped with 18-inch wooden flashboards; (3) a 4,600-foot-long, 20.5-acre impoundment at normal water surface elevation 638.6 feet NGVD 29; (4) a powerhouse containing one 0.5-megawatt vertical Kaplan generating unit, with a minimum hydraulic capacity of 95 cubic feet per second (cfs) and maximum hydraulic capacity of 370 cfs; (5) a 200-foot-long tailrace section; (6) a 40-foot-long transmission line, connecting the powerhouse to the Distribution Substation; (7) the Distribution Substation and Transmission West Substation; and (8) appurtenant facilities. Approximately 290 feet of the Ottauquechee River, between Taftsville Dam and the tailrace channel, are bypassed during normal operations. The project generates 1,038 megawatt-hours annually.

GMP proposes no modifications to the existing project facilities. GMP proposes to: (1) continue to operate the project in run-of-river mode, where outflow approximates inflow; (2) provide a 15 cfs minimum flow to the bypassed reach via spillage over the crest of the spillway; (3) seasonally install wooden flashboards; and (4) maintain recreation facilities, as it has under the current license. GMP proposes the following modifications: (1) use no more than 10% of inflow to refill the impoundment after maintenance drawdowns; (2) consult with resource agencies prior to conducting maintenance and unplanned drawdowns and repair work; (3) restrict the removal of trees greater than or equal to 3 inches in diameter at breast height in the project boundary to the period of November 1 through March 31 for protection of the northern-long-eared bat; and (4) update the historic properties management plan to address and mitigate project effects on historic properties.

m. 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. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov,* or call (886) 208–3676 (toll free) or (202) 502–8659 (TTY).

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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.*

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received

on or before the specified comment date for the application.

All filings must: (1) bear in all capital letters the title ''PROTEST,'' ''MOTION TO INTERVENE,'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions, or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. *Procedural Schedule:* The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Request Additional Information	September 2023.
Additional Information responds due.	November 2023.
Issue Notice of Ready for Environmental Analysis.	November 2023.

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20359 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2825–000]

Northstar Trading Ltd.; 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 Northstar Trading Ltd.'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 October 4, 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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–20367 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2816–000]

Rocket 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 Rocket 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 October 4, 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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–20368 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3133–000]

Brookfield White Pine, LLC, Errol Hydroelectric Co., LLC; Notice of Authorization for Continued Project Operation

The license for the Errol Hydroelectric Project No. 3133 was issued for a period ending July 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 3133 is issued to Brookfield White Pine Hydro, LLC and Errol Hydroelectric Co., LLC for a period effective August 1, 2023, through July 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before July 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Brookfield White Pine Hydro, LLC and Errol Hydroelectric Co., LLC are authorized to continue operation of the Errol Hydroelectric Project under the terms and conditions of the prior license until the issuance of a new license for the project or other disposition under the FPA, whichever comes first.

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20357 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2639–028]

Northern States Power Company—Wisconsin; Notice of Waiver Period for Water Quality Certification Application

On September 11, 2023, Northern States Power Company—Wisconsin submitted to the Federal Energy Regulatory Commission (Commission) a copy of its application for a Clean Water Act section 401(a)(1) water quality certification filed with the Wisconsin Department of Natural Resources (Wisconsin DNR), in conjunction with the above captioned project. Pursuant to section 401 of the Clean Water Act [1] and section 4.34(b)(5) of the Commission's regulations,[2] a State certifying agency is deemed to have waived its certifying authority if it fails or refuses to act on a certification request within a reasonable period of time, which is one year after the date the certification request was received. Accordingly, we hereby notify Wisconsin DNR of the following:

Date of Receipt of the Certification Request: September 11, 2023.

Reasonable Period of Time to Act on the Certification Request: One year (September 11, 2024).

If Wisconsin DNR fails or refuses to act on the water quality certification request on or before the above date, then the agency certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20358 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

[1] 33 U.S.C. 1341(a)(1).

[2] 18 CFR 4.34(b)(5) (2022).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12532–008]

Pine Creek Mine, LLC; Notice of Effectiveness of Withdrawal of Application for Surrender

On December 16, 2022, the Pine Creek Mine, LLC, filed an application for surrender of the Pine Creek Mine Tunnel Hydroelectric Project No. 12532. On August 18, 2023, the Pine Creek Mine, LLC, filed a request to withdraw its surrender application.

No motion in opposition to the request for withdrawal has been filed, and the Commission has taken no action to disallow the withdrawal. Pursuant to Rule 216(b) of the Commission's Rules of Practice and Procedure,[1] the withdrawal of the application became effective on September 5, 2023,[2] and this proceeding is hereby terminated.[3]

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20353 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC23–130–000.

Applicants: Albany Green Energy, LLC, ReEnergy Livermore Falls LLC, ReEnergy Stratton LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Albany Green Energy, LLC, et al.

Filed Date: 9/13/23.

Accession Number: 20230913–5137.

Comment Date: 5 p.m. ET 10/4/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–2540–001.

Applicants: Energy Prepay II, LLC.

Description: Tariff Amendment: Amendment to 1 to be effective 8/2/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5054.

Comment Date: 5 p.m. ET 9/25/23.

Docket Numbers: ER23–2833–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7070; Queue No. AE1–207/AE2–172 to be effective 8/15/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5005.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2834–000.

Applicants: Jicarilla Solar 1 LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/14/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5008.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2835–000.

Applicants: Jicarilla Storage 1 LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/14/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5009.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2836–000.

Applicants: Basin Electric Power Cooperative, Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Basin Electric Power Cooperative submits tariff filing per 35.13(a)(2)(iii: Basin Electric Power Cooperative Formula Rate Revisions to be effective 1/1/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5011.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2837–000.

Applicants: Earp Solar, LLC.

Description: Baseline eTariff Filing: Earp Solar, LLC MBR Tariff to be effective 9/15/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5029.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2838–000.

Applicants: BCD 2023 Fund 1 Lessee, LLC.

Description: Baseline eTariff Filing: BCD 2023 Fund 1 Lessee, LLC MBR Tariff to be effective 9/15/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5030.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2839–000.

Applicants: Southwest Power Pool, Inc., ITC Great Plains, LLC.

Description: § 205(d) Rate Filing: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: ITC Great Plains, LLC Formula Rate Revisions to be effective 1/1/2024.

Filed Date: 9/14/23.

Accession Number: 20230914–5038.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2840–000.

Applicants: Arizona Public Service Company.

Description: § 205(d) Rate Filing: Rate Schedule No. 217, Exhibit B.NGA to be effective 11/15/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5048.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2841–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Postponing Implementation of Capacity Market Mitigation Rules Applicable to DERs to be effective 7/1/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5060.

Comment Date: 5 p.m. ET 10/5/23.

Docket Numbers: ER23–2842–000.

Applicants: Sunnyside Cogeneration Associates.

Description: Baseline eTariff Filing: Baseline new to be effective 9/15/2023.

Filed Date: 9/14/23.

Accession Number: 20230914–5069.

Comment Date: 5 p.m. ET 10/5/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES23–69–000.

Applicants: Georgia Power Company.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Georgia Power Company.

Filed Date: 9/13/23.

Accession Number: 20230913–5134.

Comment Date: 5 p.m. ET 10/4/23.

Docket Numbers: ES23–70–000.

Applicants: Mississippi Power Company.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Mississippi Power Company.

Filed Date: 9/13/23.

Accession Number: 20230913–5135.

Comment Date: 5 p.m. ET 10/4/23.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM23–7–000.

Applicants: Entergy Services, LLC, Entergy Mississippi, LLC, Entergy Louisiana, LLC, Entergy New Orleans,

[1] 18 CFR 385.216(b) (2022).

[2] The Commission's Rules of Practice and Procedure provide that if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is closed for business, the filing deadline does not end until the close of business on the next business day. 18 CFR 385.2007(a)(2) (2022). Because the 15-day deadline fell on a Saturday (*i.e.,* September 2, 2023), and Monday, September 4, 2023 was a holiday, the filing deadline was extended until the close of business on Tuesday, September 5, 2023.

[3] On April 4, 2023, Pine Creek Partnership filed a motion requesting stay of the license surrender proceeding, and on April 17, 2023, Pine Creek Mine, LLC filed a request for a show cause order and enforcement sanctions. Since the surrender proceeding is terminated, the requests are moot.

LLC, Entergy Arkansas, LLC, Entergy Texas, Inc.

Description: Application of Entergy Services, LLC to Terminate Its Mandatory Purchase Obligation under the Public Utility Regulatory Policies Act of 1978.

Filed Date: 9/13/23.

Accession Number: 20230913–5142.

Comment Date: 5 p.m. ET 10/11/23.

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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–20373 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3562–000]

KEI (Maine) Power Management (III), LLC; Notice of Authorization for Continued Project Operation

The license for the Barker Mill Upper Hydroelectric Project No. 3562 was issued for a period ending July 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 3562 is issued to KEI (Maine) Power Management (III), LLC for a period effective August 1, 2023, through July 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before July 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that KEI (Maine) Power Management (III), LLC is authorized to continue operation of Barker Mill Upper Hydroelectric Project under the terms and conditions of the prior license until the issuance of a new license for the project or other disposition under the FPA, whichever comes first.

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20354 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–538–000]

Texas Eastern Transmission, LP; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on September 7, 2023, Texas Eastern Transmission, LP (Texas Eastern), 915 N Eldridge Parkway, Suite 1100, Houston, Texas 77079–2703, filed in the above referenced docket, a prior notice request pursuant to sections 157.205 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), and Texas Eastern's blanket certificate issued in Docket No. CP82–535–000, for authorization to: (1) abandon in-place an approximately 1.75-mile-long, 20-inch-diameter portion of its Line 40–G supply lateral; and (2) abandon by removal its M&R Station 72138 and related piping, all located in offshore federal waters in the Gulf of Mexico near Louisiana (Line 40–G Partial Abandonment Project). Texas Eastern states that the project will allow Texas Eastern to eliminate the need for capital expenditures associated with the ongoing maintenance and repair of facilities that are no longer required for gas transportation service. Texas Eastern states that the project will have no impact on the certificated capacity of Texas Eastern's system, and no customer has a primary firm receipt point or primary firm delivery point on the segments to be abandoned. The estimated cost of removal related to the abandonment for the project is $4,200,000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact the Federal Energy Regulatory Commission at *FercOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY (202) 502–8659.

Any questions concerning this request should be directed to Brian Kim,

Manager, Rates and Certificates, Texas Eastern Transmission, LP, P.O. Box 1642, Houston, Texas 77251–1642 at (713) 627–4059, or by email at *Brian.Kim@enbridge.com*.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on November 13, 2023. How to file protests, motions to intervene, and comments is explained below.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov*.

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is November 13, 2023. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is November 13, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp*.

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before November 13, 2023. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP23–538–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; [6]

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP23–538–000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other method: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov*.

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: Brian Kim, Manager, Rates and Certificates, Texas Eastern Transmission, LP, P.O. Box 1642, Houston, Texas 77251–1642, or by email at *Brian.Kim@enbridge.com*. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20355 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3442–000]

The City of Nashua; Notice of Authorization for Continued Project Operation

The license for the Mine Falls Hydroelectric Project No. 3442 was issued for a period ending July 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 3442 is issued to The City of Nashua for a period effective August 1, 2023, through July 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before July 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that The City of Nashua is authorized to continue operation of Mine Falls Hydroelectric Project under the terms and conditions of the prior license until the issuance of a new license for the project or other disposition under the FPA, whichever comes first.

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20360 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15314–000]

County of Coconino, AZ; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On June 12, 2023, Western Navajo Pumped Storage 1, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the to be located near the City of Page in Coconino County, Arizona. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The project is proposed as a closed loop pumped storage hydroelectric-generating facility, which would involve the construction of new water storage, water conveyance, and generation facilities at off-channel locations where no such facilities exist at this time. The project would utilize water from Lake Powell to fill and periodically refill the project reservoirs. The lower reservoir would be located approximately 5,280 feet west from the proposed upper reservoir. A zoned rockfill embankment dike approximately 75 feet high and 8,200 feet long is proposed to be constructed to enclose the perimeter of the 110-acre lower reservoir with a water surface elevation of 4,125 feet mean sea level (msl). The upper reservoir would be located approximately 5,280 feet east from the proposed lower reservoir. A zoned rockfill embankment dike approximately 75 feet high and 8,000 feet long is proposed to be constructed to enclose the perimeter of the 110-acre upper reservoir with a water surface elevation of 4,625 feet msl. Both embankment ring dikes would have an impermeable clay core and an impermeable concrete liner.

During pumping operations, water would be drawn through the eight reversible Francis pump-turbine units into eight 12-foot-diameter steel pipes that would merge into a 34 foot-diameter penstock, which would convey water to the upper reservoir. During generation, operations would be reversed. The total installed generation capacity would be 396 megawatts with a hydraulic head of 500 feet.

The proposed project would also include a new 3-mile-long, 230-kilovolt overhead transmission line that would extend from a proposed substation near the proposed powerhouse to an interconnection point with the substation located at the former Navajo Generating Station. The 3-mile-long transmission route would follow an approximately 150-foot-wide corridor southwest towards the former coal plant substation. The proposed substation would include two 200-megavolt-ampere Generator Step-up Units, relays and controls, breakers, and switches as required by the existing substation owner/electric service provider.

Applicant Contact: Mr. Erik Steimle, Western Navajo Pumped Storage 1, LLC, 100 S Olive Street, West Palm Beach, FL 33401; *erik@ryedevelopment.com;* phone: (503) 998–0230.

FERC Contact: Everard Baker; email: *everard.baker@ferc.gov;* phone: (202) 502–8554.

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 filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.* Comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications should be submitted within 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Secretary Kimberly Bose, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–15314–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–15314) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20361 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2813–000]

Castle 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 Castle 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 October 4, 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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–20371 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2814–000]

Elektron 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 Elektron 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 October 4, 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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–20370 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6470–000]

Winooski Hydroelectric Company; Notice of Authorization for Continued Project Operation

The license for the Winooski 8 Hydroelectric Project No. 6470 was issued for a period ending July 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 6470 is issued to Winooski Hydroelectric Company for a period effective August 1, 2023, through July 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before July 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Winooski Hydroelectric Company is authorized to continue operation of Winooski 8 Hydroelectric Project under the terms and conditions of the prior license until the issuance of a new license for the project or other disposition under the FPA, whichever comes first.

Dated: September 14, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–20352 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2815–000]

Horseshoe 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 Horseshoe 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 October 4, 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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–20369 Filed 9–19–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0067; FRL–10578–08–OCSPP]

Pesticide Product Registration; Receipt of Applications for New Uses (August 2023)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before October 20, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0067, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Registration Division (RD) (7505T), main telephone number: (202) 566–2427, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Registration Applications

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

Notice of Receipt—New Uses

File Symbol: 524–AAL. *Docket ID number:* EPA–HQ–OPP–2023–0379. *Applicant:* Bayer CropScience LP, 700 Chesterfield Parkway West, Chesterfield, MO 63017. *Active ingredient:* GA20ox_SUP miRNA. *Product type:* Plant-incorporated Protectant. *Proposed use:* Plant Growth Regulator. *Contact:* OPP–BPPD–ETB.

EPA Registration Numbers: 100–739 and 100–1602. *Docket ID number:* EPA–HQ–OPP–2023–0395. *Applicant:* Syngenta Crop Protection, LLC, 410 S Swing Rd., Greensboro, NC 27409. *Active ingredient:* Difenoconazole. *Product type:* Fungicide. *Proposed use:* Tobacco. *Contact:* RD.

EPA Registration Numbers: 100–1609 and 100–1602. *Docket ID number:* EPA–HQ–OPP–2023–0394. *Applicant:* Syngenta Crop Protection, LLC, 410 S Swing Rd., Greensboro, NC 27409. *Active ingredient:* Pydiflumetofen. *Product type:* Fungicide. *Proposed use:* Tobacco. *Contact:* RD.

EPA Registration Number: 71512–11. *Docket ID number:* EPA–HQ–OPP–2023–0269. *Applicant:* ISK Biosciences Corporation, 7470 Auburn Road, Suite A, Concord, Ohio 44077. *Active ingredient:* Flazasulfuron. *Product type:* Herbicide. *Proposed use:* Avocado. *Contact:* RD.

EPA Registration Number: 71512–18. *Docket ID number:* EPA–HQ–OPP–2023–0269. *Applicant:* ISK Biosciences

Corporation, 7470 Auburn Road, Suite A, Concord, Ohio 44077. *Active ingredient:* Flazasulfuron. *Product type:* Herbicide. *Proposed use:* Avocado. *Contact:* RD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: September 14, 2023.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2023–20380 Filed 9–19–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL 11397–01–OA]

Farm, Ranch, and Rural Communities Advisory Committee (FRRCC); Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), notice is hereby given that the next meeting of the Farm, Ranch, and Rural Communities Advisory Committee (FRRCC) will be held virtually on September 28, 2023. Due to unforeseen administrative circumstances, EPA is announcing this meeting with less than 15 calendar days public notice. The FRRCC provides independent policy advice, information, and recommendations to the Administrator on a range of environmental issues and policies that are of importance to agriculture and rural communities.

DATES: This meeting will be held virtually Thursday, September 28, 2023, from approximately 10 a.m. to 4 p.m. ET. This meeting will take place virtually. To register and receive information on how to listen to the meeting and to provide comments, please visit: *www.epa.gov/faca/frrcc.* Attendees must register online to receive instructions for virtual attendance.

ADDRESSES: Virtual attendance will be via Zoom. The link to register for the meeting can be found on the FRRCC web page, *www.epa.gov/faca/frrcc.*

FOR FURTHER INFORMATION CONTACT: Venus Welch-White, Designated Federal Officer (DFO), at *FRRCC@epa.gov* or 202–566–2369. General information regarding the FRRCC can be found on the EPA website at: *www.epa.gov/faca/frrcc.*

SUPPLEMENTARY INFORMATION:

Meetings of the FRRCC are open to the public. An agenda will be posted at *www.epa.gov/faca/frrcc.*

Access and Accommodations: For information on access or services for individuals with disabilities, please visit: *www.epa.gov/faca/frrcc.*

Rodney Snyder,

Senior Advisor for Agriculture, U.S. EPA.

[FR Doc. 2023–20336 Filed 9–19–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than October 5, 2023.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org*:

1. *Laura Nell Lawless, Jonathan Lawless, Andrew J. Lawless, Jackson E. Lawless, and Robert R. Lawless, all of Bowling Green, Kentucky; Karan Annette Cowan Linkous Revocable Trust, Karan O'Sullivan, as trustee, John T. Linkous, and Laura E. Linkous, all of Edmonton, Kentucky; John Robert Cowen, Jacob Cowan, Luke Cowan, and Seth Cowan, all of Lexington, Kentucky;* as a family control group acting in concert, to retain voting shares of Edmonton Bancshares, Inc., Edmonton, Kentucky, and thereby indirectly retain voting shares of Edmonton State Bank, Glasgow, Kentucky.

In addition, the Kimberly P. Thompson Irrevocable Trust, John N. Thompson, as trustee, both of Brentwood, Tennessee; the Julie C. Thompson Irrevocable Trust, David W. Thompson, as trustee, both of Edmonton, Kentucky; to retain voting shares of Edmonton Bancshares, Inc., Edmonton, Kentucky, and thereby indirectly retain voting shares of Edmonton State Bank, Glasgow, Kentucky.

2. *Julie Ann Swope 2020 Trust and Julie Ann Swope Family Trust, Julie Ann Swope, as trustee, Patrick & Julie Swope Children's Trust No. 1, Robin Ann George, Patrick Holt Swope and Julie Ann Swope, as co-trustees, two Minor Children, Patrick Holt Swope, as custodian of each, Charles E. George 2020 Trust, Charles E. George, as trustee, Charles & Samantha George Children's Trust No. 1, Robin Ann George, Charles E. George and Samantha George, as co-trustees, Charles E. George Family Trust, Charles E. George, as trustee, all of Springdale, Arkansas; Evans Family Revocable Trust, David R. Evans and Cathy George Evans, as co-trustees, Siems Family Joint Revocable Living Trust, Linden E. Siems and Brandon Siems, as co-trustees, Two Minor Child Crummey Trusts, Linden E. Siems, as trustee, Cathy George Evans Children's Trust No. 2, David R. Evans and Cathy George Evans, as co-trustees, Martin Swope, all of Fayetteville, Arkansas; 2020 Gary C. George Children's Trust No. 2, Julie Ann Swope and Charles E. George, as co-trustees, all of Springdale, Arkansas, and Mary Kathryn Brown and Carl E. George, both of Fayetteville, Arkansas, also as co-trustees; Mary Kathryn Brown 2020 Trust, Springdale, Arkansas, Mary Kathryn Brown, as trustee, Fayetteville, Arkansas; Mary Kathryn and Matt Brown Children's Trust No. 1, Robin Ann George, as co-trustee, both of Springdale, Arkansas, and Matthew J. Brown and Mary Kathryn Brown, also as co-trustees, both of Fayetteville, Arkansas; Carl E. George 2020 Trust, Springdale, Arkansas, Carl E. George, as trustee, Fayetteville, Arkansas; Carl & Anna George Children's Trust No. 1, Robin Ann George, as co-trustee, both of Springdale, Arkansas, and Carl E. George and Anna George, also as co-trustees, both of Fayetteville, Arkansas; Mary Kathryn Brown Family Trust, Springdale, Arkansas, Mary Kathryn*

Brown, as trustee, Fayetteville, Arkansas; Carl E. George Family Trust, Springdale, Arkansas, Carl E. George, as trustee, Fayetteville, Arkansas; Loyd R. Swope and Carole C. Swope, both of Lincoln, Arkansas; Erin E. Bridges Revocable Trust, Erin E. Bridges, as trustee, both of Elkins, Arkansas; and two Minor Child Crummey Trusts, Fayetteville, Arkansas, Erin E. Bridges, as trustee, Elkins, Arkansas; as part of a family control group acting in concert, to retain voting shares of Legacy BancShares, Inc., and thereby indirectly retain voting shares of Legacy National Bank, both of Springdale, Arkansas.

3. *Gary C. George LNB Trust, Gary C. George, as trustee, Robin Ann George LNB Trust, Robin Ann George, as trustee, Julie Ann Swope LNB Trust, Julie Ann Swope, as trustee, Charles E. George LNB Trust, Charles E. George, as trustee, all of Springdale, Arkansas; Mary Kathryn Brown LNB Trust, Mary Kathryn Brown, as trustee, both of Fayetteville, Arkansas; Carl E. George LNB Trust, Springdale, Arkansas, Carl E. George, as trustee, Fayetteville, Arkansas;,* as part of a family control group acting in concert, to acquire voting shares of Legacy BancShares, Inc., and thereby indirectly acquire voting shares of Legacy National Bank, both of Springdale, Arkansas.

4. *Patrick Holt Swope Revocable Trust, Patrick Holt Swope, as trustee, and Samantha Pacaccio George Revocable Trust, Samantha Pacaccio George, as trustee, all of Springdale, Arkansas; Matthew J. Brown Revocable Trust, Matthew J. Brown, as trustee, and Anna Roblee George Revocable Trust, Anna Roblee George, as trustee, all of Fayetteville, Arkansas;* as part of a family control group acting in concert, to acquire additional voting shares of Legacy BancShares, Inc., and thereby indirectly acquire voting shares of Legacy National Bank, both of Springdale, Arkansas.

Board of Governors of the Federal Reserve System.

Erin Cayce,

Assistant Secretary of the Board.

[FR Doc. 2023–20389 Filed 9–19–23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0290; Docket No. 2023–0001; Sequence No. 4]

Information Collection; System for Award Management Registration Requirements for Financial Assistance Recipients

AGENCY: Office of Systems Management, General Services Administration (GSA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995, the Regulatory Secretariat Division invites the public to comment on an extension to an existing information collection requirement regarding the pre-award registration requirements for Prime Financial Assistance Recipients.

DATES: Submit comments on or before November 20, 2023.

ADDRESSES: Submit comments identified by Information Collection ''3090–0290, System for Award Management Registration Requirements for Financial Assistance Recipients'' via *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching OMB control number 3090–0290. Select the link ''Comment Now'' that corresponds with Information Collection ''3090–0290, System for Award Management Registration Requirements for Financial Assistance Recipients''. Follow the instructions provided on the screen. Please include your name, company name (if any), and Information Collection ''3090–0290, System for Award Management Registration Requirements for Financial Assistance Recipients'' on your attached document.

Instructions: Please submit comments only and cite Information Collection ''3090–0290, System for Award Management Registration Requirements for Financial Assistance Recipients'', in all correspondence related to this collection. Comments received generally will be posted without change to *regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *regulations.gov,* approximately three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Salomeh Ghorbani, Director, IAE Outreach and Stakeholder Engagement Division, at telephone number 703–605–3467 or *IAE_Admin@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

This information collection requires applicants and recipients of Federal financial assistance, unless the applicant is an individual or Federal awarding agency that is excepted from those requirements, to register in SAM and maintain an active SAM registration with current information at all times during which they have an active Federal award or an application or plan under consideration by an agency pursuant to 2 CFR subtitle A, chapter I, and part 25 (75 FR 55673 as amended at 79 FR 75879). This facilitates prime awardee reporting of sub-award and executive compensation data pursuant to the Federal Funding Accountability and Transparency Act (Pub. L. 109–282, as amended by section 6202(a) of Pub. L. 110–252). This information collection requires that all prime financial assistance awardees, subject to reporting under the Transparency Act, register and maintain their registration in *SAM.gov.*

This information collection was amended to meet a statutory requirement of the National Defense Authorization Act (NDAA) of FY 2013. The NDAA of 2013 requires that the Federal Awardee Performance and Integrity Information System (FAPIIS) (currently located at SAM.gov) include information on a non-Federal entity's parent, subsidiary, or successor entities. Additionally, the information collection was amended to increase transparency regarding Federal spending and to support implementation of the Digital Accountability and Transparency Act of 2014 (DATA ACT).

OMB expanded the requirement to register in SAM beyond grants, cooperative agreements, and contracts, to entities that receive financial assistance such as loans, insurance, and direct appropriations. This information collection requirement (published in the **Federal Register** at 85 FR 49506 on August 13, 2020) is included in OMB's revision to guidance in 2 CFR subtitle A, chapter I, and parts 25, 170, and 200, effective June 12, 2023.

B. Annual Reporting Burden

Respondents: 211,959.
Responses per Respondent: 1.
Total annual responses: 211,959.
Hours per Response: 2.5.
Total Burden Hours: 529,898.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this

collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB) at *GSARegSec@gsa.gov.* Please cite OMB Control No. 3090–0290, System for Award Management Registration Requirements for Financial Assistance Recipients, in all correspondence.

Lesley Briante,

Acting Deputy Chief Information Officer.

[FR Doc. 2023–20386 Filed 9–19–23; 8:45 am]

BILLING CODE 6820–WY–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0118; Docket No. 2023–0001; Sequence No. 3]

Information Collection; Federal Management Regulation; Statement of Witness; Standard Form 94

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division invites members of the public to comment on an extension to an existing information collection requirement regarding OMB Control No. 3090–0118, Statement of Witness, Standard Form 94.

DATES: Submit comments on or before November 20, 2023.

ADDRESSES: Submit comments identified by Information Collection 3090–0118 via *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''Information Collection 3090–0118, Statement of Witness, Standard Form 94''. Select the link that corresponds with ''Information Collection 3090–0118, Statement of Witness, Standard Form 94''. Follow the instructions provided on the screen. Please cite OMB Control No. 3090–0118, Statement of Witness, Standard Form 94'' on your attached document.

Instructions: All items submitted must cite OMB control No. 3090–0118, Statement of Witness, Standard Form 94. All comments received will be posted without change to *regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *regulations.gov,* approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Ray Wynter, GSA, OGP, Office of Asset and Transportation Management, at telephone 202–501–3802 or via email to *ray.wynter@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

GSA's Office of Government-wide Policy is announcing the availability of Standard Form 94, Statement of Witness that is publicly available on *http://www.gsa.gov/forms.* This form will be used to collect information from witnesses reporting accidents and/or damage to Federal Fleet Vehicles. Standard Form (SF) 94 provides additional accounts of motor vehicle accidents that supplement statements made by a motor vehicle operator. Use of the SF 94 is prescribed in Federal Management Regulation, 41 CFR 102–34.290(b) and Federal Property Management Regulations, 41 CFR 101–39.401(b). The SF 94 is usually completed at the time of an accident involving a motor vehicle owned or leased by the Government.

The SF 94 is an essential part of the investigation of motor vehicle accidents, especially those involving the public with a potential for claims against the United States. It is a vital piece of information in lawsuits and provides the Assistant United States Attorneys with a written statement to refresh recollection of accidents, as necessary.

B. Annual Reporting Burden

Respondents: 290.
Responses per Respondent: 1.
Total Annual Responses: 290.
Hours per Response: 0.333.
Total Burden Hours: 97.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

OBTAINING COPIES OF PROPOSALS: Requesters may obtain a copy of the information collection documents from the Regulatory Secretariat Division, at *GSARegSec@gsa.gov.* Please cite OMB Control No. 3090–0118, Statement of Witness, Standard Form 94, in all correspondence.

Lesley Briante,

Acting Deputy Chief Information Officer.

[FR Doc. 2023–20384 Filed 9–19–23; 8:45 am]

BILLING CODE 6820–14–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–XXXX; Docket No. 2023–0001; Sequence No. 2]

Submission for OMB Review; Living Quarters Eligibility Questionnaire; GSA Form 5039

AGENCY: Office of Human Resource Management, Division of Human Capital Policy and Programs, General Services Administration (GSA).

ACTION: Notice of request for comments regarding a request for a new OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement.

DATES: Submit comments on or before October 20, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments''; or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colin C. Bennett, Human Resources Specialist, Office of Human Resources Management, Division of Human Capital Policy and Programs, at telephone 240–418–6822 or via email to *colin.bennett@gsa.gov* for clarification of content.

SUPPLEMENTARY INFORMATION:

A. Purpose

The General Services Administration routinely hires, reassigns, promotes, or

transfers Federal employees to duty stations in foreign areas (*i.e.,* outside of the United States and its territories and possessions). Civilian employees located in foreign areas are eligible for different compensation authorities compared to employees located in the United States or its territories or possessions. Besides basic pay, certain foreign allowances are often used as recruitment or retention incentives to make foreign service more economically feasible. One type of allowance is called a ''living quarters allowance,'' or ''LQA,'' and allows an agency to reimburse the cost of rental housing as well as utilities (such as electricity, natural gas, and water service). Under this authority (conveyed by the Overseas Differentials and Allowances Act of 1960, Pub. L. 86–707, Sept. 6, 1960, codified at 5 U.S.C. 5923(a)(2)), not all job candidates or overseas employees are necessarily eligible (for example, if Government-provided housing is made available). In addition, for those job candidates eligible, the amount of the benefit varies by rank (*i.e.,* GS grade), presence overseas with or without family, and overall family size. Detailed rules concerning eligibility and other matters are found in the State Department's *Department of State Standardized Regulations,* sections 031.12 and chapter 130.

To more effectively administer LQA, the General Services Administration (GSA) has created a new agency form, GSA Form 5039, *Living Quarters Allowance Eligibility Questionnaire.* This form collects basic demographic and housing-related information and also includes questions meant to coordinate housing benefits between the U.S. military and other Federal agencies (for example, if two spouses work for different Federal agencies). Individuals who complete this pre-employment questionnaire are considered job candidates and may be members of the public (if not already Federal civilian employees). The purpose of the data collection from job candidates is to ensure that eligible applicants receive allowance consideration, in the correct amounts based on the position and family size, and ineligible candidates are not erroneously provided with this significant monetary benefit.

B. Annual Reporting Burden

Respondents: 25 per year.

Responses per Respondent: 1.

Total Annual Responses: 25.

Hours per Response: 1.

Total Burden Hours: 25.

C. Public Comments

A notice published in the **Federal Register** at 88 FR 16447 on March 17, 2023. No comments were received.

Obtaining Copies of Proposals: While the proposed GSA Form 5039 is not included within this article's publication, a copy of the form can be obtained through the Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 3090–XXXX, Living Quarters Allowance Eligibility Questionnaire; GSA Form 5039, in all correspondence.

Lesley Briante,

Acting Deputy Chief Information Officer.

[FR Doc. 2023–20387 Filed 9–19–23; 8:45 am]

BILLING CODE 6820–FM–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2023–0075]

National One Health Framework To Address Zoonotic Diseases and Advance Public Health Preparedness in the United States: A Framework for One Health Coordination and Collaboration Across Federal Agencies

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), in the Department of Health and Human Services (HHS), announces the opening of a docket to obtain comment on the draft *National One Health Framework to Address Zoonotic Diseases and Advance Public Health Preparedness in the United States: A Framework for One Health Coordination and Collaboration across Federal Agencies* (NOHF-Zoonoses). As directed by Congress through the House Appropriations Committee report accompanying the 2021 omnibus appropriations bill and the 2023 Consolidated Appropriations Act, CDC has partnered with the U.S. Department of the Interior (DOI), the U.S. Department of Agriculture (USDA), and other departments and agencies to develop this One Health framework to address zoonotic diseases and advance public health preparedness. This framework will facilitate One Health collaboration for zoonotic disease prevention and control across the United States Government for the next five years. It describes a common vision, mission, and goals for key federal partners involved in implementing a One Health approach to address zoonotic diseases and advance public health preparedness in the United States.

DATES: Written comments must be received on or before November 6, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0075 by either of the methods listed below. Do not submit comments by email. CDC does not accept comments by email.

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* RE: NOHF-Zoonoses Public Comments, 1600 Clifton Road NE, Mailstop H16–5, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name (Centers for Disease Control and Prevention) and Docket Number. All relevant comments received will be posted without change to *http://regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Natalie Wendling or Dominic Cristiano, One Health Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H16–5, Atlanta, Georgia 30329. Telephone: 404–639–8950. Email: *onehealth@cdc.gov*.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. CDC and our federal partners invite input from interested parties throughout public health, agriculture, wildlife, environment, and other relevant sectors including authorities at the state, tribal, local, and territorial levels, non-governmental organizations, academic institutions, private sector, the public, and others on the proposed One Health framework to address zoonotic diseases and advance public health preparedness. This input is a valuable component in finalizing the framework, and the community's time and consideration are appreciated.

CDC and our federal partners invite public comments to inform revisions to the proposed framework and follow-up activities. Commenters are encouraged to answer the following questions:

- Are there any new or proposed objectives that should be prioritized?
- What attributes and characteristics of the proposed framework will most likely lead to success?

- Are there any specific barriers or gaps to achieving success?
- Are there any critical steps or milestones necessary to successfully implement the proposed framework?
- How do state, tribal, local, and territorial partners, non-governmental organizations, academic institutions, private sector partners, and other partners want to engage with federal collaborators to advance implementation of this framework?
- What additional One Health issues should be prioritized in the future?
- What information or recommendations are needed to ensure the guiding principles of health equity, sustainability, stewardship, and a multisectoral approach are adequately addressed in the framework? How can these guiding principles be elevated during follow-up development and drafting of implementation plans?

Organizations should submit a single response reflective of the views of the organization/membership when possible. Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on *https://www.regulations.gov*. Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information, such as Social Security numbers, medical information, inappropriate language or images, or duplicate/near duplicate examples of a mass-mail campaign.

Background

Previous multisectoral work has identified a need for a national One Health framework to address zoonotic diseases and advance public heath preparedness in the United States. In 2017, CDC, DOI, and USDA organized a One Health Zoonotic Disease Prioritization (OHZDP) workshop for the United States. Participants included 30 government officials from federal and state agencies who work to address zoonotic diseases in the public health, animal health, and environment sectors. The workshop used a One Health approach to identify and prioritize endemic and emerging zoonotic diseases of greatest national concern for the United States that should be jointly addressed by federal zoonotic disease programs. Participants also developed plans for implementing and strengthening One Health approaches to address these diseases in the United States. The development of the NOHF-Zoonoses responds to one of the recommendations from the OHZDP workshop. In addition, Congress directed CDC, in partnership with other departments and agencies, to develop a One Health framework to address zoonotic diseases and advance public health preparedness in both the House Appropriations Committee report accompanying the 2021 omnibus appropriations bill [1] and the 2023 Consolidated Appropriations Act.[2]

The draft NOHF-Zoonoses, found in the Supporting Materials tab of the docket, is focused on coordinated federal activities in the United States and describes a common vision, mission, and goals for key federal partners involved in implementing a One Health approach to address zoonotic diseases. Successful federal One Health collaboration is contingent on continued strong partnerships and coordination with public health, agriculture, wildlife, plant, environment, and other relevant authorities at state, tribal, local, and territorial levels. One Health partnerships to address zoonotic diseases cross federal, state, tribal, local, and territorial government jurisdictions and involve non-governmental, academic, and private sector partners. All relevant sectors are encouraged to collaborate for effective and consistent One Health outcomes.

Although this framework focuses primarily on zoonotic diseases and does not address other issues of One Health importance, the resulting partnerships, systems, and lessons will inform future One Health work and strengthen the nation's ability to address other threats and promote health, safety, security, and resilience at the human-animal-plant-environment interface.

Additional background information can be found on the following websites.

- Federal One Health Coordination: *https://www.cdc.gov/onehealth/what-we-do/federal-coordination.html*.
- United States Joint External Evaluation: *https://www.who.int/publications/i/item/WHO-WHE-CPI-2017.13*.
- United States One Health Zoonotic Disease Prioritization Report: *https://www.cdc.gov/onehealth/pdfs/us-ohzdp-report-508.pdf*.

CDC, USDA, and DOI will be offering three webinars to answer questions concerning the draft NOHF-Zoonoses. The time, date, and links to these webinars will be provided in a separate **Federal Register** notice.

Dated: September 15, 2023.

Tiffany Brown,

Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2023–20338 Filed 9–19–23; 8:45 am]

BILLING CODE 4163–18–P

[1] H. Rept. 116–450—Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Bill, 2021, H. Rept.116–450, 116th Cong. (2023), Title II—Department of Health and Human Services: pages 67–68 *https://www.congress.gov/congressional-report/116th-congress/house-report/450*.

[2] H.R. 2617, Public Law 117–328, ''Consolidated Appropriations Act, 2023,'' Division FF—Health and Human Services, Title II—Preparing for and Responding to Existing Viruses, Emerging New Threats, and Pandemics, Sec. 2235, pages 1297–1298 (Dec. 29, 2022), *https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf*.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0438]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before October 20, 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: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 795–7714. When submitting comments or requesting information, please include the document identifier 0990–0438–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the

following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection

Type of Collection: Reinstatement without change.

OMB No.: 0990–0438.

Abstract: The Office of Population Affairs (OPA), in the Office of the Assistant Secretary for Health (OASH), U.S. Department of Health and Human Services (HHS), requests clearance for the collection of performance measures specifically for FY2020 Teen Pregnancy Prevention (TPP) Program grantees. Collection of performance measures is a requirement of all TPP awards and is included in the NOFOs. The data collection will allow OPA to comply with federal accountability and performance requirements, inform stakeholders of grantee progress in meeting TPP program goals, provide OPA with metrics for monitoring TPP grantees, and facilitate individual grantees' continuous quality improvement efforts within their projects. OPA requests clearance for one year to cover reporting during the no-cost extension period of the awards.

ESTIMATED ANNUALIZED BURDEN TABLE

Form	Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Partners and sustainability	All TPP grantees	90	2	15/60	45
Training	All TPP Grantees	90	2	15/60	45
Dissemination	All TPP Grantees	90	2	30/60	90
Stakeholder Engagement	All TPP Grantees	90	2	15/60	45
Reach and Demographics	Tier 1 and Tier 2 Phase II Grantees	64	2	3	384
Dosage	Tier 1 and Tier 2 Phase II Grantees	64	2	2	256
Fidelity and Quality	Tier 1 and Tier 2 Phase II Grantees	64	2	2	256
Tier 2 Innovation Network	Tier 2 Innovation Network Grantees	14	2	15/60	7
Supportive Services (Tier 1)	Tier 1 Grantees	54	2	15/60	27
Total			2		1155

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2023–20290 Filed 9–19–23; 8:45 am]

BILLING CODE 4150–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request for Public Comment: 30-Day Information Collection: Indian Health Service Forms To Implement the Privacy Rule

AGENCY: Indian Health Service, HHS.

ACTION: Notice and request for comments; request for extension of approval.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Indian Health Service (IHS) invites the general public to comment on the information collection titled, ''IHS Forms to Implement the Privacy Rule'' Office of Management and Budget (OMB) Control Number 0917–0030. This notice announces the IHS intent to submit the collection, which expires September 30, 2023, to OMB for approval of an extension with modifications, and to solicit comments on specific aspects of the information collection.

DATES: *Comment Due Date:* October 20, 2023. Your comments regarding this information collection are best assured of having full effect if received within 30 days of the date of this publication.

ADDRESSES: Send your comments and suggestions regarding the proposed information collection contained in this notice, especially regarding the estimated public burden and associated response time to: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for IHS.

FOR FURTHER INFORMATION CONTACT: To request additional information, please contact Evonne Bennett, Information Collection Clearance Officer, by email: *Evonne.Bennett@ihs.gov* or (240) 472–1996.

SUPPLEMENTARY INFORMATION: The IHS published a notice on this previously approved information collection in the **Federal Register** (88 FR 42726) on July 3, 2023, and allowed 60 days for public comment. No public comment was received in response to the notice. The purpose of this notice is to allow 30 days for public comment to be submitted to OMB. A copy of the supporting statement is available at *www.regulations.gov* (see Docket ID IHS_FRDOC_0001).

Title of Collection: 0917–0030, IHS Forms to Implement the Privacy Rule (45 CFR parts 160 & 164). *Type of Information Collection Request:* Extension of the currently approved information collection, with modifications 0917–0030, IHS Forms to Implement the Privacy Rule (45 CFR parts 160 & 164). *Form(s):* IHS–810, IHS–912–1, IHS–912–2, IHS–913, IHS–917, IHS–982, and IHS–963. *Need and Use of Information Collection:* This collection of information is made necessary by the Department of Health and Human Services Rule entitled ''Standards for Privacy of Individually Identifiable Health Information'' (Privacy Rule) (45 CFR parts 160 and 164). The Privacy Rule implements the privacy requirements of the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, creates national standards to protect an individual's personal health information, and gives patients increased access to their medical records. 45 CFR 164.508, 164.520, 164.522, 164.526 and 164.528 of the Rule require the collection of information to implement these protection standards and access requirements. The IHS will use the

following data collection instruments to meet the information collection requirements contained in the Rule.

(a) 45 CFR 164.508—Authorization for Use or Disclosure of Protected Health Information (IHS–810)

45 CFR 164.508 requires covered entities to obtain or receive a valid authorization for its use or disclosure of protected health information for purposes that are not otherwise authorized or required by HIPAA (*e.g.,* treatment, payment and healthcare operations). Under this provision, individuals may initiate a written authorization permitting covered entities to release their protected health information to entities of their choosing. The form IHS–810 ''Authorization for Use or Disclosure of Protected Health Information'' is used by patients at IHS facilities to document and authorize the use, disclosure or release of their protected health information from their medical record to anyone they specify.

(b) 45 CFR 164.522(a)(1)—Request For Restriction(s) (IHS–912–1)

Under the Privacy Rule, an individual can request to restrict the use of their information with some exceptions. Section 164.522(a)(1) requires a covered entity to permit individuals to request that the covered entity restrict certain uses and disclosures of their protected health information. The covered entity may or may not agree to the restriction, and it is only required to agree in certain limited situations. The form IHS–912–1 ''Request for Restrictions(s)'' is used to document an individual's request for restriction of their protected health information and whether IHS agreed or disagreed with the requested restriction.

(c) 45 CFR 164.522(a)(2)—Request For Revocation of Restriction(s) (IHS–912–2)

Section 164.522(a)(2) permits a covered entity to terminate its agreement to a restriction when the individual agrees to or requests the termination in writing. The form IHS–912–2 ''Request for Revocation of Restriction(s)'' is used to document the agency or individual request to terminate a formerly agreed to restriction regarding the use and disclosure of protected health information. A previous request to restrict information may be revoked by the individual or IHS, subject to the limitations set forth in 164.522(a)(2).

(d) 45 CFR 164.528 and HHS Privacy Act Regulations, 45 CFR 5b.9(c)—Request for an Accounting of Disclosures (IHS–913)

These provisions require the IHS, as a covered entity and an agency within HHS, to permit individuals to request that the IHS provide an accounting of disclosures of the individual's protected health information and/or record. The form IHS–913 ''Request for an Accounting of Disclosures'' is used for the collection of information for the purpose of processing an accounting of disclosures requested by the patient and/or personal representative, and to document that request.

(e) 45 CFR 164.526—Request for Correction/Amendment of Protected Health Information (IHS–917)

This provision requires covered entities to permit an individual to request that the covered entity amend protected health information. If the covered entity accepts the requested amendment, in whole or in part, the covered entity must inform the individual that the request for an amendment is accepted. If the covered entity denies the requested amendment, in whole or in part, the covered entity must provide the individual with a written denial. The IHS developed the form (IHS–917) to permit individuals to submit their request and to document IHS's acceptance or denial of a patient's request to correct or amend their protected health information.

(f) 45 CFR 164.520—Acknowledgement of Receipt of the IHS Notice of Privacy Practices (IHS–982)

This provision requires covered entities to provide a Notice of Privacy Practices to patients and to document compliance with the notice requirements by retaining copies of written acknowledgments of the receipt of the notice or documentation of good faith efforts to obtain written acknowledgment. The IHS developed the form (IHS–982) to obtain the written acknowledgment of the receipt of the IHS Notice of Privacy Practices.

(g) 45 CFR 164.522—Request for Confidential Communication by Alternative Means or Alternate Location (IHS–963)

This provision requires covered entities to permit individuals to request and must accommodate reasonable requests by individuals to receive communications of protected health information from the covered health care provider by alternative means or at alterative locations. The IHS developed the form (IHS–963) to permit individuals to request communications by alternative means or locations.

Completed forms used in this collection of information are filed in the IHS ''Medical, Health and Billing Records,'' a Privacy Act System of Records. *Affected Public:* Individuals and households. *Type of Respondents:* Individuals. *Burden Hours:* The table below provides the following details for this information collection: types of data collection instruments, estimated number of respondents, number of responses per respondent, average burden hour per response.

TABLE—ESTIMATED ANNUAL BURDEN HOURS

Data collection instruments	Estimated number of respondents	Responses per respondent	Average burden hour per response *	Total annual burden hours
''Authorization for Use or Disclosure of Protected Health Information'' (OMB No. 0917–0030, IHS–810)	210,954	1	10/60	35,159
''Request for Restriction(s)'' (OMB No. 0917–0030, IHS–912–1)	214	1	10/60	36
''Request for Revocation of Restriction(s)'' (OMB No. 0917–0030, IHS–912–2)	3	1	10/60	.5
''Request for Accounting of Disclosures'' (OMB No. 0917–0030, IHS–913)	39	1	10/60	6.5
''Request for Correction/Amendment of Protected Health Information'' (OMB No. 0917–0030, IHS–917)	54	1	10/60	9
Acknowledgement of Receipt of the Notice of Privacy Practices Protected Health Information (IHS–982)	39	1	10/60	6.5

TABLE—ESTIMATED ANNUAL BURDEN HOURS—Continued

Data collection instruments	Estimated number of respondents	Responses per respondent	Average burden hour per response *	Total annual burden hours
"Request for Confidential Communication by Alternative Means or Alternate Location" No. 0917–0030 (IHS–963)	214	1	10/60	36
Total Annual Burden	211,303			35,253.5

* For ease of understanding, burden hours are provided in actual minutes.

The total estimated burden for this collection of information is 35,253.5 hours.

There are no capital costs, operating costs and/or maintenance costs to respondents to report.

Requests for Comments: Your written comments and/or suggestions are invited on one or more of the following points:

(a) Whether the information collection activity is necessary to carry out an agency function;

(b) Whether the agency processes the information collected in a useful and timely fashion;

(c) The accuracy of the public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information);

(d) Whether the methodology and assumptions used to determine the estimates are logical;

(e) Ways to enhance the quality, utility, and clarity of the information being collected; and

(f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Roselyn Tso,

Director, Health Service.

[FR Doc. 2023–20329 Filed 9–19–23; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: October 24, 2023.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G13, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Mairi Noverr, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G13, Rockville, MD 20852, (240) 747–7530, *mairi.noverr@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 14, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20326 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders C Study Section Translational Neural, Brain, and Pain Relief Devices (NSD–C).

Date: October 17–18, 2023.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, 940 Rose Avenue, North Bethesda, MD 20852.

Contact Person: Ana Olariu, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Rockville, MD 20852, 301–496–9223, *ana.olariu@nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders B Study Section.

Date: October 19–20, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Intercontinental San Francisco, 888 Howard Street, San Francisco, CA 94103.

Contact Person: Joel A. Saydoff, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Rockville, MD 20852, 301–496–9223, *joel.saydoff@nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; BRAIN Initiative: Research Resource Grants for Technology Integration and Dissemination (U24 Clinical Trial Not Allowed).

Date: October 26, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Bo-Shiun Chen, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Rockville, MD 20852, 301–496–9223, *bo-shiun.chen@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS.)

Dated: September 14, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20327 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Clinical Trial Implementation Cooperative Agreement (U01 Clinical Trial Required).

Date: October 18, 2023.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Lindsey M. Pujanandez, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52, Rockville, MD 20852, (240) 627–3206, *lindsey.pujanandez@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 14, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20320 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Career Transition Awards in pain and substances abuse disorders for the HEAL project.

Date: October 17, 2023.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Courtney Elaine Watkins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–3093, *courtney.watkins2@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Biomedical Imaging and Metabolism Instrumentation S10 Grant Programs.

Date: October 17–18, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michael L. Bloom, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7804, Bethesda, MD 20892, 301–451–0132, *bloomm2@mail.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neurobiology of Pain and Itch Study Section.

Date: October 18–19, 2023.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Anne-Sophie Marie Lucie Wattiez, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–4642, *anne-sophie.wattiez@nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiology of Eye Disease—2 Study Section.

Date: October 18–19, 2023.

Time: 8:00 a.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, 10 Thomas Circle NW, Washington, DC 20005.

Contact Person: Cibu Paul Thomas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1011–H, Bethesda, MD 20894, (301) 402–4341, *thomascp@mail.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Pathobiology of Kidney Disease Study Section.

Date: October 18–19, 2023.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: North Bethesda Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Atul Sahai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, MSC 7818, Bethesda, MD 20892, 301–435–1198, *sahaia@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Aging Systems and Geriatrics Study Section.

Date: October 18–19, 2023.

Time: 8:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn Washington DC/Georgetown, 2201 M. Street NW, Washington, DC 20037.

Contact Person: Roger Alan Bannister, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1010–D, Bethesda, MD 20892, (301) 435–1042, *bannisterra@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Healthcare and Health Disparities Study Section.

Date: October 18–19, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Tara Roshell Earl, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1007C, Bethesda, MD 20892, (301) 402–6857, *earltr@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Academic-Industrial Partnerships for Translation of Technologies.

Date: October 18–19, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jennifer Ann Sanders, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–3553, *jennifer.sanders@nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Integrative Myocardial Physiology/Pathophysiology B Study Section.

Date: October 18–19, 2023.

Time: 10:00 a.m. to 8:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kirk E. Dineley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 806E, Bethesda, MD 20892, (301) 867–5309, *dineleyke@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 14, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20298 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: October 19, 2023.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G76, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Marci Scidmore, Ph.D., Scientific Review Officer, Scientific Review Program, Natl. Institute of Allergy & Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G76, Bethesda, MD 20892, (240) 627–3255, *marci.scidmore@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 14, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20328 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, NIDA.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(6), title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute on Drug Abuse, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIDA.

Date: October 24, 2023.

Time: 8:30 a.m. to 5:40 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institute on Drug Abuse, NIH, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Date: October 25, 2023.

Time: 9:00 a.m. to 3:10 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institute on Drug Abuse, NIH, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Contact Person: Megan E. Bollinger, Ph.D., Management Analyst, Office of the Scientific Director, National Institute on Drug Abuse, Biomedical Research Center, 251 Bayview Boulevard, Suite 200, Baltimore, MD 21224, (443) 740–2466, *megan.bollinger@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: September 14, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20323 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: October 18, 2023.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G13A, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Mairi Noverr, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G13A, Rockville, MD 20852, (240) 747–7530, *mairi.noverr@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 13, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20321 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Vascular and Hematology Integrated Review Group; Basic Biology of Blood, Heart and Vasculature Study Section.

Date: October 12–13, 2023.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Aisha Lanette Walker, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–3527, *aisha.walker@nih.gov*.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Chronic Dysfunction and Integrative Neurodegeneration Study Section.

Date: October 17–18, 2023.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: William F. Bolger Center, 9600 Newbridge Dr., Potomac, MD 20854.

Contact Person: Bernard Rajeev Srambical Wilfred, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1042, *bernard.srambicalwilfred@nih.gov*.

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Biobehavioral Regulation, Learning and Ethology Study Section.

Date: October 17–18, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave. NW, Washington, DC 20037.

Contact Person: Sara Louise Hargrave, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3170, Bethesda, MD 20892, (301) 443–7193, *hargravesl@mail.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Prokaryotic Cell and Molecular Biology Study Section.

Date: October 17–18, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: AC Hotel by Marriott Bethesda, 4646 Montgomery Avenue, Bethesda, MD 20814.

Contact Person: Rebecca Catherine Burgess, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480–8034, *rebecca.burgess@nih.gov*.

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Maximizing Investigators' Research Award—E Study Section.

Date: October 17–18, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Vandana Kumari, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–3290, *vandana.kumari@nih.gov*.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurodifferentiation, Plasticity, Regeneration and Rhythmicity Study Section.

Date: October 17–18, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, 940 Rose Avenue, North Bethesda, MD 20852.

Contact Person: Jacek Topczewski, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1002A1, Bethesda, MD 20892, (301) 594–7574, *topczewskij2@csr.nih.gov*.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Drug and Biologic Therapeutic Delivery Study Section.

Date: October 17–18, 2023.

Time: 9:00 a.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Janice Duy, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–594–3139, *janice.duy@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Advancing Therapeutics.

Date: October 17–18, 2023.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lystranne Alysia Maynard Smith, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–402–4809, *lystranne.maynard-smith@nih.gov*.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Cellular Immunotherapy of Cancer Study Section.

Date: October 17–18, 2023.

Time: 9:30 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shahana Majid, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 867–5309, *shahana.majid@nih.gov*.

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Arthritis, Connective Tissue and Skin Study Section.

Date: October 17–18, 2023.

Time: 9:30 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Robert Gersch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, (301) 867–5309, *robert.gersch@nih.gov*.

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; Bacterial Virulence Study Section.

Date: October 17–18, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Susan Daum, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3202, Bethesda, MD 20892, 301–827–7233, *susan.boyle-vavra@nih.gov*.

Name of Committee: Cell Biology Integrated Review Group; Biology and Development of the Eye Study Section.

Date: October 17–18, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Dr., Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Robert O'Hagan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (240) 909–6378, *ohaganr2@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; BRAIN Initiative: Targeted BRAIN Circuits Projects.

Date: October 17–18, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Myongsoo Matthew Oh, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1011F, Bethesda, MD 20892, (301) 435–1042, *ohmm@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 15, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee.

[FR Doc. 2023–20375 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: October 26, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G76, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Marci Scidmore, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G76, Rockville, MD 20852, (240) 627–3255, *marci.scidmore@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 14, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20322 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Leveraging Big Data Science to Elucidate the Mechanisms of HIV Activity and Interaction with Substance Use Disorder.

Date: October 24, 2023.

Time: 3:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shareen Amina Iqbal, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 443–4577, *shareen.iqbal@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Mechanisms and Targets at the intersection of HIV and Addictive Drugs.

Date: November 6, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Brian Stefan Wolff, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 480–1448, *brian.wolff@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: September 14, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20325 Filed 9–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7066–N–12]

60-Day Notice of Proposed Information Collection: OneCPD Technical Assistance Needs Assessment Tool; OMB Control No.: 2506–0198

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested

parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* November 20, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Stephanie Stone, Director, Office of Technical Assistance Division, Department of Housing and Urban Development, 451 7th Street SW, Room 7218, Washington, DC 20410–5000; email me at *stephanie.v.stone@hud.gov* or telephone (202) 402–4121. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of available documents submitted to OMB may be obtained from Ms. Stone.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: OneCPD Technical Assistance Needs Assessment.

OMB Approval Number: 2506–0198.

Type of Request: Extension.

Form Number: N/A.

Description of the need for the information and proposed use: Application information is needed to determine competition winners, *i.e.,* the technical assistance providers best able to develop efficient and effective programs and projects that increase the supply of affordable housing units prevent and reduce homelessness, improve data collection and reporting, and use coordinated neighborhood and community development strategies to revitalize and strengthen their communities.

Respondents: Grantees and subrecipient organizations receiving funding to operate and manage programs administered by various HUD program office.

Estimated Number of Respondents: 50.

Estimated Number of Responses: 50.

Frequency of Response: 1.

Average Hours per Response: 8.

Total Estimated Burdens: 400.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Needs Assessment	50	1	50	8	400	69.02	$27,608.00

Note: Information provided for grantees participating in the assessment. Hourly rates based on March 2023 Department of Labor, Bureau of Labor Statistics, Employer Costs for Employee Compensation for state and local government workers by occupational and industry group, the median annual wage of $44.04 for Management, Professional, and Related, state, and local government workers. Fringe costs of 56.7% were added to all hourly rates so the actual rates used were $69.02. For DOL rates, visit *https://www.bls.gov/news.release/pdf/ecec.pdf.*

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Marion M. McFadden,

Principal Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. 2023–20317 Filed 9–19–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7071–N–23]

60-Day Notice of Proposed Information Collection: HUD-Owned Real Estate Good Neighbor Next Door Program, OMB Control No.: 2502–0570

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* November 20, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at

PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: HUD-Owned Real Estate Good Neighbor Next Door Program.

OMB Approval Number: 2502–0570.

Type of Request: Revision of currently approved collection

Form Numbers: HUD–9549, HUD–9549–A, HUD–9549–B, HUD–9549–C, HUD–9459–D, HUD–9549–E.

Description of the need for the information and proposed use: The information collected will be used to administer the Good Neighbor Next Door Sales Program including determining and documenting the eligibility to participate in the program. The forms are used in conjunction with the standard HUD Real Estate Owned sales contract and addenda found in OMB 2502–0306 *HUD-Owned Real Estate Sales Contract and Addendums (REO).* With each form, the Public Burden Statement is updated, and Single Family will no longer collect purchaser Social Security Numbers on the subject forms as the information is captured in a separate collection.

Respondents: Individuals or Households; Federal, state, local or tribal governments; Not- for-profits institutions.

Estimated Number of Respondents: 392.00.

Estimated Number of Responses: 980.00.

Frequency of Response: 2.50.

Average Hours per Response: 0.08.

Total Estimated Burdens: 78.40.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Jeffrey D. Little,

General Deputy Assistant Secretary for Housing.

[FR Doc. 2023–20285 Filed 9–19–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX23GK009970000]

Advisory Committee on Landslides; Request for Nominations

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Call for nominations.

SUMMARY: The U.S. Geological Survey seeks nominations for individuals to be considered for membership to serve on the Advisory Committee on Landslides.

DATES: Interested persons are invited to submit comments on or before November 20, 2023.

ADDRESSES: Please email nominations to Dr. Jonathan Godt, Designated Federal Officer, Advisory Committee on Landslides, at *jgodt@usgs.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Jonathan Godt, Landslide Hazards Program Coordinator and Designated Federal Officer, via email at *jgodt@usgs.gov,* or by telephone at 303–905–9468. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Advisory Council on Landslides (ACL) is established under the National Landslide Preparedness Act (Pub. L. 116–323) and regulated by the Federal Advisory Committee Act, 5 U.S.C. ch. 10. The ACL provides advice and recommendations to the Secretary of the Interior through the Interagency Coordinating Committee on Landslide Hazard on the implementation of the National Landslide Preparedness Act. The ACL will be composed of no fewer than 11 representative members and will meet 1–2 times per year.

Members of the ACL will be individuals not employed by the Federal Government who are qualified in landslide hazard and risk or related fields. The ACL membership will be representative of:

- States, including State geological organizations;
- territories, including territorial geological organizations;
- Indian Tribes, including Tribal geological organizations;
- research institutions and institutions of higher education qualified to provide advice regarding landslide hazard and risk reduction, and representing related scientific, architectural, engineering, and planning disciplines;
- industry standards development organizations; and
- State, territorial, local, and Tribal emergency management agencies.

Selection of members will ensure that a reasonable cross-section of views and expertise is represented on the ACL, including a range of geographies and communities impacted by landslide hazards in the United States. Each member will serve a term of up to three years with terms staggered to ensure continuity. Members of the ACL serve without compensation. However, while away from their homes or regular places of business, ACL and subcommittee members engaged in ACL or subcommittee business that the Designated Federal Official approves may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by 5 U.S.C. 5703, in the same manner as persons employed intermittently in Federal Government service.

Nominations should include a resume that provides contact information and a description of the nominee's qualifications that would enable the Department of the Interior to make an informed decision regarding the candidate's suitability to serve on the ACL. Send nominations to the Designated Federal Officer at the email provided in **ADDRESSES**. Additional information about the ACL may be found at Advisory Committee on Landslides (ACL) (*usgs.gov*).

Authority: 5 U.S.C. ch. 10.

Stephen L. Slaughter,

Associate Program Coordinator for the USGS Landslide Hazards, Natural Hazards Mission Area.

[FR Doc. 2023–20363 Filed 9–19–23; 8:45 am]

BILLING CODE 4388–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NM_FRN_MO#4500172157; NMNM–145757]

Notice of Proposed Withdrawal and Public Meeting, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: At the request of the Bureau of Land Management (BLM) and subject to valid existing rights, the Secretary of the Interior proposes to withdraw 4,212.98 acres of public lands from location and entry under the United States mining laws, from leasing under the mineral leasing laws, and from disposal of minerals under the Materials Act of 1947, for up to a 50-year term. This notice segregates the lands for up to two years from location and entry under the United States mining laws, from leasing under the mineral leasing laws, and from disposal of mineral materials, subject to valid existing rights; initiates a 90-day public comment period on the proposed withdrawal; and notifies the public that one public meeting will be held regarding the application.

DATES: Comments and requests for additional public meetings must be received by December 19, 2023. In-person public meeting regarding the withdrawal application will be held on November 14, 2023, from 5:30–7:30 p.m. at the Placitas Library, 453 Highway 65, Placitas, New Mexico 87043.

ADDRESSES: All comments should be mailed to: Bureau of Land Management Rio Puerco Field Office, Attn: Placitas Withdrawal, 100 Sun Avenue, Suite 330, Albuquerque, NM 87109.

FOR FURTHER INFORMATION CONTACT: Laura Gray, BLM Rio Puerco Field Office, (505) 761–8918 or *lgray@blm.gov* during regular business hours, 8:00 a.m. to 4:30 p.m. Mountain Time, Monday through Friday, except holidays. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or Tele Braille) 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. A map and other information related to the withdrawal application are available at the Bureau of Land Management Rio Puerco Field Office, 100 Sun Avenue, Suite 330, Albuquerque, NM 87109. Details regarding this project are also available for review on the BLM e-Planning website *https://eplanning.blm.gov/eplanning-ui/project/2026585/510.*

SUPPLEMENTARY INFORMATION: The BLM has filed a petition/application requesting the Secretary of the Interior withdraw public lands situated within the boundaries of the area described below, known as the Placitas area.

The purpose of the proposed withdrawal is to protect, preserve, and promote the scenic integrity, cultural importance, recreational values, and wildlife habitat connectivity within the Placitas area. The proposed withdrawal area's landscape character and scenic intergrity are characterized by intact conifer woodland, pinyon-juniper woodland, and savanna with minimal visual disruption. One tract is remote and characterized by moderately steep slopes with pinon and juniper trees intermixed with shrubs and sparse grasses, offering panoramic views of the Sandia Mountains and middle Rio Grande Valley.

The land is considered ancestral and sacred to the Pueblos of San Felipe and Santa Ana and is rich in archaeological resources that span thousands of years of human history. The four parcels are in a natural, scenic setting with easy proximity to a major metropolitan area, which makes the location popular for dispersed recreational activities such as hiking, horseback riding, dispersed camping, hunting, shooting, sightseeing, mountain biking, and off-road driving.

Additionally, the area has been identified as a priority wildlife linkage between the Sandia Mountains and mountain ranges to the north for big game species including deer, elk, bear, and cougar. Withdrawal of this area is desirable for the promotion of habitat connectivity.

Existing uses of the public lands may continue in accordance with their terms and conditions. Temporary uses that may be permitted during the segregation period are leases, licenses, permits, rights-of-way, and other uses consistent with the October 1992 Rio Puerco Resource Management Plan, as amended.

The legal description is as follows:

New Mexico Principal Meridian, New Mexico

San Antonio de las Huertas Grant,
Parcel C.
Town of Tejon Grant,
Tract 40.
T. 13 N., R. 4 E.,
Sec. 13, Lots 6 thru 9 and S½;
Sec. 14, Lots 12 thru 15, and E½SE¼, and SW¼SE¼;
Sec. 15, Lot 10;
Sec. 22, Lots 6 and 7, and SE¼NE¼;
Sec. 23, N½, NE¼SW¼, and SE¼;
Sec. 24, N½.
T. 12 N, R. 5 E.,
Tract 39.
T. 13 N., R. 5 E.,
Sec. 10, Lots 14 and 15;
Sec.11, Lot 9;
Sec. 17, Lots 1 thru 4, S½SW¼, and S½SE¼;
Sec. 18, Lots 1 thru 7, SE¼SW¼, and S½SE¼;
Sec. 19, Lots 1 thru 3, NE¼, and E½NW¼;
Sec. 20, E½, E½NW¼, NW¼NW¼, and NE¼SW¼;
Sec. 29, Lots 1 thru 4;
Sec. 30, SE¼;
Sec. 31, NE¼NE¼;
Tract 38.

The area aggregates 4,212.98 acres.

The Secretary approved the BLM's petition. Therefore, it constitutes a withdrawal proposal of the Secretary of the Interior (43 CFR 2310.1–3(e)).

The use of a right-of-way, interagency agreement, or cooperative agreement would not adequately constrain mineral location and surface entry, which could adversely affect ongoing management activities, resulting in land use conflicts as well as irretrievable loss of natural resources.

Licenses, permits, cooperative agreements, or discretionary land use authorizations of a temporary nature that would not significantly impact the values to be protected by the requested withdrawal may be allowed with the approval of the authorized officer of the BLM during the temporary segregation period.

For a period until December 19, 2023, persons who wish to submit comments, suggestions, or objections related to the withdrawal application may present their views in writing to the **ADDRESS** listed above.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask the BLM in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

For a period until September 22, 2025, subject to valid existing rights, the BLM lands described in this notice will be temporarily segregated from location and entry under the United States mining laws, from leasing under the mineral leasing laws, and from disposal under the Materials Act of 1947, unless the application is denied or canceled or the withdrawal is approved prior to that date. All activities currently consistent with the October 1992 Rio Puerco Resource Management Plan, as amended, are authorized to continue, including public recreation and other activities compatible with preservation of the character of the area, subject to BLM discretionary approval, during the segregation period.

This withdrawal application will be processed in accordance with the regulations set forth at 43 CFR part 2300.

(Authority: 43 U.S.C. 1714.)

Melanie G. Barnes,

State Director.

[FR Doc. 2023–20122 Filed 9–19–23; 8:45 am]

BILLING CODE 4331–23–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–36587; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before September 8, 2023, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by October 5, 2023.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before August 26, 2023. Pursuant to section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers.

Key: State, County, Property Name, Multiple Name (if applicable), Address/Boundary, City, Vicinity, Reference Number.

ARKANSAS

Pope County

Reed Cemetery, West 12th St. bordered by South Muskogee and South Phoenix Aves., Russellville, SG100009433

FLORIDA

Duval County

Tolbert House, (African American Architects in Segregated Jacksonville, 1865–1965 MPS), 1665 Pearce St., Jacksonville, MP100009458

Franklin County

Downtown Carrabelle Historic District, Roughly bet. Carrabelle R., Ave. C SE, SE 3rd St., and E Meridian St., Carrabelle, SG100009459

Indian River County

Ryburn Apartments, 1190 Royal Palm Blvd., Vero Beach, SG100009460

GEORGIA

Bulloch County

Norris Hotel, 9 Hill St., Statesboro, SG100009454

IOWA

Linn County

Hickman-Nietert-Odd Fellows Building, 102–106 South Main Ave., Alburnett, SG100009434

Woodbury County

Hubbard Park, 2800 Jones St., Sioux City, SG100009432

KANSAS

Douglas County

Lone Star Lake Dam, (New Deal-Era Resources of Kansas MPS), 660 E 665 RD, Lawrence vicinity, MP100009456

Johnson County

Downtown Gardner Historic District, 102–107 South Elm St.; 130–218 Main St.; 204 East Park St., Gardner, SG100009453

MISSISSIPPI

Hinds County

Jackson Holiday Inn Southwest, 2649 US 80 West, Jackson, SG100009438

Smith Park Architectural District (Boundary Increase 4), 401 and 415 East Capitol St., Jackson, BC100009440

Monroe County

Baptist Ville Historic District, Roughly bounded by Ben Bender Rd., Short., North Columbus, and West Vine Sts., and Woodcrest Dr., Aberdeen, SG100009439

NEW HAMPSHIRE

Cheshire County

Clay Memorial Library, 38 Main St., Jaffrey, SG100009441

NEW YORK

Suffolk County

York Hall, 799 Saint Johnland Rd., Kings Park, SG100009455

NORTH DAKOTA

Grand Forks County

Baukol Historic District, Bounded by 405 Alpha Ave., 1801–1927 North 4th St., 1803–1815 North 3rd St., and 301–407 Park Ave., Grand Forks, SG100009437

Chester Fritz Auditorium, 3475 University Ave., Grand Forks, SG100009452

OHIO

Franklin County

Bellows Avenue School, 725 Bellows Ave., Columbus, SG100009450

Marion County

Caledonia Public Square and North Water Street Historic District, Roughly bounded by North Water St., railroad tracks and North Street, High Street, and Public Square, Caledonia, SG100009463

OREGON

Multnomah County

Parker, J. J. and Hazel, House, 2911 NW Raleigh Street, Portland, SG100009462

PUERTO RICO

Cidra Municipality

Teatro Iberia, 24 Jose de Diego, Cidra, SG100009465

SOUTH CAROLINA

Greenville County

Borden Ice Cream Factory, 711 West Washington St., Greenville, SG100009444

TEXAS

Aransas County

Bracht House, 902 East Cornwall St., Rockport, SG100009445

VERMONT

Lamoille County

Lake Elmore Historic District, VT12, between Westphal and Greaves Hill Rds., Elmore, SG100009447

VIRGINIA

Norfolk Independent City

De Paul Hospital Complex Historic District, 150 Kingsley Ln., Norfolk, SG100009429

Richmond Independent City

Hermitage Road Warehouse Historic District (Boundary Increase), Hermitage Rd., 1700 blk. of Rhoadmiller St., Richmond (Independent City), BC100009430

WISCONSIN

Dane County

Madison Vocational School (Boundary Decrease), 211 North Carroll St., Madison, BC100009436

A request for removal has been made for the following resource(s):

NORTH DAKOTA

Grand Forks County

Lyons Garage, (Downtown Grand Forks MRA), 214–218 N 4th St., Grand Forks, OT82001330

House at 1648 Riverside Drive, 1648 Riverside Dr., Grand Forks, OT94001074

VERMONT

Bennington County

Johnny Seesaw's Historic District, 3574 VT 11, Peru, OT08000686

Additional documentation has been received for the following resource(s):

WISCONSIN

Dane County

Madison Vocational School (Additional Documentation), 211 North Carroll St., Madison, AD100003545

Authority: Section 60.13 of 36 CFR part 60.

Sherry A. Frear,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

[FR Doc. 2023–20379 Filed 9–19–23; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1270]

Certain Casual Footwear and Packaging Thereof; Notice of Final Determination of No Violation by Active Respondents; Issuance of Default Remedial Orders; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined that there is no violation of section 337 of the Tariff Act of 1930, as amended, in this investigation by active respondents Hobby Lobby Stores, Inc. (''Hobby Lobby''), Quanzhou ZhengDe Network Corp. d/b/a Amoji (''Amoji''), and Orly Shoe Corp. (''Orly''). The Commission has further determined to issue a limited exclusion order (''LEO'') against defaulting respondents La Modish Boutique (''La Modish''), Star Bay Group Inc. (''Star Bay''), Huizhou Xinshunzu Shoes Co., Ltd. (''Huizhou''), and Jinjiang Anao Footwear Co., Ltd. (''Anao'') and cease and desist orders against defaulting respondents La Modish and Star Bay. This investigation is hereby terminated.

FOR FURTHER INFORMATION CONTACT: Carl P. Bretscher, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2382. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*. For help accessing EDIS, please email *EDIS3Help@usitc.gov*. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 9, 2021, based on a complaint filed by Crocs, Inc. of Broomfield, Colorado (''Crocs''). 86 FR 36303–304 (July 9, 2021). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), in the importation into the United States, sale for importation, or sale in the United States after importation of certain casual footwear and packaging thereof by reason of infringement, false designation of origin, and dilution of one of more of U.S. Trademark Registration Nos. 5,149,328; 5,273,875 (collectively, the ''3D Marks''); and 3,836,415 (''the Word Mark'') (all collectively, ''the Asserted Marks''). *Id.* The complaint alleges that a domestic industry exists, and that the threat or effect of certain alleged violations is to destroy or substantially injure an industry in the United States. *Id.*

The Commission's notice of investigation named numerous respondents, including: Hobby Lobby of Oklahoma City, Oklahoma; Amoji of Quanzhou, Fujian Province, China; Skechers USA, Inc. of Manhattan Beach, California (''Skechers''); SG Footwear Meser Grp. Inc. a/k/a S. Goldberg & Co. of Hackensack, New Jersey (''SG Footwear''); Cape Robbin Inc. of Pomona, California (''Cape Robbin''); Dr. Leonard's Healthcare Corp. d/b/a Carol Wright of Edison, New Jersey (''Dr. Leonard's''); Fullbeauty Brands Inc. d/b/a Kingsize of New York, New York (''Fullbeauty''); Legend Footwear, Inc. d/b/a/Wild Diva of City of Industry, California (''Wild Diva''); Fujian Huayuan Well Import and Export Trade Co., Ltd. of Fuzhou, Fujian Province, China (''Fujian''); Yoki Fashion International LLC of New York, New York (''Yoki''); Bijora, Inc. d/b/a Akira of Chicago, Illinois (''Akira''); Hawkins Footwear, Sports, Military & Dixie Store of Brunswick, Georgia (''Hawkins''); Shoe-Nami Inc. of Gretna, Louisiana (''Shoe-Nami''); PW Shoes, Inc. a/k/a P&W of Maspeth, New York (''PW''); 718Closeouts of Brooklyn, New York (''718Closeouts''); Crocsky of Austin, Texas (''Crocsky''); Hobibear Shoes and Clothing Ltd. of Brighton, Colorado (''Hobibear''); Ink Tee of Los Angeles, California (''Ink Tee''); Maxhouse Rise Ltd. of Hong Kong, China (''Maxhouse''); La Modish of West Covina, California; Loeffler Randall Inc. of New York, New York (''Loeffler Randall''); Star Bay of Hackensack, New Jersey; and Royal Deluxe Accessories, LLC of New Providence, New Jersey (''Royal Deluxe''). The Office of Unfair Import Investigations (''OUII'') was also named as a party.

On November 17, 2021, the Commission amended the complaint and notice of investigation to add certain new respondents, including Orly of New York, New York; Mould Industria de Matrizes Ltda. d/b/a/ Boaonda of Brazil (''Boaonda''); Dongguan Eastar Footwear Enterprises Co., Ltd. of Guangzhou City, China (''Eastar''); KGS Sourcing Ltd. of Hong Kong, China (''KGS''); Fujian Wanjiaxin Industrial Developing, Inc. a/k/a Fujian Wanjiaxin Light Industrial Developing, Inc. of Quanzhou City, China (''Wanjiaxin''); Anao of Jinjiang City, China; Walmart Inc. of Bentonville, Arkansas (''Walmart''); and Huizhou of Huizhou City, China, and to terminate the investigation with respect to Crocsky, Hobibear, and Ink Tee. Order No. 30 (Oct. 21, 2021), *unreviewed by* Comm'n Notice (Nov. 17, 2021).

The Commission subsequently terminated the investigation with respect to various respondents on the basis of settlement agreements or consent orders. *See* Order No. 12 (Aug. 11, 2021) (Skechers), *unreviewed by* Comm'n Notice (Aug. 24, 2021); Order No. 16 (Aug. 26, 2021) (SG Footwear) and Order No. 17 (Aug. 26, 2021) (Cape Robbin), *unreviewed by* Comm'n Notice (Sept. 24, 2021); Order No. 20 (Sept. 1, 2021) (Dr. Leonard's), *unreviewed by* Comm'n Notice (Sept. 29, 2021); Order No. 22 (Sept. 9, 2021) (Fullbeauty) and Order No. 23 (Sept. 9, 2021) (Wild Diva), *unreviewed by* Comm'n Notice (Oct. 7, 2021); Order No. 24 (Sept. 17, 2021) (Fujian), *unreviewed by* Comm'n Notice (Oct. 7, 2021); Order No. 25 (Sept. 22, 2021) (Yoki), *unreviewed by* Comm'n Notice (Oct. 7, 2021); Order No. 26 (Sept. 28, 2021) (Akira), *unreviewed by* Comm'n Notice (Oct. 27, 2021); Order No. 27 (Oct. 6, 2021) (Hawkins), *unreviewed by* Comm'n Notice (Oct. 29, 2021); Order No. 32 (Nov. 1, 2021) (Shoe-Nami) and Order No. 33 (Nov. 1, 2021) (PW), *unreviewed by* Comm'n Notice (Nov. 29, 2021); Order No. 34 (Nov. 10, 2021) (718 Closeouts), *unreviewed by* Comm'n Notice (Dec. 6, 2021); Order No. 39 (Jan. 11, 2022) (Eastar), *unreviewed by* Comm'n Notice (Feb. 4, 2022); Order No. 46 (March 3, 2022) (Maxhouse, Wanjiaxin), *unreviewed by* Comm'n Notice (March 18, 2022); Order No. 49 (March 15, 2022) (Boaonda), *unreviewed by* Comm'n Notice (April 1, 2022); Order No. 54 (April 22, 2022) (Royal Deluxe), *unreviewed by* Comm'n Notice (May 17, 2022); Order No. 56 (May 6, 2022) (Loeffler Randall), *unreviewed by* Comm'n Notice (May 27, 2022); Order No. 81 (Sept. 28, 2022) (Walmart), *unreviewed by* Comm'n Notice (Oct. 20, 2022). The Commission also terminated the investigation with respect to KGS for good cause. Order No. 40 (Feb. 1, 2022), *unreviewed by* Comm'n Notice (Feb. 22, 2022).

On June 10, 2022, the Commission found that respondents La Modish, Star Bay, Huizhou, and Anao (''Defaulting Respondents'') were in default and waived their rights to appear, to be served with documents, and to contest the allegations in this investigation, pursuant to 19 CFR 210.16(b). Order No. 58 (May 20, 2022), *unreviewed by* Comm'n Notice (June 10, 2022).

On September 13–16, 2022, the presiding administrative law judge (''ALJ'') held an evidentiary hearing with Crocs, OUII, and the remaining respondents Orly, Hobby Lobby (collectively, ''the Orly Respondents''), and Amoji (all collectively, ''Respondents'').

On January 9, 2023, the ALJ issued the subject final ID, finding no violation of section 337 because: (1) Crocs did not prove that Respondents infringe the Asserted Marks; (2) Crocs did not prove that Respondents falsely designate the origin of their accused products or cause unfair competition; (3) Crocs did not prove that Respondents dilute the Asserted Marks by blurring or tarnishment; (4) the 3D Marks are invalid for lack of secondary meaning; and (5) Crocs waived its infringement contentions against Defaulting Respondents. ID at 71–72, 83–86, 148–49. The ID also finds that Crocs has satisfied both the technical and economic prongs of the domestic industry requirement. *Id.* at 130, 149. The ID further finds that Respondents failed to prove that the 3D Marks are invalid as functional or that the Word Mark is invalid as generic. *Id.* at 128–29, 149. The ID takes no position on Crocs's alleged injury or Respondents' fair use defense. *Id.* at 129–30.

On January 13, 2023, the Commission issued a notice soliciting submissions from the public on the public interest implications of any remedial orders the Commission may issue in this case. 88 FR 3437 (Jan. 19, 2023). On February 9, 2023, non-party Joybees, LLC, a U.S. seller of footwear, filed a statement opposing issuance of a general exclusion order, (''GEO''). EDIS Doc. ID 790010 (Feb. 9, 2023). The Commission also received a letter dated June 14, 2023, from U.S. Representative Brittany Pettersen (CO–7), who represents the congressional district in which Crocs in headquartered. EDIS Doc. ID 798554 (June 14, 2023).

On April 5, 2023, the Commission determined to review the ID's findings that: (1) Crocs waived its infringement contentions against the lined version of Orly's Gators; (2) the 3D Marks are not entitled to the presumption of validity and are invalid for lack of secondary meaning; (3) Crocs waived its infringement contentions against Defaulting Respondents; (4) subject matter jurisdiction; (5) likelihood of confusion; (6) false designation of origin; (7) dilution; and (8) the technical and economic prongs of domestic industry. Comm'n Notice at 3–4 (Apr. 5, 2023); 88 FR 21712–15 (Apr. 11, 2023). The Commission determined not to review the remaining findings in the ID.

On April 19, 2023, Crocs, the Orly Respondents, and OUII filed their responses to the Commission's notice of review. On April 26, 2023, the parties filed their respective replies. Amoji did not file its own response or join the briefing by the Orly Respondents.

Having reviewed the ID, the parties' submissions, and the evidence of record, the Commission has determined to affirm and adopt the ID's findings that Respondents have not infringed or diluted any of the Asserted Marks, falsely designated the origin of their Accused Products, or engaged in unfair competition. The Commission has determined to reverse the ID's finding that Crocs waived its infringement contentions with respect to the lined versions of the accused Orly Gators and find instead that Crocs failed to prove infringement by the lined Orly Gators.

The Commission takes no position on Orly's alleged first sale in April 2016, the presumption of validity, secondary meaning, injury, fair use, and the technical and economic prongs of the domestic industry requirement.

The Commission has further determined to issue an LEO to Defaulting Respondents and CDOs to defaulting respondents La Modish and Star Bay pursuant to section 337(g)(1). 19 U.S.C. 1337(g)(1).

The Commission's reasoning in support of its determinations is set forth more fully in its opinion issued herewith. Commissioner Kearns dissents from the Commission's finding of no violation of section 337 for the reasons detailed in his dissenting views issued herewith.

The investigation is hereby terminated.

The Commission vote for this determination took place on September 14, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: September 14, 2023.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2023–20345 Filed 9–19–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–045]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: September 25, 2023 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.

2. Minutes.

3. Ratification List.

4. Commission vote on Inv. Nos. 701–TA–684 and 731–TA–1597–1598 (Final)(Gas Powered Pressure Washers from China and Vietnam). The Commission currently is scheduled to complete and file its determinations and views of the Commission on October 13, 2023.

5. *Outstanding action jackets:* none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, 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 15, 2023.

Sharon Bellamy,

Supervisory Hearings and Information Officer.

[FR Doc. 2023–20423 Filed 9–18–23; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0001]

Agency Information Collection Activities; Proposed eCollection, eComments Requested; Revision of a Previously Approved Collection; Report of Theft or Loss of Controlled Substance and Report of Loss or Disappearance of Listed Chemicals

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Drug Enforcement Administration (DEA), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until November 20, 2023.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Scott A. Brinks, Regulatory Drafting and Policy Support Section, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3261, Email: *scott.a.brinks@dea.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, 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;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; 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.

Abstract: In accordance with current 21 CFR 1301.74, a DEA registrant must notify the Field Division Office of the Administration in writing, of any theft or significant loss of any controlled substance within one business day of discovery of the theft or loss, and must complete and send to the DEA a DEA Form 106 upon determination of a theft or significant loss. The DEA Form 106 is designed to provide a uniform method of reporting and recording thefts and losses of controlled substances as required by 21 U.S.C. 827, 21 CFR 1301.74(c) and 1301.76(b). The form is entitled ''Report of Theft or Loss of Controlled Substances'' and it is used by the DEA to help determine the quantities and types of controlled substances that are stolen or lost. It may also serve as a record of the theft or loss for the registrant. DEA is modifying this collection to move DEA Form 107 from 1117–0024 to this collection, as DEA Form 107 is more aligned with DEA Form 106. DEA Form 107 is used by regulated persons involved in reporting unusual or excessive loss or disappearance of a listed chemical. Each regulated person must report to the Special Agent in Charge of the DEA Diversional Office for the area in which the regulated person making the report is located any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a currently approved collection.

2. *Title of the Form/Collection:* Report of Theft or Loss of Controlled Substance and Reports of Loss or Disappearance of Listed Chemicals.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* DEA Form 106 and DEA Form 107. The applicable component within the Department of Justice is the Drug Enforcement Administration, Diversion Control Division.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* Affected public (Primary): Private Sector—business or other for-profit. Other: Private Sector—businesses not-for-profit institutions; Federal, State, local, and tribal governments.

5. *An estimate of the total number of respondents and the amount of time*

estimated for an average respondent to respond: DEA estimates that 10,547 persons respond as needed to this collection. Responses take 20 minutes for DEA Form 106 and for DEA Form 107.

6. *An estimate of the total annual burden (in hours) associated with the collection:* DEA estimates that this collection takes 10,881 annual burden hours.

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* $0.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response (min.)	Total annual burden (hours)
DEA Form 106	10,377	3.115737	32,332	20	10,777
DEA Form 107 (electronic)	170	1.835294	312	20	104
Unduplicated Totals	10,547	N/A	32,644		10,881

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: September 14, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–20340 Filed 9–19–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Miner's Claim for Benefits Under the Black Lung Benefits Act CM–911 and Employment History CM–911a

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of Workers' Compensation Programs (OWCP)-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 20, 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: CM–911 is the standard application form filed by the miner for benefits under the Black Lung Benefits Act. The applicant lists the coal miner's work history on the CM–911a, and this form is completed by all applicants, both miners and survivors. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 13, 2023 (88 FR 38544).

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–OWCP.

Title of Collection: Miner's Claim for Benefits under the Black Lung Benefits Act CM–911 and Employment History CM–911a.

OMB Control Number: 1240–0038.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 50,010.

Total Estimated Number of Responses: 10,020.

Total Estimated Annual Time Burden: 8,768 hours.

Total Estimated Annual Other Costs Burden: $2,420.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,

Senior PRA Analyst.

[FR Doc. 2023–20283 Filed 9–19–23; 8:45 am]

BILLING CODE 4510–CK–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit applications received.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act in the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or

views with respect to this permit application by October 20, 2023. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314 or *ACApermits@nsf.gov*.

FOR FURTHER INFORMATION CONTACT: Andrew Titmus, ACA Permit Officer, at the above address, 703–292–4479.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541, 45 CFR 670), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas as requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

Application Details

Permit Application: 2024–010

1. Applicant

Ron Naveen, Oceanites, PO Box 15259 Chevy Case, MD 20825.

Activity for Which Permit Is Requested

Waste management. The applicant seeks a waste management permit to operate Remotely Piloted Aircraft Systems (RPAS) in support of existing research activities conducted in the West Antarctica Peninsula. The applicant seeks to use RPAS to enable more efficient monitoring of penguin breeding sites and to increase penguin censusing capabilities. The permit will cover any unintentional or accidental loss of remotely piloted aircrafts through planned research operations. The applicant has provided a detailed mitigation plan to minimize risk of equipment loss, including use of observers and experienced pilots.

Location

Antarctic Peninsula Region.

Dates of Permitted Activities

September 1, 2023–August 31, 2028.

Kimiko S Bowens-Knox,

Program Analyst, Office of Polar Programs.

[FR Doc. 2023–20364 Filed 9–19–23; 8:45 am]

BILLING CODE 7555–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98390; File No. SR–CboeEDGX–2023–058]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Fees Schedule Related to Physical Port Fees

September 14, 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 September 1, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''EDGX Options'') relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (EDGX Equities), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

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.[6] Specifically, the Exchange believes the proposed rule

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGX–2023–045). On September 1, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

change is consistent with the Section 6(b)(5) [7] 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) [8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) [9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered options exchanges that trade options (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 19% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, and MIAX Emerald LLC) and one additional options exchange that is expected to launch in 2023 (*i.e.,* MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 51 members that trade options, Cboe BZX has 61 members that trade options, and Cboe C2 has 52 Trading Permit Holders (''TPHs'') (*i.e.,* members). There is also no firm that is a Member of EDGX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83430 (June 14, 2018), 83 FR 28697 (June 20, 2018) (SR–CboeEDGX–2018–017).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (June 27, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party). Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[19] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. Further, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including smaller trading firms that may be able to take advantage of lower costs that result from mutualized connectivity.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated options markets. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[20] and paragraph (f) of Rule 19b–4[21] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[19] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2023–058 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGX–2023–058. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–058 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20309 Filed 9–19–23; 8:45 am]

BILLING CODE 8011–01–P

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98393; File No. SR–CboeBYX–2023–013]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

September 14, 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 September 1, 2023, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

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 its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

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.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBYX–2023–010). On September 1, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

6(b)(5)[7] 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)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 110 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has103 members and Cboe BZX has 132 members. There is also no firm that is a Member of BYX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83441 (June 14, 2018), 83 FR 28684 (June 20, 2018) (SR–CboeBYX–2018–006).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership,.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

(and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party). Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[18] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. Further, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including smaller trading firms that may be able to take advantage of lower costs that result from mutualized connectivity.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[19] and paragraph (f) of Rule 19b–4[20] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or

[18] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f).

• Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBYX–2023–013 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBYX–2023–013. 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–CboeBYX–2023–013 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

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BILLING CODE 8011–01–P

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98386; File No. SR–NASDAQ–2023–025]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change Related to Notification and Disclosure of Reverse Stock Splits

September 14, 2023.

On July 21, 2023, The Nasdaq Stock Market LLC (''Exchange'') 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 related to notification and disclosure of reverse stock splits. The proposed rule change was published for comment in the **Federal Register** on August 3, 2023.[3]

Section 19(b)(2) of the Act[4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is September 17, 2023. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates November 1, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NASDAQ–2023–025).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20305 Filed 9–19–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 98014 (July 28, 2023), 88 FR 51376. Comment received by the Commission on the proposed rule change is available on the Commission's website at: *https://www.sec.gov/comments/sr-nasdaq-2023-025/srnasdaq2023025.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98385; File No. SR–BOX–2023–23]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule for Trading on the BOX Options Market LLC Facility To Amend Certain Qualification Thresholds of Section IV.A.1 (Tiered Volume Rebate for Non-Auction Transactions)

September 14, 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 September 1, 2023, BOX Exchange LLC (''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 Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the Fee Schedule to amend certain qualification thresholds of Section IV.A.1, (Tiered Volume Rebate for Non-Auction Transactions) on the BOX Options Market LLC (''BOX'') options facility. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxexchange.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule for trading on BOX to amend certain qualification thresholds of Section IV.A.1, (Tiered Volume Rebate for Non-Auction Transactions).

Currently, Public Customers [5] receive a per contract rebate for Electronic Non-Auction Transactions according to the Tier achieved by the Public Customer as provided in the Percentage Thresholds of National Customer Volume in Multiply-Listed Options Classes table in Section IV.A.1 of the BOX Fee Schedule. Percentage thresholds are calculated on a monthly basis by totaling the Public Customer's executed Auction and Non-Auction transaction volume on BOX, relative to the total national Customer volume in multiply-listed options classes.

The Exchange notes that Non-Auction Transactions where a Public Customer order interacts with another Public Customer order are exempt from a per contract rebate. However, these transactions still count toward the Public Customer's monthly volume on BOX. The current thresholds and rebates are as follows:

Tier	Percentage thresholds of national customer volume in multiply-listed options classes (monthly)	Per contract rebate					
		Penny Interval Classes		Non-Penny Interval Classes		SPY	
		Maker	Taker	Maker	Taker	Maker	Taker
1	0.000%–0.129%	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
2	0.130%–0.339%	(0.05)	(0.15)	(0.15)	(0.27)	(0.05)	0.00
3	0.340%–0.549%	(0.10)	(0.20)	(0.30)	(0.32)	(0.10)	0.00
4	0.550% and Above	(0.27)	(0.27)	(0.60)	(0.40)	(0.27)	0.00

The Exchange now proposes to raise the percentage thresholds within the Percentage Thresholds of National Customer Volume in Multiply-Listed Options Classes table. The proposed rebate structure is as follows:

Tier	Percentage thresholds of national customer volume in multiply-listed options classes (monthly)	Per contract rebate					
		Penny Interval Classes		Non-Penny Interval Classes		SPY	
		Maker	Taker	Maker	Taker	Maker	Taker
1	0.000%–0.249%	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
2	0.250%–0.499%	(0.05)	(0.15)	(0.15)	(0.27)	(0.05)	0.00
3	0.500%–0.749%	(0.10)	(0.20)	(0.30)	(0.32)	(0.10)	0.00
4	0.750% and Above	(0.27)	(0.27)	(0.60)	(0.40)	(0.27)	0.00

The Exchange notes that the percentage thresholds in Tiers 1 through 4 will be adjusted, however the rebate amounts will not change. For example, the Tier 2 rebates remain at $0.05 for Makers in Penny Interval Classes and $0.15 for Takers in Penny Interval Classes, but will require 0.250%–0.499% of national customer volume in multiply-listed options classes for Public Customers to qualify for the rebate. Similarly, the Tier 3 rebates remain at $0.10 for Makers in Penny Interval Classes and $0.20 for Takers in Penny Interval Classes, and the Tier 4 rebates in Penny Interval Classes remain at $0.27 but the thresholds required to qualify for those rebates will be 0.500%–0.749% and 0.750% and above of national customer volume in multiply-listed options classes, respectively.

Although, the new volume thresholds will require greater volumes to qualify for such rebates, the Exchange believes that Public Customers will still benefit from the opportunity to obtain a rebate for their transactions.[6] The Exchange recently reviewed its Tiered Volume Rebate structure for Non-Auction Transactions and determined that raising the percentage thresholds is appropriate at this time. The Exchange has not modified these volume thresholds since November of 2015 [7] and the current rebate amounts have been in place since June of 2018.[8] Further, the Exchange believes that the proposed volume tiers remain competitive with other exchanges [9] and notes that Public Customers may receive a rebate and will continue to pay no fees

[5] The Exchange notes that Public Customers do not initiate transactions on BOX directly. BOX Participants initiate electronic Non-Auction Transactions on behalf of Public Customers and these BOX Participants are assessed fees or provided rebates by the Exchange for such transactions.

[6] The Exchange notes that BOX Participants collect rebates on behalf of Public Customers and have independent fee arrangements with such Public Customers by which rebates provided by BOX would be taken into account.

[7] *See* Securities Exchange Act Release No. 76447 (November 16, 2015), 80 FR 72758 (November 20, 2015) (SR–BOX–2015–36).

[8] *See* Securities Exchange Act Release No. 83396 (June 8, 2018), 83 FR 27807 (June 14, 2018) (SR–BOX–2018–21).

[9] *See infra* note 11.

for Electronic Non-Auction transactions on BOX.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act, in general, and Section 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to adjust certain percentage thresholds in the volume-based thresholds for Public Customers in Electronic Non-Auction Transactions. The volume-based thresholds and applicable rebates are designed to incentivize Public Customers to direct order flow to the Exchange to obtain the benefit of the rebate, which will in turn benefit all market participants by increasing liquidity on the Exchange. While the Exchange proposes to increase the volume thresholds, thus requiring greater volumes to qualify for rebates, the Exchange believes that Public Customers will still benefit from the opportunity to obtain a rebate. The Exchange notes that other exchanges employ similar incentive programs; and the Exchange believes that the proposed changes to the volume based rebate thresholds are reasonable and competitive when compared to incentive structures at other exchanges.[11] In particular, Nasdaq PHLX's Customer Rebate Program has five tiers where Tier 1 is 0.00%–0.60% and Tier 5 is above 2.50% of national customer volume in multiply-listed equity and Exchange-Traded Fund (''ETF'') options with rebates that range from $0.00 to $0.21.[12] Additionally, CBOE's Volume Incentive Program has five tiers where Tier 1 is 0%–0.75% and Tier 5 is above 4.00% of national customer volume in all underlying symbols excluding certain index symbols, Nanos, and FLEX Micros with rebates that range from $0.00 to $0.15.[13] The Exchange is proposing four tiers where Tier 1 is 0.000%–0.249% and Tier 4 is 0.750% and above with rebates that range from $0.00 to $0.27 for Penny Interval Classes. Thus, the Exchange believes that comparable rebates can still be attained on BOX, under the Exchange's proposed thresholds, at lower volumes than on CBOE or Nasdaq PHLX.

The proposed changes to the thresholds in Tiers 1 through 4 are equitable and not unfairly discriminatory as they are available to all BOX Participants that initiate electronic Non-Auction Transactions on the behalf of Public Customers, and Participants may choose whether or not to take advantage of the percentage thresholds and their applicable rebates on BOX.

The Exchange continues to believe it is equitable and not unfairly discriminatory to have these rebate structures for Public Customers in Electronic Non-Auction Transactions. The securities markets generally, and BOX in particular, have historically aimed to improve markets for investors and develop various features within the market structure for Public Customer benefit. Accordingly, the Exchange believes that providing a rebate structure for Public Customers is appropriate and not unfairly discriminatory. Based on its review of competitor exchanges, the Exchange believes that the proposed rebate thresholds, although more difficult to obtain, will not disincentivize BOX Participants from sending Public Customer order flow to BOX. Rather, the Exchange believes that the proposed rebates will continue to help attract a high level of Public Customer order flow to the BOX Book and create liquidity, which the Exchange believes will ultimately benefit all Participants trading on BOX.

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 amending the proposed rebate structure for Public Customer Electronic Non-Auction Transactions will not impose a burden on competition among various Participants. The Exchange believes that the proposed changes will result in Public Customers being rebated appropriately for these transactions. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing exchanges. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. Because competitors are free to modify their own fees and rebates in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee or rebate changes in this market may impose any burden on competition is extremely limited. The Exchange notes that other exchanges provide programs to incentivize customer order flow and that the proposed changes to the volume thresholds remain competitive when compared to incentive structures at other exchanges.[14] For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act[15] and Rule 19b–4(f)(2) thereunder,[16] because it establishes or changes a due, or fee.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *See* Nasdaq PHLX LLC (''Nasdaq PHLX'') Options 7, Section 2 (Customer Rebate Program) *and* Cboe Exchange, Inc. (''CBOE'') Fee Schedule (Volume Incentive Program). The Exchange notes that these programs use different tier structures, volume calculations, and rebate amounts, however, their rebate programs operate similarly to BOX's.

[12] These rebates are referred to in Nasdaq PHLX Options 7, Section 2 as Category A rebates. The Exchange believes that Category A rebates and the volume used to determine which tiers are attained are comparable to BOX's Tiered Volume Rebate for Non-Auction Transactions (Percentage Thresholds of National Customer Volume in Multiply-Listed Options Classes) with the exception that Nasdaq PHLX excludes volume associated with electronic QCC Orders. The Exchange also notes that SPY is rebated under Nasdaq PHLX Options 7, Section 3.

[13] These rebates are for simple, Non-AIM transactions in the CBOE Fee Schedule, VIP. The Exchange believes that simple, Non-AIM transactions and the volume used to determine which tiers are attained are comparable to BOX's Tiered Volume Rebate for Non-Auction Transactions (Percentage Thresholds of National Customer Volume in Multiply-Listed Options Classes).

[14] *See supra* note 11.

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 240.19b–4(f)(2).

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–BOX–2023–23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–BOX–2023–23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–BOX–2023–23 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20304 Filed 9–19–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98397; File No. SR–C2–2023–020]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

September 14, 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 September 1, 2023, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2 Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Trading Permit Holders (''TPHs'') and non-TPHs on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gbps'') circuit and $7,500 per physical port for a 10 Gbps circuit. The Exchange proposes to increase the monthly fee for 10 Gbps physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: Cboe BZX Exchange, Inc. (options and equities platforms), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe EDGA Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–C2–2023–014). On September 1, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] 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)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its TPHs and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gbps physical ports. Further, the current 10 Gbps physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gbps physical port was last modified.[11] Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, TPHs are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gbps physical ports and charging a higher fee as compared to the 1 Gbps physical port is equitable as the 1 Gbps physical port is 1/10th the size of the 10 Gbps physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gbps alternative is lower than the value of the 10 Gbps alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gbps physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gbps physical ports is reasonably and appropriately allocated.

The Exchange also notes TPHs and non-TPHs will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a TPH of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered options exchanges that trade options (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 19% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, and MIAX Emerald LLC) and one additional options exchange that is expected to launch in 2023 (*i.e.,* MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 52 TPHs, Cboe BZX has 61 members that trade options, and Cboe EDGX has 51 members that trade options. There is also no firm that is a Member of C2 Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83455 (June 15, 2018), 83 FR 28892 (June 21, 2018) (SR–C2–2018–014).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (June 27, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

members [17] and MIAX Pearl Options has 40 members.[18]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-TPHs also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-TPHs and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of TPHs that connect to the Exchange indirectly via the third-party). Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple TPHs are able to share a single physical port (and corresponding bandwidth) with other non-affiliated TPHs if purchased through a third-party re-seller.[19] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. Further, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including smaller trading firms that may be able to take advantage of lower costs that result from mutualized connectivity.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated options markets. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated TPHs equally (*i.e.,* all market participants that choose to purchase the 10 Gbps physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gbps physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gbps physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [20] and paragraph (f) of Rule 19b–4 [21] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] For example, a third-party reseller may purchase one 10 Gbps physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gbps each and leverage the same single port.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–C2–2023–020 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–C2–2023–020. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–C2–2023–020 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98400; File No. SR–CBOE–2023–045]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule

September 14, 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 September 1, 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, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule, effective September 1, 2023. The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 19% of the market share.[3] Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to the competitive environment, the Exchange offers tiered pricing in its Fees Schedule, like that of other options exchanges fees schedules,[4] which provides Trading Permit Holders (''TPHs'') opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for TPHs to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Cboe Global Markets U.S. Options Market Volume Summary (August 30, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[4] *See e.g.,* NASDAQ Stock Market Rules, Options Rules, Options 7 Pricing Schedule, Sec. 2 Options Market—Fees and Rebates, Tiers 1–6; *see also* NYSE Arca Options, Fees and Charges, Customer Posting Credit Tiers in Non-Penny Issues.

Customer Volume Incentive Program and Affiliated Volume Plan

The Exchange proposes to amend the Customer Volume Incentive Program (''VIP'') and the Affiliated Volume Plan (''AVP''). Under the VIP, the Exchange credits each TPH the per contract amount set forth in the VIP table for Public Customer (origin code ''C'') orders transmitted by TPHs (with certain exceptions) [5] and executed electronically on the Exchange, provided the TPH meets certain volume thresholds in a month; volume for Professional Customers (origin code ''U''), Broker-Dealers (origin code ''B''), and Joint Back-Offices (''JBO'') (origin code ''J'') orders are counted toward reaching such thresholds.[6] Specifically, the percentage thresholds are calculated based on the percentage of national customer volume in all underlying symbols excluding Underlying Symbol List A [7], Sector Indexes,[8] the Dow Jones Industrial Average Index (''DJX''), the Mini Russell 2000 Index (''MRUT''), the MSCI EAFE Index (''MXEA''), the MSCI Emerging Market Index (''MXEF''), the Mini S&P 500 Index (''NANOS''), Mini-SPX Index (''XSP'') and FLEX Micros entered and executed over the course of the month. VIP offers rates for both Complex and Simple orders (both in AIM and Non-AIM orders).

Currently, VIP offers 5 tiers. Particularly, a TPH may meet the criteria under Tier 1 if its qualifying volume in the qualifying classes is above 0% and up to 0.75% of national customer volume, under Tier 2 if its qualifying volume in qualifying classes is above 0.75% and up to 2.00% of national customer volume, under Tier 3 if its qualifying volume in the qualifying classes is above 2.00% and up to 3.00% of national customer volume, under Tier 4 if its qualifying volume in the qualifying classes is above 3.00% and up to 4.00% of national customer volume, and under Tier 5 if its qualifying volume in the qualifying classes is above 4.00% of national customer volume.

The Exchange proposes to eliminate Tier 4 and to amend the volume threshold for Tier 3 to be above 2.00% and up to 4.00% of national customer volume. The Exchange also proposes a corresponding non-substantive amendment to update current Tier 5 to become Tier 4. The VIP credit rates for Simple and Complex orders remain unchanged under the proposed change.

The proposed changes are designed to incentivize more volume to earn the same credits while also maintaining an incremental incentive for TPHs to strive for the highest tier level. The Exchange expects the impact of the change to be minimal, as currently, no TPHs qualify for Tier 4. Further, under current Tiers 4 and 5, the VIP credit rates for Simple and Complex Non-AIM contracts are the same (*i.e.,* $0.15 for Simple Non-AIM contracts and $0.25 for Complex Non-AIM contracts), and the difference between VIP credit rates for Simple and Complex AIM contracts are $0.01 (*i.e.,* $0.13 for Tier 4 Simple AIM contracts and $0.14 for Tier 5 Simple AIM contracts; $0.23 for Tier 4 Complex AIM contracts and $0.24 for Complex AIM contracts). The proposed changes are also designed to increase the amount of volume TPHs provide on the Exchange and further encourage them to contribute to a deeper, more liquid market, as well as to increase transactions and take such execution opportunities provided by such increased liquidity. The Exchange believes that this, in turn, benefits all market participants by contributing towards a robust and well-balanced market ecosystem. The Exchange notes the proposed tiers are competitively achievable for all TPHs that submit significant customer order flow, in that all firms that submit the requisite significant customer order flow could compete to meet the tiers.

The Exchange proposes to make corresponding amendments to the Affiliated Volume Plan (''AVP''). Under AVP, if a Market-Maker Affiliate [9] (''Affiliate OFP'') or Appointed OFP [10] receives a credit under the VIP, the Market-Maker will receive an access credit on its BOE Bulk Ports corresponding to the VIP tier reached as well as a transaction fee credit on its sliding scale Market-Maker transaction fees (not including any additional surcharges or fees assessed as part of the Liquidity Provider Sliding Scale Adjustment Table). In connection with the proposed changes to the VIP, the Exchange proposes to make a corresponding change to the AVP and eliminate VIP Tier 4 (and corresponding MM Affiliate Access Credits and Liquidity Provider Sliding Scale Credits). The Exchange proposes to rename current VIP Tier 5 as VIP Tier 4, with the same corresponding Market-Marker Affiliate Access Credit of 25% and Liquidity Provider Sliding Scale Credit of 35%. All other Tiers and corresponding Market-Maker Affiliate Access Credits and Liquidity Provider Sliding Scale Credits remain unchanged under the proposed rule change.

New AIM Responder Fee Code

The Exchange proposes to amend its Fees Schedule in connection with the fees related to orders and auction responses executed in the Automated Improvement Mechanism (''AIM'') and Solicitation Auction Mechanism (''SAM'') Auctions.

AIM and SAM include functionality in which a TPH (an ''Initiating TPH'') may electronically submit for execution an order it represents as agent on behalf of a customer,[11] broker dealer, or any other person or entity (''Agency Order'') against any other order it represents as agent, as well as against principal interest in AIM only, (an ''Initiating Order'') provided it submits the Agency Order for electronic execution into the AIM or SAM Auctions.[12] The Exchange may designate any class of options traded on Cboe Options as eligible for AIM or SAM. The Exchange notes that all Users, other than the Initiating TPH, may submit responses to an Auction (''AIM Responses'').[13] AIM and SAM Auctions take into account AIM Responses to the applicable Auction as well as contra interest resting on the Cboe Options Book at the conclusion of the Auction (''unrelated orders''), regardless of whether such unrelated orders were already present on the Book when the Agency Order was received by the Exchange or were received after the Exchange commenced the applicable Auction. If contracts remain from one or more unrelated orders at the time the Auction ends, they are considered for participation in the AIM or SAM order allocation process.

The Exchange assesses fees for certain AIM Responses (the ''AIM Response'' fees set forth in the fees schedule). For example, the Exchange assesses a fee of $0.50 per contract for non-Customer, non-Market-Maker AIM Responses in penny classes, yielding fee code NB,

[5] *See* Cboe Options Fees Schedule, Footnote 36.

[6] *See* Cboe Options Fees Schedule, Volume Incentive Program.

[7] *See* Cboe Options Fees Schedule, Footnote 34.

[8] *See* Cboe Options Fees Schedule, Footnote 47.

[9] For purposes of AVP, ''Affiliate'' is defined as having at least 75% common ownership between the two entities as reflected on each entity's Form BD, Schedule A.

[10] *See* Cboe Options Fees Schedule Footnote 23. Particularly, a Market-Maker may designate an Order Flow Provider (''OFP'') as its ''Appointed OFP'' and an OFP may designate a Market-Maker to be its ''Appointed Market-Maker'' for purposes of qualifying for credits under AVP.

[11] The term ''customer'' means a Public Customer or a broker-dealer. The term ''Public Customer'' means a person that is not a broker-dealer. *See* Rule 1.1.

[12] *See* Rule 5.37 (AIM); Rule 5.39 (SAM); Rule 5.38 (Complex AIM); Rule 5.40 (Complex SAM); Rule 5.73 (FLEX AIM); and Rule 5.74 (FLEX SAM).

[13] For purposes of this filing and the proposed fee, the term ''AIM Response'' will include responses submitted to AIM and SAM Auctions.

and a fee of $1.05 per contract for Non-Customer, Non-Market-Maker AIM Responses in non-penny classes, yielding fee code NC.

The Exchange now proposes to add fee code ''MD'', which would be appended to Market-Maker AIM Responses [14] and assessed a fee of $0.25 per contract.

The Exchange notes that the same FLEX AIM and FLEX SAM responses will be assessed the same fee, which is consistent with the structure of the Exchange's current fees for AIM Responses, which apply uniformly to qualifying orders in AIM, SAM, FLEX AIM, and FLEX SAM.[15] The Exchange also notes that the Market-Maker AIM Responder fee applies to AIM Responses in Equity, ETF and ETN Options, Sectors Indexes,[16] and all other index products, executed in AIM, SAM, FLEX AIM, and FLEX SAM Auctions.

The Exchange also proposes to remove Market-Maker volume via AIM Market-Maker Responses (yielding fee code MD) from eligibility for credits pursuant to the Liquidity Provider Sliding Scale, similar to how Market-Maker orders transacted in open outcry (*i.e.,* manual) in Equity, ETF, and ETN Options, Sector Indexes and All Other Index Products, which yield fee code MB, are handled today. Currently, the Liquidity Provider Sliding Scale offers credits on Market-Maker orders where a Market-Maker achieves certain volume thresholds based on total national Market-Maker volume in all underlying symbols [17] during the calendar month. Footnote 10 (appended to the Liquidity Provider Sliding Scale) states that the Liquidity Provider Sliding Scale applies to Liquidity Provider (Cboe Options Market-Maker, DPM and LMM) transaction fees in all products except (1) Underlying Symbol List A [18] (34), MRUT, NANOS, XSP and FLEX Micros, and (2) volume executed in open outcry. The proposed rule change amends Footnote 10 to add volume executed via AIM Responses to the list of Liquidity Provider Sliding Scale exclusions. The proposed rule change also adds language to Footnote 10 to make it clear that the volume thresholds under the Liquidity Provider Sliding Scale will continue to include volume executed via AIM Responses. The Exchange notes that it continues to include volume executed via AIM Responses in a Market-Maker's volume eligible to meet the tier thresholds in order to continue to incentivize Market-Maker order flow to the trading floor. The Exchange offers a hybrid market system and aims to continue to balance incentives for Market-Makers to contribute to deep liquid markets for investors on both its electronic and open outcry platforms.

Score Program Changes

The Exchange proposes to amend the Select Customer Options Reduction program (''SCORe''). By way of background, SCORe is a discount program for Retail, Non-FLEX Customer (''C'' origin code) volume in the following options classes: SPX (including SPXW), VIX, RUT, MXEA, MXEF & XSP (''Qualifying Classes''). The SCORe program is available to any TPH Originating Clearing Firm or non-TPH Originating Clearing Firm that sign up for the program.[19] SCORe utilizes Discount Tiers to determine the Originating Firm's applicable corresponding discounts. To determine the Discount Tier, an Originating Firm's Retail volume in the Qualifying Classes will be divided by total Retail volume in the Qualifying Classes executed on the Exchange. The program then provides a discount per retail contract, based on the determined Discount Tier thereunder. Currently, the program sets forth four Discount Tiers, with applicable discounts ranging from $0 to $0.14 per retail contract.

The Exchange proposes to amend Footnote 48 to exclude from the SCORe program certain orders that are revised post-trade, using the Clearing Editor tool. Specifically, the Exchange proposes to exclude orders where the capacity is changed from another capacity to Customer using the Clearing Editor, and single leg orders created by hard-edits to complex orders using the Clearing Editor.

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.[20] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [21] 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) [22] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As stated above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all TPHs.

Customer Volume Incentive Program and Affiliated Volume Plan

The Exchange believes the proposed amendments to the VIP (and corresponding amendments to AVP) to eliminate Tier 4 and to amend the volume threshold for Tier 3 to be above 2.00%–4.00%, is reasonable because it continues to encourage TPHs to take the opportunity to receive credits on Customer orders by reaching the proposed volume thresholds. The Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges [23] and are reasonable, equitable and non-discriminatory because they are open to all TPHs on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above,

[14] Currently, such orders are appended fee code MA, and assessed a standard fee of $0.23 per contract, subject to the Liquidity Provider Sliding Scale and Liquidity Provider Sliding Scale Adjustment Table.

[15] *See* Cboe Exchange Fees Schedule, Footnote 20.

[16] *See* Cboe Exchange Fees Schedule, Footnote 47.

[17] Excluding products in Underlying Symbol List A (see Footnote 34), MRUT, NANOS, XSP and FLEX Micros.

[18] *See* Cboe Exchange Fees Schedule, Footnote 34.

[19] For this program, an ''Originating Clearing Firm'' is defined as either (a) the executing clearing Options Clearing Corporation (''OCC'') number on any transaction which does not also include a Clearing Member Trading Agreement (''CMTA'') OCC clearing number or (b) the CMTA in the case of any transaction which does include a CMTA OCC clearing number.

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(5).

[22] *Id.*

[23] *See supra* note 4.

the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates/credits and fees that apply based upon members achieving certain volume and/or growth thresholds. These competing pricing schedules, moreover, are presently comparable to those that the Exchange provides, including the pricing of comparable tiers.[24]

The Exchange believes adjusting the VIP volume thresholds by eliminating Tier 4 (and making corresponding changes to the AVP) and amending the volume threshold for Tier 3 is reasonable because it will continue to encourage TPHs to increase their overall order flow to the Exchange based on increasing their Customer, Professional Customer, Broker-Dealer, and JBO executed orders as a percentage of national customer volume. Particularly, the Exchange believes the proposed threshold change is reasonable because it will encourage increased volume, thus a deeper, more liquid market, and an increase in transaction opportunities provided by the increased liquidity. In turn, these increases benefit all TPHs by contributing towards a robust and well-balanced market ecosystem. Increased overall order flow benefits all investors by deepening the Exchange's liquidity pool, providing greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency, and improving investor protection.

The proposed volume thresholds also do not represent a significant departure from the current required criteria under the Exchange's existing tiers and is therefore still reasonable based on the difficulty of satisfying the tiers' criteria and ensures the existing credit and proposed thresholds appropriately reflect the incremental difficulty to achieve the existing VIP tiers. Further, the Exchange believes that the amendments are reasonable because it will still allow TPHs transmitting qualifying orders that reach a threshold of above 3.00–4.00% to receive either the same credit for doing so, in the case of Simple and Complex Non-AIM Contracts, or a $0.01 lesser credit for Simple and Complex AIM Contracts. Additionally, as noted above, currently, no TPHs qualify for Tier 4. Finally, the changes to the AVP are reasonable because the AVP utilizes the VIP tier structure, and thus, any changes to the VIP tiers must be incorporated into the AVP.

The Exchange believes Tiers 3 and 4, as amended, remain in line with existing tiers, both in required criteria and credits. For example, the volume threshold amount under existing Tier 1 is currently set as a range within a 0.75 percentage point (0%–0.75%) and Tier 2 is currently set as a range within a 1.25 percentage point (between 0.75% up to 2.00%). It is reasonable to incrementally increase this range for Tier 3 to be within 2 percentage points (between 2.00% and 4.00%), and then over 4.00% for Tier 4, as proposed, since higher credits are available for higher tiers. The Exchange also believes that the tiers, as amended, are in a reasonable increment to encourage overall order flow to the Exchange without so significantly increasing the difficulty in reaching the tiers' criteria.

The Exchange believes that the proposal represents an equitable allocation of rebates and is not unfairly discriminatory because all TPHs have the opportunity to meet the tier thresholds. The Exchange also notes that the proposed changes will not adversely impact any TPH's pricing or ability to qualify for other credit tiers. Rather, should a TPH not meet the proposed criteria, the TPH will merely not receive the proffered credit, for both the VIP and AVP.

New AIM Responder Fee Code

The Exchange believes that the proposed rule change to adopt a fee code and assess a standard rate for Market-Maker AIM Responses is reasonable, equitable and not unfairly discriminatory. As noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges,[25] including the Exchange's affiliated options exchanges,[26] offer substantially the same fees and credits in connection with similar price improvement auctions, as the Exchange now proposes.

Additionally, the Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because the proposed fee will apply automatically and uniformly to all Market-Maker AIM Response orders. The Exchange also believes that the proposed fees in connection with Market-Maker AIM Response orders do not represent a significant departure from the fees and credits rebates currently offered under the fees schedule for these market participants. For example, under the existing fees schedule electronic orders in Equity, ETF and ETN Options, Sectors Indexes,[27] and all other index products with M Capacity Codes are assessed a fee of $0.23 per contract in Penny and non-Penny Classes.

The Exchange also believes that assessing a fee applicable to Market-Maker responses that is lower than non-Customer, non-Market-Maker responses is equitable and not unfairly discriminatory because Market-Makers are already subject to certain other transaction fees not otherwise applicable to other market participants. In particular, in addition to Market-Maker-specific standard transaction fees,[28] Market-Makers are also currently assessed a marketing fee of $0.25 in Penny Program classes and $0.70 in all other classes on certain transactions resulting from customer orders,[29] including qualifying orders submitted as AIM Responses. Further, Market-Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have, as well as added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market-Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing.

[24] *Id.*

[25] *See* MIAX Options Fee Schedule, Section 1(a)(v), ''MIAX Price Improvement Mechanism (''PRIME'') Fees, which assesses a fee of $0.50 (Penny Classes) and $1.10 (non-Penny Classes) for Market-Maker PRIME responses; *see also* NYSE American Options Fee Schedule, Section I(G), ''CUBE Auction Fees and Credits'', which assesses a fee of $0.50 (Penny Classes) and $1.05 (non-Penny Classes) for Non-Customer CUBE (its Customer Best Execution Auction) responses.

[26] *See* EDGX Options Exchange Fee Schedule, ''Fee Codes and Associated Fees'', fee code BD is appended to AIM Responder Penny orders and is assessed a fee of $0.50 per share, and fee code BE is appended to AIM Responder Non-Penny orders and is assessed a fee of $1.05 per share.

[27] *See* Cboe Exchange Fees Schedule, Footnote 47.

[28] *See* Cboe Options Fees Schedule, ''SPX Liquidity Provider Sliding Scale'' table; ''Liquidity Provider Sliding Scale'' table; and ''Liquidity Provider Sliding Scale Adjustment Table''.

[29] That is, Market-Maker orders that execute against customer orders.

Additionally, the Exchange notes that Market-Makers (with an appointment in the applicable class) may not submit solicited orders into an AIM Auction; [30] this restriction does not apply to Firm orders. As stated, the Exchange also recognizes that Market-Makers are the primary liquidity providers in the options markets, and particularly, during AIM auctions. Thus, the Exchange believes Market-Makers provide the most accurate prices reflective of the true state of the market and are primarily responsible for encouraging more aggressive quoting and superior price improvement during an AIM Auction. As a result, the Exchange believes it is important to continue to incentivize Market-Makers to actively participate in such auctions by means of assessing a lower transaction fee for Market-Maker AIM Response orders. Increased Market-Maker liquidity also increases trading opportunities and signals to other participants to increase their order flow, which benefits all market participants.

The proposed rule change to remove Market-Maker volume transacted via AIM Responses from eligibility for credits pursuant to the Liquidity Provider Sliding Scale is reasonable because it is also reasonably designed to balance incentivizing Market-Maker's participation in AIM Auctions with establishing a fee in-line with other AIM Response fees. The Exchange also believes that it is reasonable to continue to include Market-Maker AIM Response volume in the volume thresholds for meeting the Liquidity Provider Sliding Scale tiers because, as stated above, it is designed to continue to incentivize Market-Maker participation in AIM Auctions and would assist the Exchange in continuing to provide a robust hybrid market. The Exchange notes that the AIM and C–AIM Auctions generally deliver meaningful opportunities for price improvement to orders and provide an efficient manner of access to liquidity for members. Increased overall auction-related order flow benefits all investors by deepening the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange notes, too, that other programs in the Fees Schedule include certain volume in meeting volume thresholds while not including the same volume as eligible for credits or reduced rates under such programs.[31] The proposed rule change is equitable and not unfairly discriminatory because the proposed rule change will apply equally to all Market-Maker AIM Response volume, in that, no such volume will be allotted credits under the Liquidity Provider Sliding Scale Program.

SCORe Program Changes

The Exchange believes the proposal to exclude certain orders that are revised post-trade, using the Clearing Editor tool is reasonable because it no longer wishes to include these orders as part of the program, and it is not required to do so. The Exchange notes that orders where the capacity is changed from another capacity to Customer using the Clearing Editor and single leg orders created by hard-edits to complex orders using the Clearing Editor were not intended to be a part of the program and believes the intention of the program will continue to be achieved as a result of the proposed changes. The Exchange believes the proposed changes are reasonable because they provide further clarity regarding what orders are (and are not) eligible for the program. Further, the Exchange believes the changes remain equitable and reasonable by not materially changing the program. The Exchange believes SCORe, currently and as amended, continues to provide an incremental incentive for Originating Firms to strive for the highest tier level, which provides increasingly higher discounts. As such, the changes are designed to encourage increased Retail volume in the Qualifying Classes, which provides increased volume and greater trading opportunities for all market participants. The Exchange believes the proposed change is equitable and not unfairly discriminatory because the exclusions of certain orders that are revised post-trade, using the Clearing Editor tool apply to all registered Originating Firms uniformly.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes the proposed rule change to the VIP and AVP does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes to the VIP, and corresponding changes to the AVP, will encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all TPHs. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [32] Further, the proposed change applies to all TPHs submitting qualified orders equally, in that all TPHs submitting such orders are eligible for the tiers (as amended), have a reasonable opportunity to meet the tiers' criteria (as amended) and will all receive the existing credit if such criteria is met. As described above, while only certain orders would count towards the qualifying thresholds, specifically, Customers, Professionals, Broker-Dealers and JBOs, these market participants' orders are primarily executed as agency orders, whose order flow would bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads. Overall, the proposed change is designed to encourage additional order flow to the Exchange, which the Exchange believes benefits all market participants on the Exchange by providing more liquidity, thus trading opportunities, encouraging even more TPHs to send orders, thereby contributing towards a robust and well-balanced market ecosystem to the benefit of all market participants.

The Exchange does not believe that the proposed rule change to adopt a new fee code for Market-Maker AIM Responses will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes will apply uniformly to all Market-Maker AIM Responses, in that all such orders will automatically and uniformly yield fee code MD and be assessed the standard fee for MD. Further, all such orders will uniformly not be eligible for credits

[30] This is also true for SAM Auctions. *See* Rule 5.39.

[31] *See e.g.,* Cboe Options Fees Schedule, Volume Incentive Program (VIP) table (which counts volume for capacity B, J and U towards tier qualification but not as eligible for the VIP credit), and Cboe Options Clearing Trading Permit Holder Proprietary Products Sliding Scale table (which counts volume in products not included in Underlying Symbol List A towards reaching the tiers, but provides reduced rates to volume in products included in Underlying Symbol List A).

[32] *See* Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

under the Liquidity Provider Sliding Scale.

Additionally, the Exchange does not believe that the proposed changes to the SCORe program will impose any burden on intramarket competition because the proposed changes apply to all registered Originating Firms uniformly, in that exclusions of certain orders that are revised post-trade, using the Clearing Editor tool apply to all registered Originating Firms uniformly.

Finally, the Exchange believes the proposed rule changes do not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges. Based on publicly available information, no single options exchange has more than 19% of the market share.[33] Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange, and, additionally off-exchange venues, if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [34] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission*, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[35] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[36] and Rule 19b–4(f)(2) [37] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–CBOE–2023–045 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CBOE–2023–045. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CBOE–2023–045 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20315 Filed 9–19–23; 8:45 am]

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[33] *See supra* note 3.

[34] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[35] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[36] 15 U.S.C. 78s(b)(3)(A)(ii).

[37] 17 CFR 240.19b–4(f)(2).

[38] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98394; File No. SR–CboeEDGA–2023–015]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

September 14, 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 September 1, 2023, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

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.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] 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)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGA–2023–011). On September 1, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83449 (June 15, 2018), 83 FR 28890 (June 21, 2018) (SR–CboeEDGA–2018–010).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 103 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe BYX has 110 members and Cboe BZX has 132 members. There is also no firm that is a Member of EDGA Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party). Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[18] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. Further, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including smaller trading firms that may be able to take advantage of lower costs that result from mutualized connectivity.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership,.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and paragraph (f) of Rule 19b–4 [20] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGA–2023–015 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGA–2023–015. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGA–2023–015 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20311 Filed 9–19–23; 8:45 am]

BILLING CODE 8011–01–P

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98395; File No. SR–CboeBZX–2023–067]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

September 14, 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 September 1, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (BZX Options), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

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.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] 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)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBZX–2023–046). On September 1, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83442 (June 14, 2018), 83 FR 28675 (June 20, 2018) (SR–CboeBZX–2018–037).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 132 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has103 members and Cboe BYX has 110 members. There is also no firm that is a Member of BZX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party). Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[18] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. Further, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including smaller trading firms that may be able to take advantage of lower costs that result from mutualized connectivity.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and paragraph (f) of Rule 19b–4 [20] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–067 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–067. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–067 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20312 Filed 9–19–23; 8:45 am]

BILLING CODE 8011–01–P

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98387; File No. SR–ICEEU–2023–018]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 and Partial Amendment No. 2, Relating to Amendments to the Outsourcing Policy

September 14, 2023.

I. Introduction

On July 10, 2023, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Outsourcing Policy (to be renamed the Outsourcing and Third Party Risk Management Policy) (the ''Outsourcing Policy''). On July 11, 2023, ICE Clear Europe filed Amendment No. 1 to the proposed rule change to make certain changes to the Form 19b–4 and Exhibit 1A for file no. SR–ICEEU–2023–018; [3] and on July 24, 2023, ICE Clear Europe filed Partial Amendment No. 2 to the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 amended and restated in its entirety the Form 19b–4 and Exhibit 1A to correct the narrative description of the proposed rule change. Amendment No. 1 did not change the purpose or basis of the proposed rule change.

change to make a certain change to Exhibit 5 of file no. SR–ICEEU–2023–018 [4] (together, ''proposed rule change''). The proposed rule change was published for comment in the **Federal Register** on July 31, 2023.[5] The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

ICE Clear Europe is registered with the Commission as a clearing agency for the purpose of clearing security-based swaps.[6] In its role as a clearing agency for clearing security-based swaps, ICE Clear Europe regularly enters into arrangements with affiliates and third-party service providers to perform certain functions or activities. Such arrangements often come with a variety of risks, including legal, operational, general business, and other types of risks. To reduce risk exposure from such outsourcing arrangements, ICE Clear Europe created its Outsourcing Policy to describe, in a consolidated document, procedures for managing outsourcing arrangements with affiliates and third-party service providers, including how ICE Clear Europe's Board of Directors (''Board'') maintains oversight of these outsourcing arrangements.[7]

The proposed rule change would amend ICE Clear Europe's Outsourcing Policy to extend coverage to third-party service provider arrangements that technically may not constitute outsourcing, to describe in more detail third-party risk management, to add the execution of risk assessments, and to update the Document Governance and Exception Handling language, among other changes.

As proposed, the purpose of the Outsourcing Policy would clarify that it would extend to arrangements in which services are provided by third parties to ICE Clear Europe, regardless of whether such services are considered outsourcing, including to assessing the risks of such services. The definition of ''outsourcing'' would be clarified as the use of third-party service providers, either an external party or an affiliate, and either directly or through sub-outsourcing, to provide a service that would otherwise be performed by ICE Clear Europe itself and is therefore subject to the Board's oversight. The proposed rule change would more clearly distinguish outsourcing from a purchasing arrangement, which would not involve an arrangement otherwise performed by ICE Clear Europe and therefore typically would not be subject to Board oversight. Regarding outsourced activities, the Outsourcing Policy would explicitly state that ICE Clear Europe would remain responsible for discharging its obligations, the outsourcing arrangement would not result in the delegation of ICE Clear Europe's responsibility, and the outsourced activities would conform to the same standards that would be required if the activities were completed internally.

Under the proposed rule change, the Outsourcing Policy would more clearly distinguish between affiliates and external third-party service providers by adding a definition of the term ''third party,'' which would include any organization (whether or not affiliated) that has entered into a business relationship or contract with ICE Clear Europe to provide products, services, processes, activities or business functions. The use of external third parties (*i.e.,* those not affiliated with ICE Clear Europe in any way) would be managed consistently at the group level through the existing Vendor Management Policy (''VMP''). The proposed rule change would more clearly describe current practice under the Outsourcing Policy by stating that outsourcing through affiliates typically has a lower residual risk profile because, among listed reasons in the existing Policy, the affiliates would have a similar higher standard of operational resilience (rather than referring to business continuity resilience) and ICE Clear Europe would have greater influence (not just control) over the operation of the affiliate's services.

The proposed rule change would add detail to existing statements in the Outsourcing Policy about the objective of and processes for entering into different types of contracting arrangements. Rather than covering solely outsourcing arrangements, the objective would extend to utilizing service providers more generally. The amended Outsourcing Policy would clarify the process of making assessments of service providers in various situations, such as regulated parties and parties in different jurisdictions; the management of outsourcing; and considerations about conflicts of interest and independent audit rights. The Outsourcing Policy would continue to reference ICE Clear Europe's Outsourcing Operating Manual, albeit renamed to cover risk management of additional third-party service providers, rather than just outsourcing arrangements. The Outsourcing Policy would state that contracting with third parties is covered consistently at a group level under the VMP, and would clarify, consistent with current practice, that ICE Clear Europe would use the VMP process as an input for the risk-based assessment of each service provider. ICE Clear Europe, where appropriate, would make external third parties aware of relevant internal policies so that they may gain a better understanding of ICE Clear Europe's regulatory obligations and expected service levels. When contracting with affiliates, ICE Clear Europe's relevant assessment would be made in accordance with its ordinary governance practices, and not necessarily by the senior management. As is current practice, ICE Clear Europe follows its Conflicts of Interest Policy when managing any potential conflicts of interests as a result of its service arrangements, but the proposed rule change would add an explicit reference to the Conflicts of Interest Policy. An additional assessment would be added with respect to cloud outsourcing, where ICE Clear Europe would consider, understand, and manage any risks related to Clearing Members connecting to its services via cloud service providers.

The proposed rule change would add a new Risk Assessments subsection to the processes for entering into different types of contracting arrangements that would set out the proportional risk assessment that would be performed on a service provider, regardless of whether the proposed arrangement falls within the definition of outsourcing, in order to identify, measure, and mitigate risks. The Risk Assessments subsection would include but would not be limited to certain considerations, such as whether the service is a critical or important function or a dependence to the delivery of one of ICE Clear Europe's services, whether the activity is outsourcing, whether the service relies on cloud-based technology that may pose new or additional risks, whether the service

[4] Partial Amendment No. 2 amended and restated in its entirety Exhibit 5 to correct an inadvertent omission of a single word. Partial Amendment No. 2 did not change the purpose or basis of the proposed rule change.

[5] Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 and Partial Amendment No. 2, Relating to Amendments to the Outsourcing Policy, Exchange Act Release No. 97974 (July 25, 2023); 88 FR 49545 (July 31, 2023) (File No. SR–ICEEU–2023–018) (''Notice'').

[6] Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules and the Outsourcing Policy.

[7] Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change Relating to the ICE Clear Europe Outsourcing Policy, Exchange Act Release No. 95685 (Sept. 7, 2022); 87 FR 56129 (Sept. 13, 2022) (File No. SR–ICEEU–2022–014).

provider is an external third party or an affiliate, the legal jurisdiction of the service provider, conflicts of interest, operational resilience considerations, data security, exit plans, contractual terms, and availability of alternative or back-up providers. For outsourced or critical non-outsourced services, the risk assessment would be performed at least annually, and on an ad-hoc basis following a material incident or service disruption event or material service agreement breach. Such risk assessments would be required to include a review of the service provider's performance against the agreed service levels. The responsibilities of executing risk assessments and related testing would be required to be overseen by ICE Clear Europe's Chief Operating Officer or the COO's delegate, with ownership of each service and the related resiliency arrangements resting with the relevant Head of Department.

The proposed rule change would extend existing provisions about the identification of critical or important functions to acquired services generally, rather than applying only to outsourcing, as is currently written. The proposed rule change would clarify that in identifying critical or important functions, ICE Clear Europe would consider the continuity of its important business services or operation as a CCP that could threaten its financial stability or impact its resolvability. As proposed, a third party would be treated as critical if it is contracted to perform such a critical function, with the determination of criticality to be reassessed on at least an annual basis. The Outsourcing Policy would clarify that any outsourcing of critical or important functions could impact ICE Clear Europe's operational resilience measures more generally, rather than affecting the narrower category of business continuity measures. Exit plans for critical and important functions would be required to be tested periodically. As part of its operational resilience framework, ICE Clear Europe would examine purchased services, as well as outsourced or sub-outsourced services, that are a dependence for its important business services. Additional language would require that the operational resilience framework shall include extreme but plausible test scenarios relating to the disruption of critical third-party services.

Under the proposed rule change, the Outsourcing Policy would amend the discussion of additional considerations of particular importance to ICE Clear Europe to ensure that considerations would be given to important business services and critical functions that are affected by third party service arrangements, including with respect to business continuity arrangements, incident management responsiveness and reporting, independent assurances, redundancies, and notice periods and exit strategies. A new subsection detailing Contractual Agreements would be added, specifying that for outsourcing arrangements in particular, ICE Clear Europe's Legal team would review any written service agreements to confirm the inclusion of all relevant contractual safeguards so that ICE Clear Europe could monitor relevant risks, regulatory requirements, and expectations. ICE Clear Europe would look to ensure that the agreements outline the rights, obligations, and responsibilities of all the parties, and include provisions associated with data security; access, audit and information rights; sub-outsourcing; service resilience; service levels; incident management; termination; and exit plans. Arrangements for purchased services would be similarly reviewed, but the Outsourcing Policy would acknowledge that some purchased services may be subject to non-negotiable terms set by the third party, which would be considered during the pre-execution risk assessment phase. The new Contractual Agreements subsection also would require that ICE Clear Europe periodically exercise its audit rights, as appropriate, regarding critical outsourcing arrangements, and that this may include on-site visits.

The proposed rule change would revise provisions related to Board oversight to provide that the Board must approve new or materially amended outsourcing arrangements. Certain clarifications would be made to the requirements for the annual outsourcing assessment report to be prepared by the Chief Operating Officer, including the addition of a summary of critical non-outsourcing services received. The proposed rule change would add a new subsection on regulatory engagement, setting out that ICE Clear Europe shall engage with regulatory authorities before executing or materially amending a critical service arrangement, regardless of whether it falls within the definition of outsourcing, with due regard to relevant regulatory requirements or expectations.

Lastly, the proposed rule change would revise provisions related to document governance, breach management, and exception handling, to ensure consistency with other ICE Clear Europe policies. As proposed, the document owner identified by ICE Clear Europe would be responsible for ensuring that the Outsourcing Policy remains up-to-date and reviewed in accordance with the internal governance processes. Document reviews would be conducted by the document owner and related staff, with sign off by the head of department and the Chief Risk Officer, or their respective delegates. Document reviews would encompass at the minimum regulatory compliance, documentation and purpose, implementation, use and open items from previous validations or reviews. Results of the review would be reported to the Executive Risk Committee or, in certain cases, to the Model Oversight Committee. The document owner would aim to remediate the findings, complete internal governance, and receive regulatory approvals before the next annual review is due. The document owner also would be responsible for reporting any material breaches or deviations to the Head of Department, Chief Risk Officer and Head of Regulation and Compliance in order to determine if further escalation is required. The Outsourcing Policy would state explicitly that changes to it would have to be approved in accordance with ICE Clear Europe's governance process and would take effect following completion of required internal and regulatory approvals. Exceptions to the Outsourcing Policy likewise would be approved according to the governance processes for approvals of changes to the Outsourcing Policy.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[8] For the reasons discussed below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[9] and Rules 17Ad–22(e)(2)(v) and (e)(3)(i) thereunder.[10]

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 ICE Clear Europe be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements,

[8] 15 U.S.C. 78s(b)(2)(C).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 17 CFR 240.17Ad–22(e)(2)(v) and (e)(3)(i).

contracts, and transactions.[11] As noted above, the proposed rule change would revise ICE Clear Europe's Outsourcing Policy to expand its application to a wider variety of affiliated and third party service arrangements, rather than solely covering outsourcing, as well as clarify and add to existing provisions that govern agreements for performing certain functions and activities. Some of these functions and activities relate to ICE Clear Europe's operations and business, while others may have to do with its clearance and settlement obligations. As proposed, the Outsourcing Policy would provide greater clarity as to the processes for entering into different types of contracting arrangements; and add detailed and, where applicable, annual risk assessments of potential service providers. Such detailed risk assessments would include considerations of whether the service is a critical or important function or a dependence to the delivery of one of ICE Clear Europe's services, among other things. The proposed rule change also would clarify provisions about the identification of critical or important functions, including that in identifying such functions, ICE Clear Europe would consider the continuity of its important business services or operation as a CCP that could threaten its financial stability or impact its resolvability. Additional language on Contractual Agreements would more clearly guide ICE Clear Europe in making sure that service agreements outline the rights, obligations, and responsibilities of all involved parties, and include provisions regarding service levels, service resilience, and incident management, among others. Taken together, these amendments would clarify how ICE Clear Europe can continue to meet its security-based swap obligations and help prevent service interruptions through carefully drafted and managed service agreements with third parties or affiliates, thus promoting the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions.

For these reasons, the Commission believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.[12]

B. Consistency With Rule 17Ad–22(e)(2)(v) Under the Act

Rule 17Ad–22(e)(2)(v) requires, in relevant part, that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed, as applicable, to provide for governance arrangements that specify clear and direct lines of responsibility.[13]

As amended, the Outsourcing Policy would clarify, in various provisions throughout the document, the responsibilities, ownership, and reporting obligations of certain personnel and departments in relation to risk management of service arrangements. For example, the proposed rule change would more clearly distinguish between outsourcing, which is subject to Board oversight, and purchasing arrangements, which are not. The Board would additionally and explicitly be responsible for the approval of new or materially amended outsourcing arrangements. When contracting with affiliates, ICE Clear Europe's relevant assessment would be made in accordance with its ordinary governance practices, and not necessarily by the senior management. The responsibilities of executing detailed risk assessments and related testing would be overseen by ICE Clear Europe's Chief Operating Officer or delegate, with ownership of each service and the related resiliency arrangements resting with the relevant Head of Department. The proposed Outsourcing Policy specifies that the Legal team would be responsible for drafting and/or reviewing written service agreements to ensure that relevant contractual safeguards are in place. New provisions would be added to ensure appropriate document governance and exception handling. Overall, the proposed rule change inserted and clarified the decision-making responsibilities and reporting chains of command with respect to a variety of aspects of the Outsourcing Policy, thus providing for governance arrangements that specify clear and direct lines of responsibility.

For these reasons, the Commission believes that the proposed rule change is consistent with Rule 17Ad–22(e)(2)(v).[14]

C. Consistency With Rule 17Ad–22(e)(3)(i) Under the Act

Rule 17Ad–22(e)(3)(i) requires that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to, as applicable, maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by ICE Clear Europe, which includes risk management policies, procedures, and systems designed to identify, measure, monitor, and manage the range of risks that arise in or are borne by ICE Clear Europe, that are subject to review on a specified periodic basis and approved by ICE Clear Europe's board of directors annually.[15]

The Commission believes that the proposed revisions to the existing Outsourcing Policy not only would extend the scope of its application beyond traditional outsourcing arrangements to more comprehensively capture other types of service agreements with similar risks, but also would detail the factors against which risk assessments and contractual agreements are to be made and monitored, with existing relevant provisions for the Board's annual review of the Outsourcing Policy. As noted above, the new Risk Assessments subsection would require ICE Clear Europe to consider, among other things, whether the service is a critical or important function or a dependence to the delivery of one of ICE Clear Europe's services, whether the service relies on cloud-based technology that may pose new or additional risks, conflicts of interest, and data security. Likewise, the newly added Contractual Agreements subsection requires such contracts address data security; access, audit and information rights; and incident management, among other things. Overall, these considerations touch upon the various risks that may emerge when contracting with affiliates or third parties for services and by addressing them in detail in the proposed revisions to the Outsourcing Policy, the Commission believes that ICE Clear Europe is strengthening its ability to identify, monitor, and measure the risks related to such arrangements.

For these reasons, the Commission believes that the proposed rule change is consistent with Rule 17Ad–22(e)(3)(i).[16]

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, with the requirements of Section 17A(b)(3)(F) of the Act,[17] and Rules 17Ad–22(e)(2)(v) and 17Ad–22(e)(3)(i).[18]

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 15 U.S.C. 78q–1(b)(3)(F).

[13] 17 CFR 240.17Ad–22(e)(2)(v).

[14] 17 CFR 240.17 Ad–22(e)(2)(v).

[15] 17 CFR 240.17 Ad–22(e)(3)(i).

[16] 17 CFR 240.17Ad–22(e)(3)(i).

[17] 15 U.S.C. 78q–1(b)(3)(F).

[18] 17 CFR 240.17Ad–22(e)(2)(i) and (v) and 17 CFR 240.17Ad–22(e)(3)(i).

It is therefore ordered pursuant to Section 19(b)(2) of the Act [19] that the proposed rule change (SR–ICEEU–2023–018), be, and hereby is, approved.[20]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20306 Filed 9–19–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98389; File No. SR–CboeBZX–2023–068]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

September 14, 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 September 1, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''BZX Options'') relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (BZX Equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

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.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [7] 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) [8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) [9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb

[19] 15 U.S.C. 78s(b)(2).

[20] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBZX–2023–047). On September 1, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83429 (June 14, 2018), 83 FR 28685 (June 20, 2018) (SR–CboeBZX–2018–038).

physical port was last modified.[11] Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered options exchanges that trade options (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 19% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, and MIAX Emerald LLC) and one additional options exchange that is expected to launch in 2023 (*i.e.,* MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 61 members that trade options, Cboe EDGX has 51 members that trade options, and Cboe C2 has 52 Trading Permit Holders (''TPHs'') (*i.e.,* members). There is also no firm that is a Member of BZX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party). Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[19] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (June 27, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

third-parties may also be able connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. Further, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including smaller trading firms that may be able to take advantage of lower costs that result from mutualized connectivity.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated options markets. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [20] and paragraph (f) of Rule 19b–4 [21] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeBZX–2023–068 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–068. 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

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f).

withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–068 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20308 Filed 9–19–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98396; File No. SR–CboeEDGX–2023–057]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

September 14, 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 September 1, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (EDGX Options), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

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.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] 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)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11]

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGX–2023–044). On September 1, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83450 (June 15, 2018), 83 FR 28884 (June 21, 2018) (SR–CboeEDGX–2018–016).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 124 members that trade equities, Cboe BZX has 132 members that trade equities, Cboe EDGA has103 members and Cboe BYX has 110 members. There is also no firm that is a Member of EDGX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party). Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[18] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. Further, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

have numerous customers of their own. Given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including smaller trading firms that may be able to take advantage of lower costs that result from mutualized connectivity.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and paragraph (f) of Rule 19b–4 [20] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeEDGX–2023–057 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGX–2023–057. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–057 and should be submitted on or before October 11, 2023.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20313 Filed 9–19–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98388; File No. 4–443]

Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment to the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options To Add MEMX LLC as a Plan Sponsor

September 14, 2023.

Pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 608 thereunder,[2] notice is hereby given that on August 29, 2023, MEMX LLC (''MEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') an amendment to the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options (''OLPP'' or ''Plan'').[3] The Commission approved the application of MEMX to register as a national securities exchange on May 4, 2020.[4] The Commission subsequently approved MEMX's proposal to adopt rules to govern the trading of options on the Exchange for a new facility called MEMX Options.[5] One of the conditions of the Commission's approval of MEMX Options was the requirement for MEMX to join the OLLP.[6] The amendment adds MEMX as a Plan Sponsor[7] of the OLPP.[8] The Commission is publishing this notice to solicit comments on the amendment from interested persons.

I. Description and Purpose of the Amendment

The OLPP establishes procedures designed to facilitate the listing and trading of standardized options contracts on the options exchanges. The amendment to the OLPP adds MEMX as a Sponsor. The other OLPP Sponsors are BOX, Cboe, Cboe BZX, Cboe C2, Cboe EDGX, Nasdaq BX, MIAX, MIAX Emerald, MIAX PEARL, Nasdaq, Nasdaq GEMX, Nasdaq ISE, Nasdaq MRX, Nasdaq Phlx, NYSE American, NYSE Arca, and OCC. MEMX has submitted an executed copy of the OLPP to the Commission in accordance with the procedures set forth in the OLPP regarding new Plan Sponsors. Section 7 of the OLPP provides for the entry of new Plan Sponsors to the OLPP. Specifically, Section 7 of the OLPP provides that an Eligible Exchange[9] may become a Plan Sponsor of the OLPP by: (i) executing a copy of the OLPP, as then in effect; (ii) providing each then-current Plan Sponsor with a copy of such executed OLPP; and (iii) effecting an amendment to the OLPP, as specified in Section 7(ii) of the OLPP.[10]

Section 7(ii) of the OLPP sets forth the process by which an Eligible Exchange may effect an amendment to the OLPP to become a Plan Sponsor. Specifically, an Eligible Exchange must: (a) execute a copy of the OLPP as then in effect with the only change being the addition of the new Plan Sponsor's name in Section 9 of the OLPP; [11] and (b) submit the executed OLPP to the Commission. The OLPP then provides that such an amendment will be effective when the amendment is approved by the Commission or otherwise becomes effective pursuant to Section 11A of the Act and Rule 608 thereunder.

II. Effectiveness of the OLPP Amendment

The foregoing OLPP amendment has become effective pursuant to Rule 608(b)(3)(iii) [12] because it has been designated by the sponsors as involving solely technical or ministerial matters. At any time within sixty days of the filing of the amendment, the Commission may summarily abrogate the amendment and require that it be refiled pursuant to paragraph (a)(1) of Rule 608,[13] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the amendment is consistent with the Act and the rules thereunder. Comments may be submitted by any of the following methods:

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[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] On July 6, 2001, the Commission approved the OLPP, which was proposed by the American Stock Exchange LLC (''Amex'') (n/k/a NYSE American, LLC (''NYSE American'')), Chicago Board Options Exchange, Incorporated (''Cboe''), International Securities Exchange LLC (''ISE'') (n/k/a Nasdaq ISE, LLC (''Nasdaq ISE'')), Options Clearing Corporation (''OCC''), Philadelphia Stock Exchange, Inc. (''Phlx'') (n/k/a Nasdaq Phlx LLC (Nasdaq Phlx)), and Pacific Exchange, Inc. (''PCX'') (n/k/a NYSE Arca, Inc. (''NYSE Arca'')). *See* Securities Exchange Act Release No. 44521, 66 FR 36809 (July 13, 2001). *See also* Securities Exchange Act Release Nos. 49199 (February 5, 2004), 69 FR 7030 (February 12, 2004) (adding Boston Stock Exchange, Inc. as a Sponsor to the OLPP); 57546 (March 21, 2008), 73 FR 16393 (March 27, 2008) (adding Nasdaq Stock Market, LLC (''Nasdaq'') as a Sponsor to the OLPP); 61528 (February 17, 2010), 75 FR 8415 (February 24, 2010) (adding BATS Exchange, Inc. (''BATS'') (n/k/a Cboe BZX Exchange, Inc. (''Cboe BZX'')) as a Sponsor to the OLPP); 63162 (October 22, 2010), 75 FR 66401 (October 28, 2010) (adding C2 Options Exchange Incorporated (''C2'') (n/k/a Cboe C2 Exchange, Inc. (''Cboe C2'')) as a sponsor to the OLPP); 66952 (May 9, 2012), 77 FR 28641 (May 15, 2012) (adding BOX Options Exchange LLC (''BOX'') as a Sponsor to the OLPP); 67327 (June 29, 2012), 77 FR 40125 (July 6, 2012) (adding Nasdaq OMX BX, Inc. (''BX'') (n/k/a Nasdaq BX, Inc. (''Nasdaq BX'')) as a Sponsor to the OLPP); 70765 (October 28, 2013), 78 FR 65739 (November 1, 2013) (adding Topaz Exchange, LLC as a Sponsor to the OLPP (''Topaz'') (n/k/a Nasdaq GEMX, LLC (''Nasdaq GEMX''); 70764 (October 28, 2013), 78 FR 65733 (November 1, 2013) (adding Miami International Securities Exchange, LLC (''MIAX'') as a Sponsor to the OLPP); 76822 (January 1, 2016), 81 FR 1251 (January 11, 2016) (adding EDGX Exchange, Inc. (''EDGX'') (n/k/a Cboe EDGX Exchange, Inc. (''Cboe EDGX'')) as a Sponsor to the OLPP); 77323 (March 8, 2016), 81 FR 13433 (March 14, 2016) (adding ISE Mercury, LLC (''ISE Mercury'') (n/k/a Nasdaq MRX, LLC (''Nasdaq MRX'')) as a Sponsor to the OLPP); 79897 (January 30, 2017), 82 FR 9263 (February 3, 2017) (adding MIAX PEARL, LLC (''MIAX PEARL'') as a Sponsor to the OLPP) and 85228 (March 1, 2019), 84 FR 8355 (March 7, 2019) (adding MIAX Emerald, LLC (''MIAX Emerald'') as a Sponsor to the OLPP).

[4] *See* Securities and Exchange Act Release No. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020) (File No. 10–237).

[5] *See* Securities and Exchange Act Release No. 95445 (August 8, 2022), 87 FR 49894 (August 12, 2022) (File No. SR–MEMX–2022–10).

[6] *See id.* at 49907.

[7] A ''Plan Sponsor'' is an Eligible Exchange whose participation in the OLPP has become effective pursuant to Section 7 of the OLPP.

[8] *See* Letter from Anders Franzon, General Counsel, MEMX, to Vanessa Countryman, Secretary, Commission, dated August 29, 2023 (''Amendment'').

[9] The OLPP defines an ''Eligible Exchange'' as a national securities exchange registered with the Commission pursuant to Section 6(a) of the Act, 15 U.S.C. 78f(a), that (1) has effective rules for the trading of options contracts issued and cleared by the OCC approved in accordance with the provisions of the Act and the rules and regulations thereunder and (2) is a party to the Plan for Reporting Consolidated Options Last Sale Reports and Quotation Information (the ''OPRA Plan''). MEMX has represented that it has met both the requirements for being considered an Eligible Exchange. *See* Amendment, *supra* note 8 (Section 7(i) of the OLPP).

[10] MEMX has represented that it has executed a copy of the current Plan, amended to include MEMX as a Plan Sponsor in Section 9 of the Plan, and has provided each current Plan Sponsor with a copy of the executed and amended Plan. *See* Amendment, *supra* note 8.

[11] The list of Plan Sponsors is set forth in Section 9 of the OLPP.

[12] 17 CFR 242.608(b)(3)(iii).

[13] 17 CFR 242.608(a)(1).

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 4–443 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 4–443. 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 plan that are filed with the Commission, and all written communications relating to the plan 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 4–443 and should be submitted on or before October 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20307 Filed 9–19–23; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(85).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Submission Deadline for Schedule Information for Chicago O'Hare International Airport, John F. Kennedy International Airport, Los Angeles International Airport, Newark Liberty International Airport, and San Francisco International Airport for the Summer 2024 Scheduling Season

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

ACTION: Notice of submission deadline.

SUMMARY: Under this notice, the FAA announces the submission deadline of October 5, 2023, for Summer 2024 flight schedules at Chicago O'Hare International Airport (ORD), John F. Kennedy International Airport (JFK), Los Angeles International Airport (LAX), Newark Liberty International Airport (EWR), and San Francisco International Airport (SFO). In addition, this notice announces a new voluntary, targeted hourly scheduling limit at EWR based on a review of recent operational performance metrics.

DATES: Schedules should be submitted by October 5, 2023.

ADDRESSES: Schedules may be submitted to the Slot Administration Office by email to: *7-AWA-slotadmin@faa.gov.*

FOR FURTHER INFORMATION CONTACT: Al Meilus, Manager, Slot Administration and Capacity Analysis, AJR–G, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–2822; email *Al.Meilus@faa.gov.*

SUPPLEMENTARY INFORMATION: This document provides routine notice to carriers serving capacity-constrained airports in the United States, including ORD, JFK, LAX, EWR, and SFO. In particular, this notice announces the deadline for carriers to submit schedules for the Summer 2024 scheduling season. The FAA deadline coincides with the schedule submission deadline established in the Calendar of Coordination Activities as published by the International Air Transport Association (IATA).

General Information for All Airports

The FAA has designated JFK as an IATA Level 3 airport consistent with the Worldwide Slot Guidelines (WSG).[1] The FAA currently limits scheduled operations at JFK by order that expires on October 26, 2024.[2]

The FAA has designated EWR, LAX, ORD, and SFO as IATA Level 2 airports[3] subject to a schedule review process premised upon voluntary cooperation. The Summer 2024 scheduling season is from March 31, 2024, through October 26, 2024, in recognition of the IATA Summer season.

The FAA is primarily concerned about scheduled and other regularly conducted commercial operations during designated hours, but carriers may submit schedule plans for the entire day. The designated hours for the Summer 2024 scheduling season are: at EWR and JFK from 0600 to 2300 Eastern Time (1000 to 0300 UTC), at LAX and SFO from 0600 to 2300 Pacific Time (1300 to 0600 UTC), and at ORD from 0600 to 2100 Central Time (1100 to 0200 UTC). These hours are unchanged from previous scheduling seasons.

Carriers should submit schedule information in sufficient detail including, at minimum, the marketing or operating carrier, flight number, scheduled time of operation, frequency, aircraft equipment, and effective dates. IATA standard schedule information format and data elements for communications at Level 2 and Level 3 airports in the IATA Standard Schedules Information Manual (SSIM) Chapter 6 may be used. The WSG provides additional information on schedule submissions at Level 2 and Level 3 airports. Some carriers at JFK manage and track slots through FAA-assigned Slot ID numbers corresponding to an arrival or departure slot in a particular half-hour on a particular day of week and date. The FAA has a similar voluntary process for tracking schedules at EWR with Reference IDs, and certain carriers are managing their schedules accordingly. The primary users of IDs are United States and Canadian carriers that have the highest frequencies and considerable schedule changes throughout the season and can benefit from a simplified exchange of

[1] The FAA generally applies the WSG to the extent there is no conflict with U.S. law or regulation. The FAA recognizes the WSG has been replaced by the Worldwide Airports Slot Guidelines (WASG) edition 1, effective June 1, 2020, and subsequently WASG edition 2, effective July 1, 2022. The WASG is published jointly by Airports Council International-World, IATA, and the Worldwide Airport Coordinators Group (WWACG). While the FAA is considering whether to implement certain changes to the Guidelines in the United States, it will continue to apply WSG edition 9.

[2] Operating Limitations at John F. Kennedy International Airport, 73 FR 3510 (Jan. 18, 2008), as most recently extended 87 FR 65161 (Oct. 28, 2022). The slot coordination parameters for JFK are set forth in this Order.

[3] These designations remain effective until the FAA announces a change in the **Federal Register**.

information not dependent on full flight details. Carriers are encouraged to submit schedule requests at those airports using Slot or Reference IDs.

As stated in the WSG, schedule facilitation at a Level 2 airport is based on the following: (1) Schedule adjustments are mutually agreed upon between the carriers and the facilitator; (2) the intent is to avoid exceeding the airport's coordination parameters; (3) the concepts of historic precedence and series of slots do not apply at Level 2 airports; although WSG recommends giving priority to approved services that plan to operate unchanged from the previous equivalent season at Level 2 airports, and (4) the facilitator should adjust the smallest number of flights by the least amount of time necessary to avoid exceeding the airport's coordination parameters. Consistent with the WSG, the success of Level 2 in the United States depends on the voluntary cooperation of carriers.

The FAA considers several factors and priorities that are consistent with the WSG as it reviews schedule and slot requests at Level 2 and Level 3 airports, including (1) historic slots or services from the previous equivalent season over new demand for the same timings; (2) services that are unchanged over services that plan to change time or other capacity relevant parameters; (3) introduction of year-round services; (4) effective period of operation; (5) regularly planned operations over *ad hoc* operations, and other operational factors that may limit a carrier's timing flexibility.

The FAA seeks to maintain close communications with carriers and terminal schedule facilitators on potential runway schedule issues or terminal and gate issues that may affect the runway times. In addition to applying these priorities from the WSG, the U.S. Government has adopted a number of measures and procedures to promote competition and new entry at U.S. slot-controlled and schedule-facilitated airports.

Slot management in the United States differs in some respect from procedures in other countries. In the United States, the FAA is responsible for facilitation and coordination of runway access for takeoffs and landings at Level 2 and Level 3 airports; however, the airport authority or its designee is responsible for facilitation and coordination of terminal/gate/airport facility access. The process with the individual airports for terminal access and other airport services is separate from, and in addition to, the FAA schedule review based on runway capacity.

Generally, the FAA uses average hourly runway capacity throughput for airports and performance metrics in conducting its schedule review at Level 2 airports and determining the scheduling limits at Level 3 airports included in FAA rules or orders.[4] The FAA also considers other factors that can affect operations, such as capacity changes due to runway, taxiway, or other airport construction, air traffic control procedural changes, airport surface operations, and historical or projected flight delays and congestion.

Finally, the FAA notes that the schedule information submitted by carriers to the FAA may be subject to disclosure under the Freedom of Information Act (FOIA). The WSG also provides for release of information at certain stages of slot coordination and schedule facilitation. In general, once it acts on a schedule submission or slot request, the FAA may release information on slot allocation or similar slot transactions, or schedule information reviewed as part of the schedule facilitation process. The FAA does not expect that practice to change, and most slot and schedule information would not be exempt from release under FOIA. The FAA recognizes that some carriers may submit information on schedule plans that is both customarily and actually treated as private. Carriers that submit such confidential schedule information should clearly mark the information, or any relevant portions thereof, as proprietary information (''PROPIN''). The FAA will take the necessary steps to protect properly designated information to the extent allowable by law.

EWR General Information

Consistent with the WSG, carriers are asked for their voluntary cooperation to adjust schedules to meet the targeted scheduling limits in order to minimize potential congestion and delay. Even with the current targeted scheduling limits, on-time performance at EWR is among the worst in the nation. Since 2018, EWR has had the largest number of Ground Delay Programs (GDPs),[5] the largest number of late arriving aircraft due to GDPs,[6] and the lowest on-time arrival rate [7] among the Core 30 airports. The FAA has also reviewed the distributions of scheduled operations and actual runway operations. Based on Aviation System Performance Metrics (ASPM) data from January 2022 through July 2023, there is a significant imbalance between scheduled operations and actual runway operations.[8] Based on FAA internal analysis, the median hourly number of actual runway operations at EWR is lower than the median number of hourly scheduled operations by three operations per hour. Further, the actual airport throughput (the sum of actual arrivals and departures) is less than or equal to 77 operations per hour 95% of the time based on ASPM empirical data. Current approved schedules at EWR routinely exceed 77 operations per hour and in fact exceed the current schedule limit of 79 operations per hour. The hours that are most frequently scheduled above the approved hourly targeted scheduling limit are 0700, 0800, 1500, 1600, 1700, 1900, and 2000 Eastern Time. Schedules in these hours can reach 88 operations per hour. This imbalance in schedules and actual throughput results in congestion which, in turn, results in chronic delays and cancellations.

The current voluntary targeted scheduling limits at EWR are 79 operations per hour and 43 operations per half hour. The current targeted maximum number of scheduled arrivals or departures, respectively, is 43 in an hour and 24 in a half-hour.[9] To better align scheduled operations with the airport's runway operational capacity, based on actual runway operations, the targeted scheduling limit is reduced to 77 operations per hour and 42 operations per half hour. Improving the alignment between scheduled operations and actual operations will help prevent unnecessary delays, will help optimize the efficient use of the airport's resources, and will help deliver passengers to their destinations more reliably and on time. To balance arrivals

[4] The FAA typically determines an airport's average adjusted runway capacity or typical throughput for Level 2 airports by reviewing hourly data on the arrival and departure rates that air traffic control indicates could be accepted for that hour, commonly known as ''called'' rates. The FAA also reviews the actual number of arrivals and departures that operated in the same hour. Generally, the FAA uses the higher of the two numbers, called or actual, for identifying trends and schedule review purposes. Some dates are excluded from analysis, such as during periods when extended airport closures or construction could affect capacity.

[5] ASPM: Key Advisories: GDP & GS Report. *https://aspm.faa.gov/aspmhelp/index/ASPM_Key_Advisories__GDP_%26_GS_Report.html.*

[6] ASPM: Airport Analysis: EDCT Report.

[7] Aviation System Performance Metrics (ASPM): Airport Analysis: Delayed Flights Report. *https://aspm.faa.gov/aspmhelp/index/ASPM__Analysis__Delayed_Flights.html.*

[8] ASPM: Airport Efficiency: Daily Configuration By Hour Report. *https://aspmhelp.faa.gov/index/ASPM_Efficiency__Daily_Configuration_By_Hour_Report.html.*

[9] *See* 88 FR 22514 (April 13, 2023); 87 FR 60430 (October 5, 2022).

and departures, the targeted maximum number of scheduled arrivals and departures, respectively, will be 42 in an hour and 23 in a half-hour. These targets are expected to allow some higher levels of operations in certain periods (not to exceed the hourly limits) and some recovery from lower demand in adjacent periods. Consistent with general established practice at EWR, the FAA will accept flights above the limits if the flights were operated as approved, or treated as operated, by the same carrier on a regular basis in the previous corresponding season (*i.e.,* Summer 2023) and consistent with the recent DOT reassignment of 16 peak-hour runway timings.[10] However, the FAA does not intend to approve requests for new flights unless they can be accommodated within the targeted limits. The FAA is seeking carriers' voluntary cooperation to get scheduled operations down to the new targeted scheduling limits.

Carriers are reminded that FAA approval for runway times is separate from the approval process for gates or other airport infrastructure and both are essential for the success of Level 2 at EWR. Schedule facilitation at Level 2 airports is designed to engender collaboration and gain mutual agreement between the carriers and the FAA regarding schedules and potential adjustments to stay within the performance goals and capacity limits of the airport and to mitigate delays and congestion that would result in the need for Level 3 slot controls. The FAA expects that all carriers operating at EWR will respect the targeted scheduling limits and work cooperatively with the FAA in order to avoid unacceptable delays and other adverse operational impacts at the airport.

Issued in Washington, DC, on September 15, 2023.

Alyce Hood-Fleming,

Vice President, System Operations Services.

[FR Doc. 2023–20419 Filed 9–18–23; 11:15 am]

BILLING CODE 4910–13–P

[10] See Department of Transportation Order 2022–7–1, Docket DOT–OST–2021–0103, served July 5, 2022, ''Reassignment of Schedules at Newark-Liberty International Airport''.10.

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2023–0027]

Agency Information Collection Activities: Request for Comments for a New Information Collection; Withdrawal

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice; withdrawal.

SUMMARY: The FHWA is withdrawing the notice, ''Agency Information Collection Activities: Request for Comments for a New Information Collection,'' published in the **Federal Register** on September 15, 2023.

FOR FURTHER INFORMATION CONTACT: Paul Jodoin, 202–366–5465, Office of Operations, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION: The FHWA is withdrawing the notice published in the **Federal Register** on September 15, 2023, at 88 FR 63644 (FR Number 2023–20021).

Issued on: September 15, 2023.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2023–20344 Filed 9–19–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2023–0026]

Agency Information Collection Activities: Request for Comments for a New Information Collection; Withdrawal

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice; withdrawal.

SUMMARY: The FHWA is withdrawing the notice, ''Agency Information Collection Activities: Request for Comments for a New Information Collection,'' published in the **Federal Register** on September 15, 2023.

FOR FURTHER INFORMATION CONTACT: Jason Broehm, Office of Safety, 202–366–2201, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m., from Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The FHWA is withdrawing the notice published in the **Federal Register** on September 15, 2023, at 88 FR 63643 (FR Doc. 2023–20042).

Issued on: September 15, 2023.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2023–20341 Filed 9–19–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway Projects in Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by TxDOT and Federal agencies.

SUMMARY: This notice announces actions taken by TxDOT and Federal agencies that are final. The environmental review, consultation, and other actions required by applicable Federal environmental laws for these projects are being, or have been, carried out by TxDOT pursuant to an assignment agreement executed by FHWA and TxDOT. The actions relate to various proposed highway projects in the State of Texas. These actions grant licenses, permits, and approvals for the projects.

DATES: By this notice, TxDOT is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of TxDOT and Federal agency actions on the highway projects will be barred unless the claim is filed on or before the deadline. For the projects listed below, the deadline is February 20, 2024. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such a claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Patrick Lee, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; telephone: (512) 416–2358; email: *Patrick.Lee@txdot.gov*. TxDOT's normal business hours are 8:00 a.m.–5:00 p.m. (central time), Monday through Friday.

SUPPLEMENTARY INFORMATION: The environmental review, consultation, and other actions required by applicable Federal environmental laws for these

projects are being, or have been, carried out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 9, 2019, and executed by FHWA and TxDOT.

Notice is hereby given that TxDOT and Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the highway projects in the State of Texas that are listed below.

The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion (CE), Environmental Assessment (EA), or Environmental Impact Statement (EIS) issued in connection with the projects and in other key project documents. The CE, EA, or EIS and other key documents for the listed projects are available by contacting the local TxDOT office at the address or telephone number provided for each project below.

This notice applies to all TxDOT and Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [54 U.S.C. 312501 *et seq.*]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act [33 U.S.C. 1251–1377] (Section 404, Section 401, Section 319); Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

The projects subject to this notice are:

1. FM 1103 from Rodeo Way to FM 78, Guadalupe County, Texas. The project will widen the existing two-lane divided roadway to a four-lane divided roadway with a combination of a center turn lane and medians. The project is 1.867 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on June 2, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT San Antonio District Office at 4615 NW Loop 410, San Antonio, TX 78229; telephone: (210) 615–5839.

2. US 69 South Broadway from South Town Drive South to 0.3 miles south of FM 2813, Smith County, Texas. The proposed project will provide operational improvements at the US 69 intersections with Cumberland Road, Centennial Parkway, and FM 2813/Marsh Farm Road. Operational improvements include constructing a Restricted Crossing U-turn (RCUT) intersection at FM 2813, constructing additional dedicated left-turn and right-turn lanes, and constructing and removing median breaks. A third travel lane is proposed on northbound and southbound US 69 between Cumberland Road and FM 2813/Marsh Farm Road. Shared-use paths are proposed along US 69 between Cumberland Road and FM 2813/Marsh Farm Road. A raised median is proposed from South Town Drive to Baylor Drive and from East Heritage Drive to Cumberland Road. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on June 26, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Tyler District Office at 2709 West Front Street Tyler, TX 75702; telephone: (903) 510–9100.

3. FM 2493 from SL 323 to FM 2813 (also known as Old Jacksonville Highway), Smith County, Texas. Improvements include widening the existing four-lane roadway with a continuous center left-turn lane to a six-lane urban arterial with a raised median from approximately 0.3-mile north of SL 323 to 0.2-mile south of FM 2813. Additionally, a new grade-separated interchange will be constructed at Grande Boulevard. The project also includes improvements to cross-street intersections and driveways, construction of a grade-separated interchange at State Highway (SH) 57/Grande Boulevard, the addition of a 12-foot-wide shared-use path adjacent to the southbound FM 2493 mainlanes from the northern project limits to TX–49 Loop to accommodate bicyclists and pedestrians, construction of a six-foot-wide sidewalk along the northbound FM 2493 mainlanes and southbound mainlanes south of the TX–49 Loop, connections to the existing Legacy Trail, improved signalization, and drainage improvements. The length of the project is approximately 5.6 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 5, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Tyler District Office at 2709 West Front Street, Tyler, TX 75702; telephone: (903) 510–9100.

4. US 90A from Griggs Road to Cullen Road, Harris County, Texas. The project consists of drainage improvements including increased number of inlets, increased storage capacity of storm sewer, and a 1.58-acre detention pond. The project is approximately 0.18 miles long. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 10, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by

contacting the TxDOT Houston District Office at 7600 Washington Avenue, Houston, TX 77007; telephone: (713) 802–5000.

5. US 82, Clarksville Loop from SH 37 South to FM Road 114, Red River County, Texas. From SH 37 South to FM 37 North, US 82 will be widened from two lanes to a divided four-lane roadway. From SH 37 North/US 82 interchange to Business (BU) 82, the four-lane widening of US 82 will continue. A grade-separated structure will be constructed over SH 37 North to accommodate the proposed lane addition on US 82. From BU 82 to FM 114, US 82 will extend approximately 0.37 miles eastward to FM 412. The project length is approximately 4.4 miles. There will be realignments along intersections and transitional pavement along with additional pedestrian elements on some portions of the project. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 19, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Paris District Office at 1365 North Main Street, Paris, TX 75640; telephone: (903)737–9300.

6. Las Vegas Trail from Quebec Drive to I–820, Tarrant County, Texas. TxDOT is proposing improvements along a 0.3-mile section of Las Vegas Trail from Quebec Drive to I–820 in White Settlement and Fort Worth, Texas. The project will also extend approximately 250 feet east along Heron Drive and 300 feet east along Shoreview Drive. The reconstruction of Las Vegas Trail will result in additional travel lanes, turns lanes at intersections, and a shared-use path. A section of the roadway will be realigned to improve the roadway geometry. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 27, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Fort Worth District Office at 2501 S W Loop 820 Fort Worth, TX 76133; telephone: (817) 370–6744.

7. I–35 from 0.5 mile south of the I–35/Uniroyal Dr/Beltway Parkway interchange to 3.2 miles north of the Uniroyal Interchange, Webb County, Texas. This project will realign and widen the I–35 main lanes to consist of three 12-foot-wide travel lanes in each direction with 10-foot-wide inside and outside shoulders divided by a three-foot-tall concrete traffic barrier. Throughout the project limits, the existing two-way frontage roads will be converted to one-way frontage roads and realigned within the right-of-way. These frontage roads will typically consist of two 12-foot-wide travel lanes with four-foot-wide inside and outside shoulders. At the I–35/Uniroyal/Beltway(I–35/UR/BW) Interchange, the two existing I–35 overpass bridges will be removed and a new three-span bridge will be constructed. At the I–35 underpass, the layout for Uniroyal Dr. and Beltway Pkwy will have two east and west through lanes and two dual left-turn lanes for traffic heading north onto the east frontage roads and heading south onto the west frontage roads. All lanes will consist of 12-foot-wide lanes with four-foot-wide outside shoulders, curb, gutters and six-foot-wide sidewalks. A four-foot-wide raised median will divide opposing directions of traffic. Between the bridge abutments and columns under the underpass, a 24-foot-wide turnaround lane with a four-foot outside shoulder and two-foot-wide inside shoulders will facilitate turnarounds for the frontage roads traffic. Approximately two miles north of the I–35/Uniroyal/Beltway Interchange the frontage roads will be elevated for the new proposed I–35/Hachar-Reuthinger Interchange. This Interchange will consist of elevated I–35 frontage roads with crossover bridges aligning with the proposed Hachar-Reuthinger frontage roads. In this location, the I–35 frontage roads will be widened to consist of three 12-foot-wide travel lanes with 10-foot-wide outside shoulders and four-foot-wide inside shoulders. The two proposed I–35 crossovers will each fit four 12-foot-wide lanes and a 24-foot-wide I–35 frontage roads turnaround. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on July 28, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Laredo District Office at 1817 Bob Bullock Loop, Laredo, TX 78043; telephone: (956) 712–7400.

8. Extension of NASA 1 from just south of FM 528 to approximately 0.25 mile west of I 45 at North Landing Boulevard, Harris County, Texas. The project will take place in in the cities of League City and Webster and will construct a roadway on new location consisting of four 12-foot-wide lanes (two in each direction) divided by a raised median that varies from four feet to 32 feet in width, from just south of FM 528 to approximately 0.25 mile west of I–45 at North Landing Boulevard. The project will also include a roundabout (traffic circle), a five-foot-wide sidewalk, a 10-foot-wide shared-used path, and an approximately 1.5-acre detention basin. The project is approximately 0.65 mile in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 3, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Houston District Office at 7600 Washington Avenue, Houston, TX 77007; telephone: (713) 802–5000.

9. US 90 from 0.5 mile west of the US 90/Union Pacific Railroad (UPRR) intersection to SH 146, Liberty County, Texas. The project will eliminate the UPRR at-grade crossing and construct a grade-separated overpass with US 90 over the UPRR tracks, with at-grade discontinuous frontage roads for property access and U-turns. The US 90 overpass will be a concrete beam bridge and will include four 12-foot travel lanes (two in each direction) separated by a concrete traffic barrier, 10-foot wide outside shoulders, and four-foot inside shoulders. The project length is approximately 1.0 mile. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 8, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Beaumont District Office at 8350 Eastex Freeway, Beaumont, TX 77708; telephone: (409) 892–7311.

10. Warriors Path Phase 2 from FM 2410 east of Knights Road to Pontotoc Trace, Bell County, Texas. Warriors Path Phase 2 will widen from an existing 22-foot-wide roadway to a 40-foot-wide roadway. The road will remain two lanes, but a continuous center turn lane will be added. Additional improvements include a curb and gutter stormwater management system and an eight-foot-wide sidewalk on the west side. The length of the project is approximately 0.42 mile. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on

August 10, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Waco District Office at 100 South Loop Drive, Waco, TX 76704; telephone: (254) 867–2700.

11. IH 20 from east of FM 1208 to east of SH 349/Rankin Highway, Midland County, Texas. The project will provide operational improvements at the IH 20 interchanges with FM 1208, Business I–20, East Loop 250, County Road 1140, County Road 1150, FM 307, SH 158/SH 140/Garden City Highway, FM 715/Fairgrounds Road, and County Road 1180/Lamesa Road (nine total). Operational improvements include flipping County Road 1150 and County Road 1180/Lamesa Road so they underpass IH 20; installing a new interchange at County Road 1140; and through lanes/turn lanes at FM 1208, Business I–20, East Loop 250, County Road 1150, FM 307, SH 158/SH 140/Garden City Highway, FM 715/Fairgrounds Road, and County Road 1180/Lamesa Road. The project will also widen the IH 20 main lanes to provide an additional travel lane in each direction and convert/reconstruct the frontage roads to one-way operation (note the frontage roads between Business I–20 and County Road 1140 have already been converted to one-way operation). Additionally, the project will reconfigure the exit/entrance ramps on IH 20 at these interchanges. The total project length is approximately 12.8 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 23, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Odessa District Office at 3901 E Highway 80, Odessa, TX 79761; telephone: (432) 498–4746.

12. US 83 from US83/84 ''Y'' intersection to CR 160, Taylor County, Texas. The project will widen and upgrade US 83 to five lanes consisting of two 12-foot lanes in each direction, a continuous 12-foot center turn lane, drainage improvements, and exiting turn lanes to county roads and the future site for Jim Ned High School. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 31, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Abilene District Office at 4250 N Clack, Abilene, TX 79601; telephone: (325) 676–6817.

13. Mykawa Road From FM 518 to Beltway 8, Harris and Brazoria Counties, Texas. The project will widen the existing Mykawa Road from a two-lane undivided roadway to a four-lane divided roadway with a 10-foot shared use path for bicycles and pedestrians, separated from vehicles, along the west side of the roadway. The project will also include storm water drainage and detention, landscaping, street lighting, modification of traffic signals, and utility relocations. The total project length is approximately 2.9 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on August 31, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Houston District Office at 7600 Washington Avenue, Houston, TX 77007; telephone: (713) 802–5000.

14. Braker Lane from Dawes Place to Samsung Boulevard, Travis County, Texas. The project will construct a new location four-lane arterial roadway divided by medians from Dawes Place to Samsung Blvd. The project will also include bike lanes, sidewalks, and drainage improvements. The project is 0.75 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on June 14, 2023, and other documents in the TxDOT project file. The EA, FONSI and other documents in the TxDOT project file are available by contacting the TxDOT Austin District Office at 7901 North I–35, Austin, TX 78753; telephone: (512) 832–7000.

15. FM 1171 from west of FM 156 to IH 35W, Denton County, Texas. The project will construct a new location non-freeway roadway. The urbanized sections of the roadway will consist of three 12-foot-wide lanes in each direction, with a 16-foot-wide median, four-foot-wide inside shoulders, 10-foot-wide outside shoulders, a 10-foot-wide shared use path, and a six-foot-wide sidewalk. Within the rural section of the roadway, the new location non-freeway roadway will consist of two 12-foot-wide lanes (ultimate 6-lanes) in each direction, a 60-foot-wide depressed median, four-foot-wide inside shoulders, and 10-foot-wide outside shoulders for bicycle accommodation. The project is approximately 3.5 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on June 30, 2023, and other documents in the TxDOT project file. The EA, FONSI and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–4480.

16. FM 1385 from US 380 to FM 455, Denton County, Texas. The project will include reconstructing and widening the existing two-lane rural highway to ultimately a six-lane divided urban roadway. FM 1385 from US 380 to FM 428 West will be constructed as a six-lane facility while the roadway from FM 428 West to FM 455 will be constructed as a four-lane interim facility. The majority of the project follows the existing FM 1385 roadway alignment; however, two areas are being proposed for new location roadway realignments to address mobility and safety concerns. The first 0.9-mile-long realignment is located south of Mustang Road and will directly connect FM 1385 to the north and to the south without requiring vehicles to travel along the Mustang Road portion of the existing FM 1385. The second 0.45-mile-long realignment is located southeast of the current alignment. This improvement will flatten-out the existing ''S'' curve at Gee Road and improve mobility at this intersection with FM 1385. The project is approximately 12.03 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on July 14, 2023, and other documents in the TxDOT project file. The EA, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–4480.

17. International Bridge Trade Corridor (IBTC) from 365 Tollway and FM 493 to I–2, Hidalgo County, Texas. The project will construct a controlled access six-lane facility divided by concrete barrier with overpasses, ramps, and two-lane frontage roads in certain locations. The ultimate design will consist of six 12-foot-wide travel lanes (three in each direction), 10-foot-wide outside shoulders, and 10-foot-wide

inside shoulders, divided by a concrete barrier. The project length is approximately 13.15 miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on September 1, 2023, and other documents in the TxDOT project file. The EA, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Pharr District Office 600 W Expressway 83, Pharr, TX 78577; telephone: (956) 702–6100.

Authority: 23 U.S.C. 139(l)(1).

Michael T. Leary,

Director, Planning and Program Development, Federal Highway Administration.

[FR Doc. 2023–20284 Filed 9–19–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2023–0033]

Agency Information Collection Activities: Request for Comments for a New Information Collection

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for an information collection, which is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by November 20, 2023.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit comments by only one of the following means:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *https://www.regulations.gov.*

Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jason Broehm, Office of Safety, 202–366–2201, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m., from Monday through Friday, except federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Safe Streets and Roads for All Grant Program.

Background: The Department of Transportation's (DOT) Office of the Secretary and the Federal Highway Administration are committed to a comprehensive strategy to address the unacceptable number of traffic deaths and serious injuries occurring on our roads and streets. The Infrastructure Investment and Jobs Act (IIJA), also known as the Bipartisan Infrastructure Law (BIL), Section 24112 aligns with the Department's safety priority through the creation of the Safe Streets and Roads for All Grant Program. This grant program supports local initiatives to prevent deaths and serious injuries on roads and streets and is intended for metropolitan planning organizations, political subdivisions of a State, federally recognized Tribal governments, and multijurisdictional groups of these entities.

This program includes grant funds to develop a comprehensive safety action plan; to conduct planning, design and development activities for projects and strategies identified in a comprehensive safety action plan; or to carry out projects and strategies identified in a comprehensive safety action plan. To receive applications for grant funds, evaluate the effectiveness of projects that have been awarded grant funds, and monitor project financial conditions and project progress, a collection of information is necessary.

Eligible applicants will request Safe Streets and Roads for All funds in the form of a grant application. Additional information submission will be required of grant recipients during the grant agreement, implementation, and evaluation phases.

Responding to the grant opportunity is on a voluntary-response basis, utilizing an electronic grant platform. The grant application is planned as a one-time information collection. DOT estimates that it will take approximately 30 hours to complete an application for a comprehensive safety action plan grant and approximately 110 hours to complete an application for an implementation grant.

Respondents: Metropolitan planning organizations, political subdivisions of a State, Federally recognized Tribal governments and multijurisdictional groups of these entities.

Frequency: One time per grant application.

During the project management phase, the grantee will complete quarterly progress and monitoring reports to ensure that the project budget and schedule are maintained to the maximum extent possible, that compliance with Federal regulations will be met, and that the project will be completed with the highest degree of quality. Reporting responsibilities include quarterly program performance reports using the Performance Progress Report (SF–PPR) and quarterly financial status using the SF–425 (also known as the Federal Financial Report or SF–FFR).

Respondents: Grant recipients.

Frequency: quarterly throughout the period of performance.

During the project management phase, each grantee that expends $750,000 or more during their own fiscal year in all Federal awards must have a single or program-specific audit conducted for that year in accordance with the provisions of 2 CFR 200.501. (The $750,000 threshold is not limited to Safe Streets and Roads for All funding.) This reporting responsibility is required annually and uses a form, the SF–SAC. It is estimated that this survey will take an average of 100 hours for large auditees and 21 hours for all other auditees to complete, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Respondents: Grant recipients.

Frequency: annually during any fiscal year in which $750,000 or more in any Federal funds are expended, throughout the period of performance.

During the project evaluation phase, the reporting requirement is necessary to assess program effectiveness for the Federal government and to comply with Subsection 24112(g). This report provides information regarding how the project is achieving the outcomes that grantees have targeted to help measure the effectiveness of the Safe Streets and Roads for All Grant Program. In addition, under Subsection 24112(h), at the end of the period of performance for a grant under the program each grant recipient is required to submit a report that describes the costs of each eligible

project carried out using the grant funds; the outcomes and benefits generated; the lessons *learned; and any recommendations relating to future projects or strategies.*

Respondents: Grant recipients.

Frequency: one time after the period of performance ends.

Estimated Average Burden per Response:

- *Application phase:* approximately 30 hours for the comprehensive safety action plan grants and 110 hours for the implementation grants per respondent.
- *Grant Agreement phase:* approximately 1 hour per respondent (comprehensive safety action plan or implementation grant).
- *For grantees expending $750,000 or more of all Federal funds in a fiscal year only:*

Approximately 100 hours for large grantees.

Approximately 21 hours for all other grantees.

- *Project Management phase:* 8 hours annually per grant.
- *Project Evaluation phase:* 12 hours annually per implementation grant; 2 hours annually per action plan grant.

Estimated Total Annual Burden Hours:

First year: Approximately 41 hours, including grant application, for comprehensive safety action plan grants and approximately 131 hours, including grant application, for implementation grants.

Subsequent years (cumulative): 10 hours for action plan grants (expected period of performance: 2 years); 48 hours for implementation grants (expected period of performance: 5 years); *add 100 hours for single audits for large grantees and 21 hours for all other grantees expending $750,000 or more of Federal funds in a single fiscal year.*

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; 23 U.S.C. 134 and 135; and 23 CFR Chapter 1, subchapter E, part 450.

Issued On: September 15, 2023.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2023–20337 Filed 9–19–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2023–0034]

Agency Information Collection Activities: Request for Comments for a New Information Collection

AGENCY: Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for an information collection, which is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by November 20, 2023.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit comments by only one of the following means:

Website: Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

Instructions: You must include the agency name and docket number or the Information Collection Review (ICR/RFC) Reference Number for this Notice at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Paul Jodoin, 202–366–5465, Office of Operations, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Title: National Traffic Incident Management Annual Self-Assessment (TIMSA).

Background: Each of the over 6 million crashes per year presents a safety danger to motorists and responders while often causing delays on the nation's roads. It is critical to safety and mobility for these crashes to be mitigated as efficiently and safely as possible. To address these concerns, dozens of Traffic Incident Management (TIM) Programs have been established throughout the country over the past 25–30 years. Most of the top 75 metropolitan areas and several rural areas have some form of TIM Program, often coordinated through a multi-disciplinary committee comprised of all the response disciplines. The TIMSA tool was established to help regions assess the level of TIM Program maturity and to identify areas for improvement.

The information is used by each jurisdiction to better understand opportunities for improving safety and mobility in their region. The FHWA also uses the data to assess progress of the FHWA national TIM program and identify opportunities to help regions improve.

Respondents: Approximately 100 individuals will complete the questionnaire in collaboration with an estimated average of 5 other participants.

Frequency: Annually.

Estimated Average Burden per Response: Approximately 1–2 hours.

Estimated Total Annual Burden Hours: 200.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Issued On: September 15, 2023.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2023–20339 Filed 9–19–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Adoption of Electric Vehicle Charging Stations Categorical Exclusion Under the National Environmental Policy Act

AGENCY: Office of the Secretary, U.S. Department of Transportation.

ACTION: Notice of adoption of categorical exclusion.

SUMMARY: The U.S. Department of Transportation (DOT) is adopting the Department of Energy's (DOE's) Electric Vehicle Charging Stations Categorical Exclusion (CE) under the National Environmental Policy Act to use in DOT programs and funding opportunities administered by DOT. This notice describes the categories of proposed actions for which DOT intends to use DOE's CEs and describes the consultation between the agencies.

DATES: This action is effective upon publication.

FOR FURTHER INFORMATION CONTACT: April Marchese, Deputy Director, P–30, Office of Environment, by phone at 202–366–2074, or by email at *april.marchese@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

National Environmental Policy Act and Categorical Exclusions

The National Environmental Policy Act (NEPA), as amended at, 42 U.S.C. 4321–4347 (NEPA), requires all Federal agencies to assess the environmental impact of their actions. Congress enacted NEPA in order to encourage productive and enjoyable harmony between humans and the environment, recognizing the profound impact of human activity and the critical importance of restoring and maintaining environmental quality to the overall welfare of humankind. 42 U.S.C. 4321, 4331. NEPA's twin aims are to ensure agencies consider the environmental effects of their proposed actions in their decision-making processes and inform and involve the public in that process. 42 U.S.C. 4331. NEPA created the Council on Environmental Quality (CEQ), which promulgated NEPA implementing regulations, 40 CFR parts 1500 through 1508 (CEQ regulations).

To comply with NEPA, agencies determine the appropriate level of review—an environmental impact statement (EIS), environmental assessment (EA), or (CE. 42 U.S.C. 4336. If a proposed action is likely to have significant environmental effects, the agency must prepare an EIS and document its decision in a record of decision. 42 U.S.C. 4336. If the proposed action is not likely to have significant environmental effects or the effects are unknown, the agency may instead prepare an EA, which involves a more concise analysis and process than an EIS. 42 U.S.C. 4336. Following the EA, the agency may conclude the process with a finding of no significant impact if the analysis shows that the action will have no significant effects. If the analysis in the EA finds that the action is likely to have significant effects, however, then an EIS is required.

Under NEPA and the CEQ regulations, a Federal agency also can establish CEs—categories of actions that the agency has determined normally do not significantly affect the quality of the human environment—in their agency NEPA procedures. 42 U.S.C. 4336(e)(1); 40 CFR 1501.4, 1507.3(e)(2)(ii), 1508.1(d). If an agency determines that a CE covers a proposed action, it then evaluates the proposed action for extraordinary circumstances in which a normally excluded action may have a significant effect. 40 CFR 1501.4(b). If no extraordinary circumstances are present or if further analysis determines that the extraordinary circumstances do not involve the potential for significant environmental impacts, the agency may apply the CE to the proposed action without preparing an EA or EIS. 42 U.S.C. 4336(a)(2), 40 CFR 1501.4. If the extraordinary circumstances have the potential to result in significant effects, the agency is required to prepare an EA or EIS.

Section 109 of NEPA, enacted as part of the Fiscal Responsibility Act of 2023, allows a Federal agency to ''adopt'' or use another agency's CEs for a category of proposed agency actions. 42 U.S.C. 4336(c). To use another agency's CEs under section 109, an agency must identify the relevant CEs listed in another agency's (''establishing agency'') NEPA procedures that cover its category of proposed actions or related actions; consult with the establishing agency to ensure that the proposed adoption of the CE to a category of actions is appropriate; identify to the public the CE that the agency plans to use for its proposed actions; and document adoption of the CE. *Id.*

This notice documents DOT's adoption of DOE's Electric Vehicle Charging Stations CE under section 109 of NEPA to use in DOT programs and funding opportunities administered by DOT Operating Administrations.

II. Identification of the Categorical Exclusion

DOE's Electric Vehicle Charging Stations CE

DOE's electric vehicle charging stations CE is codified in DOE's NEPA procedures as CE B5.23 of 10 CFR part 1021, subpart D, appendix B, as follows:

B5.23 Electric Vehicle Charging Stations

The installation, modification, operation, and removal of electric vehicle charging stations, using commercially available technology, within a previously disturbed or developed area. Covered actions are limited to areas where access and parking are in accordance with applicable requirements (such as local land use and zoning requirements) in the proposed project area and would incorporate appropriate control technologies and best management practices.

''Previously disturbed or developed'' refers to land that has been changed such that its functioning ecological processes have been and remain altered by human activity. The phrase encompasses areas that have been transformed from natural cover to non-native species or a managed state, including, but not limited to, utility and electric power transmission corridors and rights-of-way, and other areas where active utilities and currently used roads are readily available. 10 CFR 1021.410(g)(1).

The DOE CE also includes additional conditions referred to as integral elements. (10 CFR part 1021 subpt. D, app. B) In order to apply this CE, the proposal must be one that would not

(1) Threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health, or similar requirements of DOT or Executive Orders;

(2) Require siting and construction or major expansion of waste storage, disposal, recovery, or treatment facilities (including incinerators), but the proposal may include categorically excluded waste storage, disposal, recovery, or treatment actions or facilities;

(3) Disturb hazardous substances, pollutants, contaminants, or CERCLA-excluded petroleum and natural gas products that preexist in the environment such that there would be uncontrolled or unpermitted releases;

(4) Have the potential to cause significant impacts on environmentally sensitive resources. An environmentally sensitive resource is typically a resource that has been identified as needing

protection through Executive Order, statute, or regulation by Federal, state, or local government, or a federally recognized Indian tribe. An action may be categorically excluded if, although sensitive resources are present, the action would not have the potential to cause significant impacts on those resources (such as construction of a building with its foundation well above a sole-source aquifer or upland surface soil removal on a site that has wetlands). Environmentally sensitive resources include, but are not limited to:

(i) Property (such as sites, buildings, structures, and objects) of historic, archeological, or architectural significance designated by a Federal, state, or local government, federally recognized Indian tribe, or Native Hawaiian organization, or property determined to be eligible for listing on the National Register of Historic Places;

(ii) Federally listed threatened or endangered species or their habitat (including critical habitat) or Federally-proposed or candidate species or their habitat (Endangered Species Act); state-listed or state-proposed endangered or threatened species or their habitat; Federally-protected marine mammals and Essential Fish Habitat (Marine Mammal Protection Act; Magnuson-Stevens Fishery Conservation and Management Act); and otherwise Federally-protected species (such as the Bald and Golden Eagle Protection Act or the Migratory Bird Treaty Act);

(iii) Floodplains and wetlands;

(iv) Areas having a special designation such as Federally- and state-designated wilderness areas, national parks, national monuments, national natural landmarks, wild and scenic rivers, state and Federal wildlife refuges, scenic areas (such as National Scenic and Historic Trails or National Scenic Areas), and marine sanctuaries;

(v) Prime or unique farmland, or other farmland of statewide or local importance, as defined at 7 CFR 658.2(a), ''Farmland Protection Policy Act: Definitions,'' or its successor;

(vi) Special sources of water (such as sole-source aquifers, wellhead protection areas, and other water sources that are vital in a region); and

(vii) Tundra, coral reefs, or rain forests; or

(5) Involve genetically engineered organisms, synthetic biology, governmentally designated noxious weeds, or invasive species, unless the proposed activity would be contained or confined in a manner designed and operated to prevent unauthorized release into the environment and conducted in accordance with applicable requirements, such as those of the Department of Agriculture, the Environmental Protection Agency, and the National Institutes of Health.

Proposed DOT Category of Actions

DOT intends to apply this categorical exclusion to any DOT EV charging station project undertaken directly by DOT, to any EV charger action requiring an approval by DOT, or to any project that is financed in whole or in part through Federal funds made available by DOT (including the National Electric Vehicle Infrastructure Formula Program or the Charging and Fueling Infrastructure Discretionary Grant Program).

The CE allows for the installation, modification, operation, and removal of EV charging stations. DOT will consider each proposal for EV charging stations to ensure that the proposal is within the scope of the CE. DOT intends to apply this CE in a manner consistent with DOE's application—to the same types of proposals (which have included a wide variety of locations on and off Federal property, differences in local conditions, various numbers of EV charging stations per proposal, and different types of equipment and technologies including Level 1, Level 2, and DC Fast Charging stations).

III. Consideration of Extraordinary Circumstances

When applying this CE, DOT will evaluate the proposals to ensure evaluation of integral elements listed above. In addition, in considering extraordinary circumstances, DOT will consider whether the proposed action has the potential to result in significant effects as described in DOE's extraordinary circumstances listed at 10 CFR 1021.410(b)(2). DOE defines extraordinary circumstances as unique situations presented by specific proposals, including, but not limited to, scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; and unresolved conflicts concerning alternative uses of available resources. In addition, DOT will also consider if there are any extraordinary circumstances with regards to section 4(f).

IV. Consultation With DOE and Determination of Appropriateness

DOT and DOE consulted on the appropriateness of DOT's adoption of the CE from June 2023 through early August 2023. DOT and DOE's consultation included a review of DOE's experience developing and applying the CE, as well as the types of actions for which DOT plans to utilize the CE. These DOT actions are very similar to the type of projects that DOE funds and therefore the impacts of DOT projects will be very similar to the impacts of DOE projects, which are not significant, absent the existence of extraordinary circumstances that could involve potentially significant impacts. Therefore, DOT has determined that its proposed use of the CE as described in this notice would be appropriate. Additional documentation of DOE and DOT's consultation is available upon request.

V. Notice to the Public and Documentation of Adoption

This notice serves to identify to the public and document DOT's adoption of DOE's CE for electric vehicle charging stations. The notice identifies the types of actions to which DOT will apply the CE, as well as the considerations that DOT will use in determining whether an action is within the scope of the CE.

Issued under authority delegated in 49 CFR 1.25(b).

Carlos Monje, Jr.,

Under Secretary of Transportation for Policy, U.S. Department of Transportation.

[FR Doc. 2023–20238 Filed 9–19–23; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's List of Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.: 202–622–6922; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions

Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On September 15, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

BILLING CODE 4810–AL–P

Individuals

1. MOHAMMADI, Gholamali (Arabic: غلامعلی محمدی) (a.k.a. MOHAMMADI, Gholam'ali; a.k.a MOHAMMADI, Golamali), Iran; DOB 22 Jun 1963; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0049770926 (Iran); Head of Iran's Prisons Organization (individual) [IRAN-HR].

   Designated pursuant to 1(a)(ii)(A) of Executive Order 13553 of September 28, 2010 "Blocking Property of Certain Person With Respect to Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions" (E.O. 13553), 75 FR 60567, 3 CFR 2010 Comp., p. 253, for being an official of the Government of Iran (GoI) or a person acting on behalf of the GoI (including members of paramilitary organizations) who is responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in Iran or Iranian citizens or residents, or the family members of the foregoing, on or after June 12, 2009, regardless of whether such abuses occurred in Iran.

2. TIRANDAZ, Payam (Arabic: پیام تیرانداز), Iran; DOB Mar 1980 to Mar 1981; POB Kermanshah, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 3255338395 (Iran) (individual) [IRAN-HR] (Linked To: FARS NEWS AGENCY).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the FARS NEWS AGENCY, a person whose property and interests in property are blocked pursuant to E.O. 13553.

3. ABEDZADEH, Abdolreza (Arabic: عبدالرضا عابدزاده) (a.k.a. ABED, Abdolreza; a.k.a. ABED, Abdul Reza), Iran; DOB 31 Oct 1962; POB Ahwaz, Khuzestan, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Passport T47386686 (Iran) expires 15 Dec 2023; National ID No. 1756451699 (Iran) (individual) [SDGT] [IFSR] (Linked To: KHATAM OL ANBIA GHARARGAH SAZANDEGI NOOH).

   Designated pursuant to 1(a)(iii)(A) of E.O. 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," 66 FR 49079, as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended), for having acted or purported to act for or on behalf of, directly or indirectly, KHATAM OL ANBIA GHARARGAH SAZANDEGI NOOH, a person whose property and interests in property are blocked pursuant to E.O. 13224.

4. ALGHASI-MEHR, Delavar (Arabic: دلاور القاصی مهر) (a.k.a. ALGHASI MEHR, Delavar; a.k.a. ALGHASIMEHR, Delavar; a.k.a. ALQASI MEHR, Delavar), East Tehran Province, Iran; DOB 23 Aug 1974; POB Chegeni, Lorestan Province, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport M51374090 (Iran) issued 03 Nov 2024 (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

5. AMJADIAN, Hossein (Arabic: حسین امجدیان), Tehran, Iran; DOB 26 Jul 1971; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport H33409785 (Iran) expires 29 Feb 2020 (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

6. GOUDARZI, Mohammad Moazzami (Arabic: محمد معظمی گودرزی) (a.k.a. GOUDARZI, Mohammad Moazami), Tehran, Iran; DOB 21 Mar 1957; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport J43303959 (Iran) expires 16 Oct 2022 (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

7. MOUSAABADI, Abbasali Mohammadian (a.k.a. MOHAMMADIAN, Abbas Ali; a.k.a. MOHAMMADIAN, Abbas-Ali (Arabic: عباسعلی محمدیان); a.k.a. MUSAABADI, Abbas'Ali Mohammadian), Tehran, Iran; DOB 20 Feb 1964; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport L29764521 (Iran); National ID No. 5129832620 (Iran) (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

8. ABEDINEJAD, Alireza (Arabic: علیرضا عابدی نژاد), Tehran, Iran; DOB 16 Apr 1974; POB Shahre Rey, Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0491500998 (Iran) (individual) [IRAN-EO13846] (Linked To: DOURAN SOFTWARE TECHNOLOGIES).

Designated pursuant to 7(a)(vii) of Executive Order 13846 of August 6, 2018, "Reimposing Certain Sanctions With Respect to Iran," 83 FR 38939, 3 CFR, 2018 Comp., p. 854, for having acted or purported to act for or on behalf of, directly or indirectly, DOURAN SOFTWARE TECHNOLOGIES, a person whose property and interests in property are blocked pursuant to Executive Order 13628 of October 9, 2012 "Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reductions and Syrian Human Rights Act of 2012 and Additional Sanctions With Respect to Iran" (E.O. 13628), which was revoked and superseded by E.O. 13846.

9. KASAEI, Soheila (Arabic: سهیلا کسایی) (a.k.a. KASA'I, Soheila; a.k.a. KASA'I, Soheyla), Tehran, Iran; DOB 30 Jun 1975; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Female; Passport T34583776 (Iran) expires 18 Aug 2020; National ID No. 0062452169 (Iran); Birth Certificate Number 1876 (Iran) (individual) [IRAN-EO13846] (Linked To: DOURAN SOFTWARE TECHNOLOGIES).

   Designated pursuant to 7(a)(vii) of E.O. 13846 for having acted or purported to act for or on behalf of, directly or indirectly, DOURAN SOFTWARE TECHNOLOGIES, a person whose property and interests in property are blocked pursuant to E.O. 13628, which was revoked and superseded by E.O. 13846.

10. NAJAFIANPUR, Amer (Arabic: عامر نجفیان پور) (a.k.a. NAJAFIANPOUR, Amer), Tehran, Iran; DOB 23 Sep 1975; POB Varamin, Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0410833738 (Iran) (individual) [IRAN-EO13846] (Linked To: DOURAN SOFTWARE TECHNOLOGIES).

    Designated pursuant to 7(a)(vii) of E.O. 13846 for having acted or purported to act for or on behalf of, directly or indirectly, DOURAN SOFTWARE TECHNOLOGIES, a person whose property and interests in property are blocked pursuant to E.O. 13628, which was revoked and superseded by E.O. 13846.

11. ABDOLLAHPOUR, Mohammad (Arabic: محمد عبدالله پور) (a.k.a. ABDOLLAH-POUR, Mohammad), Gilan Province, Iran; DOB 21 Mar 1963 to 20 Mar 1964; POB Astaneh Ashrafieh, Gilan, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

12. BAKHSH HABIBI, Roham (Arabic: رهام بخش حبیبی) (a.k.a. BAKHSH HABIBI, Raham), Shiraz, Fars Province, Iran; DOB 24 Oct 1964; POB Basht, Kohgiluyeh and Boyer Ahmad; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; LEF Commander Fars Province (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

13. GHEIB PARVAR, Gholamhossein (Arabic: غلامحسین غیب پرور) (a.k.a. GHEIB PARVAR, Gholam Hossein; a.k.a. GHEYB PARVAR, Gholam Hossein; a.k.a. GHEYBPARVAR, Gholam Hossein), Iran; DOB 22 Dec 1960; POB Shiraz, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport R55505958 (Iran) (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

14. SARANI, Khodarahm (Arabic: خدارحم سارانی), Zahedan, Sistan and Baluchestan Province, Iran; DOB 21 Mar 1976; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; IRGC Commander in Zahedan (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

15. GHOLIZADEH, Majid (Arabic: مجید قلی زاده) (a.k.a. GHOLI ZADEH, Majid; a.k.a. GHOLIA ZADEH, Majid; a.k.a. GHOLIZADEH ZAHMATKESH, Majid (Arabic: مجید قلی زاده زحمت کش); a.k.a. QOLIZADEH, Majid), Iran; DOB 01 Mar 1962 to 31 Mar 1963; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0042851882 (Iran); Director of Tasnim News Agency (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: TASNIM NEWS AGENCY).

Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, TASNIM NEWS AGENCY, a person whose property and interests in property are blocked pursuant to E.O. 13553.

16. MOGHADAM FAR, Hamidreza (Arabic: حمید رضا مقدم فر) (a.k.a. MOGHADAM FAR, Hamid Reza; a.k.a. MOGHADDAM, Hamidreza (Arabic: حمید رضا مقدم)), Iran; DOB 01 Mar 1961 to 31 Mar 1962; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0042729890 (Iran) (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

17. MAJIDI, Mazaher (Arabic: مظاهر مجیدی), No 36, Shaqayeq St, Qahreman St, E'temadieh Street, Hamedan, Iran; DOB 26 May 1960; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport K30861618 (Iran); National ID No. 3872316141 (Iran); Birth Certificate Number 3277 (Iran) (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

18. REYHANI, Bahman (Arabic: بهمن ریحانی), Kermanshah, Iran; DOB 20 Feb 1965; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport E51007873 (Iran) expires 30 Sep 2024 (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

19. SHAKARAMI, Jamal (Arabic: جمال شاکرمی) (a.k.a. MOHAMMAD MIRZA, Jamal Shah Karami; a.k.a. SHAH KARAMI, Jamal; a.k.a. SHAH KARAMI, Jamal Mohammad Mirza; a.k.a. SHAHKARAMI, Jamal; a.k.a. SHAKRAMI, Jamal), 1859 Mahdieh Hoveyzeh, Ilam, Iran; Apartmani Houses M Mu'allim, Ilam 6931168911, Iran; DOB 23 Nov 1969; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 4500393846 (Iran); Birth Certificate Number 586 (Iran) (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

20. SAFAVI, Seyyed Khalil (Arabic: سید خلیل صفوی) (a.k.a. SAFAVI, Seyed Khalil), Rezvanshahr, Gilan Province, Iran; DOB 01 Sep 1966; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 3501325266 (Iran); LEF Commander of Rezvanshahr City, Gilan Province (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

21. SHAHRESTANI, Hassan Mofakhami (Arabic: حسن مفخمی شهرستانی) (a.k.a. MOFAKHAMI, Hassan; a.k.a. SHAHRASHTANI, Hasan; a.k.a. SHAHRASHTANI, Hassan Mofakhmi), No. 16, Shahid Ahmad Mohammadi Alley, Rasht, Gilan Province, Iran; DOB 28 Aug 1976; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Birth Certificate Number 1609 (Iran) (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

22. TAHERI, Ahmad (Arabic: احمد طاهری), No. 29, Yekom Golsorkh St, Ghods Madar Blv, Zahedan, Sistan and Baluchestan, Iran; DOB 25 Jul 1963; POB Teymor Abad neighborhood, Zabol, Sistan and Baluchestan Province, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 3672586654 (Iran); Birth Certificate Number 883 (Iran) (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

23. MONTAZEROLMEHDI, Saeed (Arabic: سعید منتظرالمهدی) (a.k.a. MONTAZER AL-MAHDI, Said; a.k.a. MONTAZERUL-MAHDI, Mohammad Saeed), Tehran, Iran; DOB 08 Nov 1971; POB Tehran, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Social Deputy and Spokesperson of the Iranian Police (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

24. NADERIAN, Ahmad (Arabic: احمد نادریان), Iran; DOB 21 Jul 1967; POB Zabol, Sistan and Baluchistan Province, Iran; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 5339852334 (Iran) (individual) [IRAN-HR] (Linked To: LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN).

    Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN, a person whose property and interests in property are blocked pursuant to E.O. 13553.

25. POURJAMSHIDIAN, Ali Akbar (Arabic: علی اکبر پورجمشیدیان) (a.k.a. POURJAMSHIDIAN, Aliakbar), Iran; DOB 30 Dec 1962; nationality Iran; Additional

Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport V43937498 (Iran) expires 18 Dec 2022 (individual) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

Entities

1. FARS NEWS AGENCY (Arabic: خبرگزاری فارس) (a.k.a. FARS NEWS AGENCY CULTURAL INSTITUTE (Arabic: مؤسسه فرهنگی خبرگزاری فارس)), Number 1, Shahrood Alley, Ferdowsi Square, Tehran 115999346717, Iran; Website www.farsnews.ir; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 26 Oct 1998; National ID No. 10100426798 (Iran); Registration Number 10581 (Iran) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

   Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

2. PRESS TV (Arabic: پرس تی وی) (a.k.a. PRESS TV LIMITED), 4 East 2nd St., Farhang Blvd, Saadat Abad, Tehran 19977-66411, Iran; Website http://www.presstv.ir; Additional Sanctions Information - Subject to Secondary Sanctions; Business Registration Number 10957861 (United Kingdom) expires 30 Nov 2021 [IRAN-EO13846] (Linked To: ISLAMIC REPUBLIC OF IRAN BROADCASTING).

   Designated pursuant to 7(a)(vii) of E.O. 13846 for having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REPUBLIC OF IRAN BROADCASTING, a person whose property and interests in property are blocked pursuant to E.O. 13628, which was revoked and superseded by E.O. 13846.

3. YAFTAR PAZHOHAN PISHTAZ RAYANESH LIMITED COMPANY (Arabic: یافتار پژوهان پیشتاز رایانش) (a.k.a. YAFTAR COMPANY; a.k.a. YAFTAR LEADING RESEARCHERS COMPUTING; a.k.a. YAFTAR PAJOOHAN PISHTAZ RAYANESH), No 56, 4th and 5th floors, Ghasemi Alley, Shahid Akbari Boulevard, Azadi St, Tehran, Tehran, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; National ID No. 10320862133 (Iran); Business Registration Number 436501 (Iran) [IRAN-EO13846].

   Designated pursuant to 7(a)(v) of E.O. 13846 for having engaged in censorship or other activities with respect to Iran on or after June 12, 2009, that prohibit, limit, or penalize the exercise of freedom of expression or assembly by citizens of Iran, or that limit access to print or broadcast media, including the facilitation or support of intentional frequency manipulation by the Government of Iran that would jam or restrict an international signal.

4. TASNIM NEWS AGENCY (Arabic: خبرگزاری تسنیم) (a.k.a. ATI SAZAN FARHANG TASNIM INSTITUTE; a.k.a. TASNIM CULTURAL INSTITUTION ORGANIZATION

(Arabic: موسسه اتی سازان فرهنگ تسنیم)), South Side First Floor, 2 Plaque 12 Pourfallah Street-Shahid Doctor Hassan Azdi St, Tehran, Iran; Website www.tasnimnews.com; Additional Sanctions Information - Subject to Secondary Sanctions; National ID No. 10320794964 (Iran); Business Registration Number 29478 (Iran) [IRGC] [IFSR] [IRAN-HR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS).

Designated pursuant to 1(a)(ii)(C) of E.O. 13553 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the ISLAMIC REVOLUTIONARY GUARD CORPS, a person whose property and interests in property are blocked pursuant to E.O. 13553.

Dated: September 15, 2023.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–20378 Filed 9–19–23; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Internal Revenue Service (IRS) Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before October 20, 2023 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

1. *Title:* Form W–8BEN—Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individual), Form W–8BEN–E—Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities), Form W–8ECI—Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States, Form W–8EXP—Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding and Reporting, Form W–8IMY—Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting.

OMB Number: 1545–1621.

Type of Review: Revision of a currently approved collection.

Abstract: Form W–8BEN is used for certain types of income to establish that the person is a foreign person, is the beneficial owner of the income for which Form W–8BEN is being provided and, if applicable, to claim a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the United States has an income tax treaty. Form W–8ECI is used to establish that the person is a foreign person and the beneficial owner of the income for which Form W–8ECI is being provided, and to claim that the income is effectively connected with the conduct of a trade or business within the United States. Form W–8EXP is used by a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, or foreign private foundation. The form is used by such persons to establish foreign status, to claim that the person is the beneficial owner of the income for which Form W–8EXP is given and, if applicable, to claim a reduced rate of, or exemption from, withholding. In addition, a withholding qualified holder under IRC section 1445 may use a Form W–8EXP to establish that it is treated as a U.S. person and claim an exemption to withholding pursuant to IRC section 897(l) (relating to qualified foreign pension funds). Form W–8IMY is provided to a withholding agent or payer by a foreign intermediary, foreign partnership, and certain U.S. branches to make representations regarding the status of beneficial owners or to transmit appropriate documentation to the withholding agent. Treasury Regulations section 1.1441–1(e)(4)(iv) provides that a withholding agent may establish a system for a beneficial owner to electronically furnish a Form W–8 or an acceptable substitute Form W–8.

Form Number: W–8BEN, W–8BEN–E, W–8ECI, W–8EXP, and W–8IMY.

Affected Public: Businesses or other for-profit organizations; Individuals or Households; Not-for-profit institutions.

Frequency of Response: Annually.

Estimated Number of Respondents: 3,390,700.

Estimated Total Number of Annual Responses: 3,390,700.

Estimated Time per Respondent: 7.42 hours to 29.85 hours.

Estimated Total Annual Burden Hours: 30,562,902.

2. *Title:* Tax-Exempt Organization Complaint (Referral).

OMB Number: 1545–New.

Type of Review: Existing IC in use that does not contain an OMB control number.

Abstract: This request covers the taxpayer burden with Form 13909, *Tax-Exempt Organization Complaint (Referral).* Form 13909 is used by individuals to submit a complaint about tax-exempt organizations. The information provided on this form will help the Internal Revenue Service (IRS) determine if there has been a violation of federal tax law.

Document Number: 13909.

Current Actions: Request for OMB approval of an existing Information Collection (IC) tool in use without a proper OMB approval number.

Affected Public: Not-for-profit institutions, and Federal, State, local or tribal governments.

Estimated Number of Respondents: 8,000.

Estimated Total Number of Annual Responses: 8,000.

Estimated Time per Respondent: 48 min.

Estimated Total Annual Burden Hours: 6,400.

3. *Title:* Election to Treat a Qualified Revocable Trust as Party of an Estate.

OMB Number: 1545–1881.

Form Number: 8855.

Abstract: Form 8855 is used to make a section 645 election that allows a qualified revocable trust to be treated and taxed (for income tax purposes) as part of its related estate during the election period.

Current Actions: There are no changes to burden.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 5,000.

Estimated Total Number of Annual Responses: 5,000.

Estimated Time per Response: 5 hours, 38 minutes.

Estimated Total Annual Burden Hours: 28,200 hours.

(Authority: 44 U.S.C. 3501 *et seq.*)

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023–20287 Filed 9–19–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

National Research Advisory Council, 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 National Research Advisory Council will hold a meeting on Wednesday, October 11, 2023, by Teams conference call system. The meeting will convene at 11 a.m. and end at 2 p.m. eastern daylight time. This meeting is open to the public.

The purpose of the National Research Advisory Council is to advise the Secretary on research conducted by the Veterans Health Administration, including policies and programs targeting the high priority of Veterans' health care needs.

On October 11, 2023, the agenda will include updates on the Research Enterprise Initiative to include Investigators, and Scientific Review Management and Brain Health; VA Shield and the Air Force Health Study; and VA as an Academic Health System.

For anyone interested in attending the meeting, the teleconference number is 1–872–701–0185, conference ID 369 055 026# or the meeting link is *https://teams.microsoft.com/l/meetup-join/19%3ameeting_Y2Q5MTg2NGQtMTA2OS00YTMyLWExODAtYjg5MTlmMzlhODlj%40thread.v2/0?context=%7b%22Tid%22%3a%22e95f1b23-abaf-45ee-821d-b7ab251ab3bf%22%2c%22Oid%22%3a%22121a3c2b-ae37-46ab-a12a-fa7b555533ae%22%7d.*

No time will be allocated at this meeting for receiving oral presentations from the public. Members of the public wanting to attend, have questions or presentations to present may contact Rashelle Robinson, Designated Federal Officer, Office of Research and Development (14RD), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at 202–443–5768, or *Rashelle.robinson@va.gov no later than close of business on September 30, 2023.* All questions and presentations will be presented during the public comment section of the meeting. Any member of the public seeking additional information should contact Rashelle Robinson at the above phone number or email address noted above.

Dated: September 14, 2023.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–20299 Filed 9–19–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0161]

Agency Information Collection Activity: Medical Expense Report; Withdrawal

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice; withdrawal.

SUMMARY: On Friday, September 15, 2023, the Veterans Benefits Administration (VA), published a notice in the **Federal Register** announcing an opportunity for public comment on the proposed collection Medical Expense Report (VA Form 21P–8416). This notice was published in error; therefore, this document corrects that error by withdrawing this FR notice, document number 2023–19969.

DATES: As of Friday, September 15, 2023, the FR notice published at 88 FR 63686 on September 15, 2023, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.*

SUPPLEMENTARY INFORMATION: FR Doc. 2023–19969, published on Friday, September 15, 2023 (88 FR 63686), is withdrawn by this notice.

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. 2023–20318 Filed 9–19–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0829]

Agency Information Collection Activity: Income and Asset Statement in Support of Claim for Pension or Parents' DIC; Withdrawn

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice; withdrawal.

SUMMARY: On Friday, September 15, 2023, the Veterans Benefits Administration (VA), published a notice in the **Federal Register** announcing an opportunity for public comment on the proposed collection Income and Asset Statement in Support of Claim for Pension or Parents' (VA Form 21P–0969). This notice was published in error; therefore, this document corrects that error by withdrawing this FR notice, document number 2023–20001.

DATES: As of Friday, September 15, 2023, the FR notice published at 88 FR 178, page 63677 on September 15, 2023, is withdrawn.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.*

SUPPLEMENTARY INFORMATION: FR Doc. 2023–20001, published on Friday, September 15, 2023 (88 FR 178, page 63677), is withdrawn by this notice.

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. 2023–20331 Filed 9–19–23; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 88 Wednesday,

No. 181 September 20, 2023

Part II

Department of the Treasury

31 CFR Part 35

Coronavirus State and Local Fiscal Recovery Funds; Interim Final Rule

DEPARTMENT OF THE TREASURY

31 CFR Part 35

RIN 1505–AC81

Coronavirus State and Local Fiscal Recovery Funds

AGENCY: Department of the Treasury.

ACTION: Interim final rule.

SUMMARY: The Secretary of the Treasury is issuing an interim final rule to implement the amendments made by the Consolidated Appropriations Act, 2023 with respect to the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund established under the American Rescue Plan Act.

DATES:

Effective date: The provisions in this interim final rule are effective September 20, 2023.

Comment date: Comments must be received on or before November 20, 2023.

ADDRESSES: Please submit comments electronically through the Federal eRulemaking Portal: *https://www.regulations.gov.* Comments can be mailed to the Office of Recovery Programs, Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220. Because postal mail may be subject to processing delay, it is recommended that comments be submitted electronically. All comments should be captioned with ''Coronavirus State and Local Fiscal Recovery Funds 2023 Interim Final Rule Comments.'' Please include your name, organization affiliation, address, email address and telephone number in your comment. Where appropriate, a comment should include a short executive summary. In general, comments received will be posted on *https://www.regulations.gov* without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, will be part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Jessica Milano, Acting Chief Recovery Officer, Office of Recovery Programs, Department of the Treasury, (844) 529–9527.

SUPPLEMENTARY INFORMATION:

I. Introduction

Overview

Since the first case of coronavirus disease 2019 (COVID–19) was discovered in the United States in January 2020, the pandemic has caused severe, intertwined public health and economic crises. In March 2021, as these crises continued, the American Rescue Plan Act of 2021 (ARPA) [1] established the Coronavirus State and Local Fiscal Recovery Funds (SLFRF) to provide state, local, and Tribal governments [2] with the resources needed to respond to the pandemic and its economic effects and to build a stronger, more equitable economy during the recovery. Upon enactment, the ARPA provided that SLFRF funds [3] may be used:

(a) To respond to the public health emergency or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(b) To respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers;

(c) For the provision of government services to the extent of the reduction in revenue due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year prior to the emergency; and

(d) To make necessary investments in water, sewer, or broadband infrastructure.

The U.S. Department of the Treasury (Treasury) issued an interim final rule implementing the SLFRF program on May 10, 2021 (the 2021 interim final rule).[4] Treasury received over 1,500 public comments on the 2021 interim final rule.

Executive Summary of the 2022 Final Rule

On January 6, 2022, Treasury issued a final rule which responded to public comments and made several clarifications and changes to the provisions of the 2021 interim final rule to provide broader flexibility and greater simplicity in the SLFRF program.[5] The 2022 final rule provided for the following:

- *Public Health and Negative Economic Impacts:* Recipients may use SLFRF funds for a non-exhaustive list of programs, services, and capital expenditures that support an eligible COVID–19 public health or economic response. Recipients must serve ''impacted'' and ''disproportionately impacted'' classes of beneficiaries: impacted classes experienced the general, broad-based impacts of the pandemic, while disproportionately impacted classes faced more severe impacts, often due to preexisting disparities.

Public health eligible uses include COVID–19 mitigation and prevention, medical expenses, behavioral healthcare, and preventing and responding to violence. Negative economic impact eligible uses include assistance to households such as job training, rent, mortgage, or utility aid, affordable housing development, childcare; assistance to small businesses or nonprofits such as through loans or grants to mitigate financial hardship; assistance to impacted industries like travel, tourism, and hospitality that faced substantial pandemic impacts; or assistance to address impacts to the public sector, for example by hiring public sector workers to pre-pandemic levels.

- *Premium Pay:* Recipients may provide premium pay to a broad set of essential workers.
- *Revenue Loss:* Recipients may determine revenue loss due to the COVID–19 public health emergency by claiming the standard allowance of up to $10 million or completing the full revenue loss calculation. Recipients may use funds under revenue loss for government services.
- *Water, Sewer, and Broadband Infrastructure:* Recipients may use SLFRF funds for eligible broadband infrastructure investments to improve access, affordability, and reliability; and for eligible water and sewer infrastructure investments, including a broad range of lead remediation and stormwater management projects.

Impact of SLFRF

Since the launch of the SLFRF program, Treasury has disbursed 99.99% of SLFRF funds to approximately 30,000 state, local, and

[1] Sec. 9901, Public Law 117–2, 135 Stat. 223.

[2] Throughout this **SUPPLEMENTARY INFORMATION**, Treasury uses ''state, local, and Tribal governments'' or ''recipients'' to refer generally to governments receiving SLFRF funds; this includes states, territories, Tribal governments, counties, metropolitan cities, and nonentitlement units of local government.

[3] The ARPA added section 602 of the Social Security Act, which created the State Fiscal Recovery Fund, and section 603 of the Social Security Act, which created the Local Fiscal Recovery Fund (together, SLFRF). Sections 602 and 603 contain substantially similar eligible uses; the primary difference between the two sections is that section 602 established a fund for states, territories, and Tribal governments and section 603 established a fund for metropolitan cities, nonentitlement units of local government, and counties.

[4] *See* 86 FR 26786 (May 17, 2021).

[5] *See* 87 FR 4338 (Jan. 27, 2022).

Tribal governments, and these recipients have moved swiftly to deploy this funding in their communities. According to data reported to Treasury through March 31, 2023,[6] states and the largest local governments have budgeted nearly 80% of their total available SLFRF funds. Recipients are using SLFRF funds across a wide variety of eligible uses to meet the unique needs of their communities.[7] Recipients have been using SLFRF funds to shore up state and local finances, helping to avoid a repeat of the Great Recession when state and local government budgets were a drag on the overall economy for 14 quarters of the recovery.[8] Recipients reported that they budgeted nearly $100 billion for over 53,000 revenue replacement projects to provide fiscal stability through the provision of government services. Recipients have also budgeted over $12 billion across over 5,800 projects to respond to the public health needs of the COVID–19 pandemic including by providing testing, vaccinations, staffing, and outreach to underserved communities; budgeted $17 billion in projects to meet housing needs including through rental assistance, development and preservation of affordable housing, and permanent supportive housing services; budgeted over $11 billion to support workers through job training for populations impacted by the pandemic, to provide premium pay, and to invest in public sector capacity building; and budgeted over $26 billion for water, sewer, and broadband infrastructure projects. Overall, the impact of the SLFRF program is already proving to be transformative for communities across the country as recipients use SLFRF funds to build a more equitable economic recovery and help the country be better prepared for future crises.

Overview of the Consolidated Appropriations Act, 2023

On December 29, 2022, the Consolidated Appropriations Act, 2023 (the 2023 CAA) was signed into law by the President,[9] amending sections 602 and 603 of the Social Security Act to give state, local, and Tribal governments more flexibility to use SLFRF funds to provide emergency relief from natural disasters, build critical infrastructure, and support community development.

Generally, the 2023 CAA does not alter the existing eligible use categories originally provided by the ARPA. All eligible uses described in the 2022 final rule remain available to recipients. The 2023 CAA codifies the option for recipients to use up to $10 million, which Treasury termed the ''standard allowance,'' to replace lost revenue and use that funding to provide government services in lieu of calculating revenue loss according to the formula set forth in the 2022 final rule. Otherwise, the 2023 CAA provides for new eligible uses.

The 2023 CAA provides that state, local, and Tribal governments may use SLFRF funds to provide emergency relief from natural disasters or the negative economic impacts of natural disasters, including temporary emergency housing, food assistance, financial assistance for lost wages, or other immediate needs. As described later in this interim final rule, the emergency relief from natural disasters eligible use category is subject to the same program administration requirements as the four existing eligible uses in the SLFRF program, including the obligation deadline of December 31, 2024, and expenditure deadline of December 31, 2026.

The 2023 CAA also grants the authority for recipients to use SLFRF funds for additional infrastructure projects, including projects eligible under certain Department of Transportation programs (Surface Transportation projects) and projects eligible under Title I of the Housing and Community Development Act of 1974 (Title I projects). The 2023 CAA also provides additional requirements that apply to SLFRF funds used for Surface Transportation and Title I projects. These additional requirements provided for in the 2023 CAA are outlined below:

- The total amount of SLFRF funds a recipient may direct toward Surface Transportation and Title I projects is capped at the greater of $10 million and 30% of a recipient's total SLFRF award.
- Except as otherwise determined by the Secretary, the use of SLFRF funds for Surface Transportation and Title I projects is also subject to certain other laws, including the requirements of titles 23, 40, and 49 of the U.S. Code, title I of the Housing and Community Development Act of 1974, and the National Environmental Policy Act of 1969.
- SLFRF funds used for Surface Transportation and Title I projects must supplement, not supplant, other Federal, state, territorial, Tribal, and local government funds (as applicable) that are otherwise available for these projects. This provision does not apply to funds used under the emergency relief from natural disasters eligible use category.
- Recipients must obligate funds used for Surface Transportation projects and Title I projects by December 31, 2024 (the same obligation deadline that applies to the other eligible uses) and must expend funds by September 30, 2026. This expenditure deadline is three months earlier than the expenditure deadline for all other eligible uses.
- Treasury may delegate oversight and administration of the requirements associated with funds used for Surface Transportation projects and Title I projects to the appropriate Federal agency. This interim final rule discusses how the Department of Transportation will oversee funds expended for certain Surface Transportation projects.

Sections 602 and 603 of the Social Security Act specify two restrictions on uses of funds: for recipients other than Tribal governments, funds may not be used for deposits into any pension fund and, in the case of states and territories only, funds may not be used to directly or indirectly offset a reduction in net tax revenue resulting from a change in law, regulation, or administrative interpretation during the covered period. The 2023 CAA did not amend these restrictions.

Thus, sections 602(c)(1) and 603(c)(1) of the Social Security Act, as amended by the 2023 CAA, provide that SLFRF funds may be used:

(a) To respond to the public health emergency or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(b) To respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers;

[6] U.S. Department of the Treasury, April 2023 Quarterly and Annual Reporting Analysis, *https://home.treasury.gov/system/files/136/April-2023-Reporting-Blog-Post.pdf.*

[7] The figures included in this interim final rule include Project and Expenditure reporting data covering the period ending March 31, 2023 from the all SLFRF recipients. It includes quarterly data reported by states, territories, and metropolitan cities and counties with a population over 250,000 or an allocation over $10 million, non-entitlement units of local government allocated more than $10 million, and Tribal governments allocated over $30 million from January 1, 2023–March 31, 2023 and annual data reported by metropolitan cities and counties with populations less than 250,000 and an allocation less than $10 million, Tribal governments with an allocation less than $30 million, and non-entitlement units of local government allocated less than $10 million from April 1, 2022 to March 31, 2023.

[8] Press Release, U.S. Department of the Treasury, Remarks by Secretary of the Treasury Janet L. Yellen at National Association of Counties 2023 Legislative Conference (Feb. 14, 2023).

[9] Public Law 117–328 (Dec. 29, 2022).

(c) For the provision of government services up to an amount equal to the greater of—

(i) The amount of the reduction in revenue due to the COVID–19 public health emergency relative to revenue collected in the most recent full fiscal year prior to the emergency; or

(ii) $10,000,000

(d) To make necessary investments in water, sewer, or broadband infrastructure; or

(e) To provide emergency relief from natural disasters or the negative economic impacts of natural disasters, including temporary emergency housing, food assistance, financial assistance for lost wages, or other immediate needs.

Sections 602(c)(4) and 603(c)(5) of the Social Security Act, as amended by the Infrastructure Investment and Jobs Act, provide that SLFRF funds may be used for an authorized Bureau of Reclamation project for purposes of satisfying any non-Federal matching requirement required for the project.[10]

Sections 602(c)(5) and 603(c)(6) of the Social Security Act, as added by the 2023 CAA, provide that SLFRF funds may be used for Surface Transportation projects and Title I projects, including in some cases to satisfy a non-Federal share requirement applicable to certain projects or to repay a loan provided under one of the Surface Transportation programs.

Structure of the Supplementary Information

Following this Introduction, this **SUPPLEMENTARY INFORMATION** is organized into four sections: (1) Eligible Uses, (2) Discussion of Revenue Loss and Program Administration Provisions, (3) Comments and Effective Date, and (4) Regulatory Analyses. Recipients seeking information regarding the original four eligible uses in the SLFRF program generally may reference the 2022 final rule and other SLFRF program guidance.

The Eligible Uses section describes the standards for determining eligible uses of funds in each of the eligible use categories provided in the 2023 CAA:

(1) Emergency Relief from Natural Disasters
(2) Surface Transportation Projects and Title I Projects
  a. Surface Transportation Projects
  b. Title I Projects

As with the 2022 final rule, each eligible use category has separate and distinct standards for assessing whether a use of funds is eligible. Standards, restrictions, or other provisions in one eligible use category do not apply to other categories. Therefore, recipients should first determine which eligible use category a potential use of funds fits within, then assess whether the potential use of funds meets the eligibility standard or criteria for that category. Recipients using funds for Surface Transportation projects receiving funding from the Department of Transportation must consult with the Department of Transportation before using SLFRF funds for these projects.

In the Emergency Relief from Natural Disasters section of this interim final rule, Treasury identifies a non-exhaustive list of specific uses of funds that are eligible, called ''enumerated eligible uses,'' that provide emergency relief from the physical or negative economic impacts of natural disasters. The sections discussing Surface Transportation projects and Title I projects specifically describe the eligible projects articulated by the statute.

The Discussion of Revenue Loss and Program Administration Provisions section provides additional information, where relevant, to clarify the availability of the standard allowance, discuss program requirements applicable to the new eligible uses, and describe relevant distinctions between the requirements of the 2022 final rule and this interim final rule. This section includes:

(1) Revenue Loss
(2) Timeline for Use of SLFRF Funds
(3) Use of Funds for Match or Cost-Share Requirements
(4) Reporting
(5) Uniform Guidance

Next, the Comments and Effective Date section discusses the effective date and comment period for this interim final rule. Finally, the Regulatory Analyses section provides Treasury's analysis of the impacts of this rulemaking, as required by several laws, regulations, and Executive Orders. This section discusses the impact of the amendments in the 2023 CAA, where relevant. Please reference the 2022 final rule for the regulatory analyses of the impacts of the 2022 final rule.

Throughout this **SUPPLEMENTARY INFORMATION**, statements using the terms ''should'' or ''must'' refer to requirements. Statements using the term ''encourage'' or ''advise'' refer to recommendations, not requirements.

This **SUPPLEMENTARY INFORMATION** references three rule-making documents. Statements referencing ''the 2021 interim final rule'' refer to the rule released May 10, 2021, and published May 17, 2021. Statements referencing ''the 2022 final rule'' refer to the rule released January 6, 2022 and published January 27, 2022. Statements referencing ''this interim final rule'' reference this rule, released August 4, 2023, and published September 20, 2023.

Uses of Funds Not Specifically Identified as Eligible in This Interim Final Rule

Even if a use of funds is not specifically identified as eligible in this interim final rule, recipients may still be able to direct SLFRF funds toward that purpose as described further below.

First, the eligible uses described in the 2022 final rule remain available to recipients, and recipients may continue to pursue eligible projects under the 2022 final rule. For example, under the revenue loss eligible use category, recipients have broad latitude to use funds for government services up to their amount of revenue loss due to the pandemic, provided that other restrictions on use do not apply. A potential use of funds that does not fit within the other eligible use categories in this interim final rule or in the 2022 final rule may be permissible as a government service. Please reference the 2022 final rule for further information.

Second, the eligible use category for providing emergency relief from natural disasters provides a non-exhaustive list of enumerated eligible uses, which means that the listed eligible uses include some, but not all, of the uses of funds that could be eligible under this eligible use category. This interim final rule outlines a standard for determining other eligible forms of emergency relief, beyond those specifically enumerated. If a recipient would like to pursue a use of funds to provide emergency relief that is not specifically enumerated, the recipient should use the standards and associated guidance to assess whether the use of funds is eligible.

Third, as described further below, many of the uses in the Title I projects eligible use category are also eligible in the public health and negative economic impacts eligible use category, discussed in the 2022 final rule, where there is no cap on the amount of SLFRF funds that may be directed toward an eligible use. Furthermore, the public health and negative economic impacts eligible use category also offers a standard for determining if other uses of funds, beyond those specifically enumerated, are eligible. Recipients seeking to use SLFRF funds for Title I projects may consider the relevant eligible uses and available funding levels to determine which eligible use category best supports their community's needs. As noted above, this interim final rule did

[10] *See* section 40909 of Public Law 117–58, 135 Stat. 429, 1126 (Nov. 15, 2021).

not alter the public health and negative economic impacts eligible use category. Please see the 2022 final rule for more information.

Request for Comments

Treasury seeks comment on sections addressing the new eligible uses, Emergency Relief from Natural Disasters, Surface Transportation projects, and Title I projects. To better facilitate public comment, Treasury has included specific questions in the relevant sections of this **SUPPLEMENTARY INFORMATION**. Treasury encourages state, local, and Tribal governments in particular to provide feedback and to engage with Treasury regarding issues that may arise regarding the new eligible uses.

II. Eligible Uses

A. Emergency Relief From Natural Disasters

Background

The 2023 CAA amended sections 602 and 603 of the Social Security Act to permit recipients to use SLFRF funds to ''provide emergency relief from natural disasters or the negative economic impacts of natural disasters, including temporary emergency housing, food assistance, financial assistance for lost wages, or other immediate needs.'' As state, local, and Tribal governments spend billions of dollars a year to respond to the impacts of natural disasters that are growing in size, scale, and frequency, often as a result of climate change,[11] this new eligible use supports recipients in responding to the varied and evolving needs of their communities with SLFRF funds already on hand.

Since 1980, there have been 341 natural disasters in the United States that reached or exceeded damages valued at $1 billion, causing 15,821 deaths and resulting in nearly $2.5 trillion in damages.[12] In recent years, costly U.S. natural disasters have become even more frequent, in part due to the impacts of climate change, which are known to create more frequent and intense droughts and storms,[13] lengthen wildfire seasons in the Western States,[14] and increase heavy rainfall events in the contiguous 48 states.[15] In 2020, 2021, and 2022, there were an average of 20 weather and climate disasters each year that reached or exceeded damages valued at $1 billion, compared to an average of 12.8 weather and climate disasters annually from 2010 to 2019.[16] From 2020 to 2022 alone, these billion-dollar natural disasters caused 1,460 deaths and resulted in damages valued at $434.6 billion.[17]

The impacts of natural disasters range from loss of life and other consequences for health and safety to destruction of property and infrastructure and disruption of economic activity. The increasing prevalence of natural disasters and corresponding increased costs of responding to and recovering from natural disasters places additional burden on state, local, and Tribal governments.[18] This burden is experienced throughout communities, including through strains placed on public infrastructure and on households, ranging from impacts to housing, food, water, wages, and other needs.

The U.S. Census Bureau found that approximately 3.3 million people were displaced from their homes by natural disasters in 2022.[19] Even when individuals and families in an impacted area are not displaced after a natural disaster, they may face significant costs to repair homes to become livable again.[20] Natural disasters also can disrupt regular access to food and water, causing food insecurity and reliance on support from disaster relief organizations.[21] Furthermore, the damage caused by natural disasters can cause short-term earnings losses, as it may physically prevent individuals from working, whether due to housing displacement, physical barriers in accessing their place of employment or business, sustained damage to their place of employment or business, or injuries sustained as a result of the natural disaster.[22] Natural disasters also can generate a significant volume of debris[23] and damage buildings and infrastructure that provide critical or essential services to the general public, such as educational, utility, emergency, medical, and other services, creating strains on local governments and other responders.

While the impacts of a natural disaster can be widespread, communities that are historically underserved often experience heightened impacts as a result of underlying disparities and ability to prepare for disasters,[24] resiliency of homes to natural disasters,[25] risk of food insecurity,[26] ability to recover financially after a natural disaster,[27] and ultimately their ability to quickly return to social and economic life after a natural disaster.[28] Tribal governments, for example, are the first and sometimes the only responders to natural disasters that impact their communities.[29] Despite this responsibility, Tribal emergency management capacity has been underfunded over the years,

[11] Billion-dollar disaster events account for the majority (>80%) of the damage from all recorded U.S. weather and climate events per NCEI and Munich Re. NOAA National Centers for Environmental Information (NCEI), U.S. Billion-Dollar Weather and Climate Disasters (2023), *https://www.ncei.noaa.gov/access/billions/,* DOI: 10.25921/stkw-7w73.

[12] *See id.*

[13] U.S. Department of the Interior, US Geological Survey, Climate FAQ: How can climate change affect natural disasters? (2023), *https://www.usgs.gov/faqs/how-can-climate-change-affect-natural-disasters#:~:text=With%20increasing%20global%20surface%20temperatures,more%20powerful%20storms%20to%20develop.*

[14] NOAA NCEI, U.S. Billion-Dollar Weather and Climate Disasters (2023), *https://www.ncei.noaa.gov/access/billions/,* DOI: 10.25921/stkw-7w73.

[15] In recent years, a larger percentage of precipitation has come in the form of intense single-day events. Environmental Protection Agency, ''Climate Change Indicators: Heavy Precipitation,'' Figure 1: Extreme One-Day Precipitation Events in the Contiguous 48 states, 1910–2020 (Aug. 1, 2022). *https://www.epa.gov/climate-indicators/climate-change-indicators-heavy-precipitation.*

[16] NOAA NCEI, U.S. Billion-Dollar Weather and Climate Disasters (2023), *https://www.ncei.noaa.gov/access/billions/,* DOI: 10.25921/stkw-7w73.

[17] *See id.*

[18] *See id.*

[19] U.S. Census Bureau. Household Pulse Survey: Displaced in Last Year by Natural Disaster (2023). *https://www.census.gov/data-tools/demo/hhp/#/?measures=DISPLACED.*

[20] Harvard University's Joint Center for Housing Studies estimates that disaster-related home repairs and improvements cost $300 million in annual spending for every $10 billion in disaster losses incurred in the three years prior. Kermit. Baker & Alexander Hermann, Joint Center for Housing Studies of Harvard University. *Rebuilding from 2017's Natural Disasters: When, For What, and How Much?, https://www.jchs.harvard.edu/blog/rebuilding-from-2017s-natural-disasters-when-for-what-and-how-much.*

[21] Centers for Disease Control and Prevention, Natural Disaster and Severe Weather, *Food and Water Needs: Preparing for a Disaster or Emergency* (Jan. 29, 2019).

[22] Jeffrey A. Groen, et al, Census Bureau, Center for Economic Studies. *Storms and Jobs: The Effect of Hurricanes on Individuals' Employment and Earnings over the Long Term, https://www2.census.gov/ces/wp/2015/CES-WP-15-21.pdf.*

[23] Linda Luther, Congressional Research Service, R44941, Disaster Debris Management: Requirements, Challenges, and Federal Agency Roles (2017).

[24] Federal Emergency Management Agency (FEMA), 2022–2026 FEMA Strategic Plan (2023).

[25] Substance Abuse and Mental Health Services Administration, Disaster Technical Assistance Center Supplemental Research Bulleting, *Greater Impacts: How Disasters Affect People of Low Socioeconomic Status* (2017).

[26] Kevin M. Fitzpatrick, et al., *Food Insecurity in the Post-Hurricane Harvey Setting: Risks and Resources in the Midst of Uncertainty,* 17(22), Int. J. Environ. Res.Public Health 8424, (2020).

[27] Caroline Ratcliffe, et al., Urban Institute, Insult to Injury Natural Disasters and Residents' Financial Health 7 (2019).

[28] FEMA, 2022–2026 FEMA Strategic Plan (2023).

[29] National Congress of American Indians, Indian Country FY 2022 Budget Request (2023), 47–54. *https://www.ncai.org/resources/ncai-publications/NCAI_IndianCountry_FY2022_BudgetRequest.pdf.*

limiting Tribal governments' access to disaster resources before, during, or after the disaster strikes.[30]

This interim final rule provides significant flexibility for recipients to use SLFRF funds to provide emergency relief from the widespread physical and negative economic impacts of natural disasters. Recognizing that communities that have been historically underserved often experience deeper impacts of natural disasters due in part to differences that exist prior to the occurrence of a natural disaster, Treasury encourages recipients to consider how the emergency relief they provide supports all communities in resuming their lives after a natural disaster and building resiliency to future natural disasters.

In the section that follows, this interim final rule discusses how recipients may use SLFRF funds to provide emergency relief from the physical or negative economic impacts of natural disasters, including the standards for identifying a natural disaster and responsive emergency relief.

1. Standards for Providing Emergency Relief From Natural Disasters

This section of the interim final rule discusses the standards for providing emergency relief from the physical or negative economic impacts of natural disasters. Generally, a recipient should undertake the following two-step process:

1. Identify a natural disaster that has occurred or is expected to occur imminently, or a natural disaster that is threatened to occur in the future.

2. Identify emergency relief that responds to the physical or negative economic impacts, or potential physical or negative economic impacts, of the identified natural disaster. The emergency relief must be related and reasonably proportional to the impact identified.

This interim final rule implements the framework described above by defining natural disaster, defining emergency relief, and providing a non-exhaustive list of examples of emergency relief that may be provided. In addition to this non-exhaustive list, recipients may use the two-step framework above to identify and provide additional types of emergency relief in response to the physical or negative economic impacts, or the potential for such impacts, of an identified natural disaster.

The eligible uses set forth in this interim final rule provide flexibility to recipients to respond to the widespread physical and economic impacts of natural disasters in their communities. Treasury encourages recipients to consider how the provision of emergency relief can support communities that have been historically underserved and are more at risk of the impacts of natural disasters.

2. Identifying Natural Disasters

This interim final rule explains that for the purposes of the SLFRF program, a natural disaster is defined as a hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, or fire, in each case attributable to natural causes, that causes or may cause substantial damage, injury, or imminent threat to civilian property or persons. A natural disaster may also include another type of natural catastrophe, attributable to natural causes, that causes, or may cause substantial damage, injury, or imminent threat to civilian property or persons. This definition provides recipients the flexibility to determine an event to be a natural disaster even if it is not of a type specifically listed in the definition. This definition is based on the definition of natural disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) (the Stafford Act), which provides the statutory authority for most Federal disaster response activities, including as they pertain to Federal Emergency Management Agency (FEMA) assistance and programs.[31] The Stafford Act provides the framework for an orderly means of assistance by the Federal government to state, local, and Tribal governments in carrying out their responsibilities to alleviate the suffering and damage that result from such disasters.[32]

3. Identifying Emergency Relief

This interim final rule defines emergency relief as assistance that is needed to save lives and to protect property and public health and safety, or to lessen or avert the threat of catastrophe. This definition of emergency relief is based on the Stafford Act's definition of ''emergency.'' [33]

Emergency relief must be related and reasonably proportional to the physical or negative economic impacts of a natural disaster that has occurred or is expected to occur imminently, or to the potential physical or negative economic impacts of a natural disaster that is threatened to occur in the future. Emergency relief that bears no relation or is grossly disproportionate to the type or extent of the impacts of the natural disaster would not be an eligible use.

In the case of a response to a natural disaster that has occurred or is expected to occur imminently, communities, individuals, or areas that did not or are not expected to experience the natural disaster or its negative economic impacts would not be eligible to receive emergency relief in response to the natural disaster. In evaluating whether a use is reasonably proportional, recipients should consider relevant factors about the natural disaster's actual or imminent physical or negative economic impacts and the emergency relief to be provided, including the availability of other assistance such as insurance or other Federal assistance. For more information, recipients should reference the section titled Duplication of Benefits below. Recipients should also consider the efficacy, cost, cost effectiveness, and time to delivery of the response.

When providing emergency relief from a natural disaster that is threatened to occur in the future, mitigation activities to address the potential physical or economic impacts of the natural disaster in a community where the natural disaster is unlikely to occur would not be considered a related and reasonably proportional response because there would not be an established need to provide emergency relief from that natural disaster, for example.

Available emergency relief based on the immediacy of the natural disaster. This section discusses how recipients may distinguish between a natural disaster that has already occurred or is expected to occur imminently, and the threat of a future occurrence of a natural disaster. As discussed, recipients may provide emergency relief from natural disasters in the form of assistance that is needed to save lives and to protect property and public health and safety or to lessen or avert the threat of catastrophe.

To provide emergency relief before, during, or after a natural disaster that has already occurred or is expected to occur imminently, the recipient should first identify how the disaster meets the definition of natural disaster as described above. The natural disaster

[30] *See Id.*

[31] *See* 42 U.S.C. 5195a(a)(2).

[32] FEMA, Stafford Act, as *Amended,* P–592 vol. 1 (2021).

[33] *See* 42 U.S.C. 5122(1) (''Emergency' means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.'')

that has occurred or is imminent must be, or have been, the subject of an emergency declaration or designation applicable to the recipient's geography and jurisdiction in the form of (1) an emergency declaration pursuant to the Stafford Act; (2) an emergency declaration by the Governor of a state pursuant to state law; or (3) an emergency declaration made by a Tribal government. If one of the declarations listed in (1)–(3) is not available, recipients may satisfy this requirement through the designation of an event as a natural disaster by the chief executive (or equivalent) of the recipient government, provided that the chief executive documents that the event meets the definition of natural disaster provided above. Recipients should maintain documentation consistent with the terms and conditions of the award agreement. Note that if the governor of a state declares an emergency for the entire state, the local governments within that state are not also required to declare an emergency in order to use SLFRF funds to provide emergency relief. A recipient government does not need to submit to Treasury for approval of the designation of a natural disaster; Treasury will defer to the reasonable determination of the recipient's chief executive (or equivalent) in making such a designation. For information about duplication of benefits requirements when responding to natural disasters with Stafford Act declarations, please reference the section titled Duplication of Benefits below.

As discussed above, Treasury's definition of emergency relief includes assistance to lessen or avert the threat of a future natural disaster, based on the Stafford Act definition of ''emergency,'' which enables recipients to provide mitigation activities. By providing mitigation activities that would reduce the threat of a future natural disaster's potential impacts, the recipient will have reduced the severity of threats to life, risks of loss of economic activity, and costs to private and public entities to respond and recover, because less damage will be incurred.

To provide emergency relief in the form of mitigation activities, to lessen or avert the threat of a future natural disaster, a recipient should document evidence of historical patterns or predictions of natural disasters (as defined above) that would reasonably demonstrate the likelihood of the future occurrence of a natural disaster in its community. A recipient should use this evidence to support its determination that mitigation activities would be related and reasonably proportional to the threat of a natural disaster that it is addressing. For example, a recipient could utilize FEMA's National Risk Index [34] to represent the community's relative risk for hurricanes to establish the likelihood of a future hurricane, or a Tribal government could cite Indigenous Traditional Ecological Knowledge to determine future risks.[35]

4. Eligible Types of Emergency Relief

Sections 602 and 603 of the Social Security Act, as amended by the 2023 CAA, provide a non-exhaustive list of four types of emergency relief from natural disasters or their negative economic impacts that may be provided using SLFRF funds: temporary emergency housing, food assistance, financial assistance from lost wages, and other immediate needs. This interim final rule discusses and expands on this list, to enable recipients both to complement existing disaster relief funding and to address gaps in assistance.

To facilitate implementation, this interim final rule identifies a non-exhaustive list of eligible emergency relief, which means that the listed eligible uses include some, but not all, of the uses of funds that could be eligible. This non-exhaustive list of eligible emergency relief does not distinguish between emergency relief from the physical impacts of natural disasters and emergency relief from the negative economic impacts of natural disasters. However, the list does distinguish between emergency relief provided from a declared or designated natural disaster that has occurred or is expected to occur imminently, and emergency relief provided from the threat of a future natural disaster. To assess whether additional types of emergency relief would be eligible under this category beyond the non-exhaustive list provided below, recipients should first identify a natural disaster and then identify emergency relief that responds to the natural disaster's physical or negative economic impacts according to the standards discussed in the prior section.

Treasury has included references to programs currently administered by FEMA in the discussion of the eligible uses below. These references do not impose any of the associated requirements of these FEMA-administered programs. Furthermore, recipients are not required to receive pre-approval from FEMA or Treasury to use SLFRF funds for these eligible uses.

Duplication of Benefits. As a general matter, recipients may not claim use of Federal financial assistance to cover a cost that the recipient is covering with another Federal award, by insurance, or from another source,[36] and subrecipients are bound by the same requirements as recipients.[37] Specific requirements apply when recipients use Federal funds to provide assistance with respect to losses suffered as a result of a major disaster or emergency declared under the Stafford Act (disaster losses). Under the emergency relief from natural disasters eligible use category, certain duplication of benefits requirements under the Stafford Act, in addition to all relevant Uniform Guidance cost principles requirements, would apply to recipients using funds for events that both a) satisfy this interim final rule's definition of natural disaster and b) form the basis for a Stafford Act declaration of an emergency or major disaster. Accordingly, if a recipient uses SLFRF funds to cover disaster losses under the emergency relief from natural disasters eligible use category, it must abide by the Stafford Act's prohibition on duplication of benefits: Recipients may not provide financial assistance to a person, business concern, or other entity with respect to disaster losses for which such beneficiary will receive financial assistance under any other program or from insurance or any other source.[38] A recipient may provide assistance with respect to disaster losses to a person, business concern, or other entity that is or may be entitled to receive assistance for those losses from another source, if such person, business concern, or other entity has not received the other benefits by the time of application for SLFRF funds and the person, business concern, or other entity agrees to repay any duplicative

[34] *See* FEMA's National Risk Index available at *https://hazards.fema.gov/nri/hurricane.*

[35] Memorandum from the White House Office of Science and Technology Policy & the White House Council on Environmental Quality on Indigenous Traditional Ecological Knowledge and Federal Decision Making (Nov. 15, 2021). For example, a Tribe may be able to rely on Indigenous Traditional Ecological Knowledge in considering the threat of wildfires on Tribal lands.

[36] *See, e.g.,* 2 CFR 200.1 *Definitions* (defining ''improper payment'' to include ''duplicate payments''); 2 CFR 200.403 *Factors affecting allowability of costs* (providing that ''in order to be allowable under Federal awards'' costs must ''[b]e necessary and reasonable for the performance of the Federal award and be allocable thereto under these principles'' and ''[n]ot be included as a cost . . . of any other federally-financed program in either the current or a prior period'').

[37] 2 CFR 200.101(b)(2) (''The terms and conditions of Federal awards (including this part [2 CFR part 200, the Uniform Guidance]) flow down to subawards to subrecipients unless a particular section of this part or the terms and conditions of the Federal award specifically indicate otherwise.'').

[38] *See* 5 U.S.C. 5155(a).

assistance to the SLFRF recipient.[39] Recipients may also use SLFRF funds to provide assistance for any portion of disaster losses not covered by other benefits.[40]

To ensure compliance with the Stafford Act's prohibition on duplication of benefits, SLFRF recipients are advised to review FEMA's guidance codified at 44 CFR 206.191.

FEMA's guidance sets forth a ''delivery sequence'' for assistance with disaster losses, providing that sources of assistance later in the sequence are considered ''duplicative'' if paid despite the availability of other sources of assistance earlier in the sequence.[41] That is, if two sources provide assistance for the same disaster losses, the assistance provided later in the delivery sequence is considered duplicative and must not be paid or if paid must be repaid when the duplication of benefits occurs. While not listed in section 206.191's delivery sequence, recipients should treat SLFRF funds as last in the delivery sequence, unless the recipient, in consultation with the appropriate FEMA Regional Administrator or state disaster-assistance administrator, determines that another sequence is appropriate.[42] For example, assistance with disaster losses would generally be duplicative of insurance covering those same losses because insurance comes first in the delivery sequence. In that case, SLFRF funds should not be used to cover any portion of the disaster losses for which insurance benefits are received. The recipient is responsible for preventing and rectifying duplication of benefits with respect to disaster losses and should coordinate with the relevant FEMA Regional Administrator and state disaster assistance administrator, or other relevant agencies providing disaster assistance, as described in FEMA's guidance.

To facilitate compliance with the Stafford Act's prohibition on duplication of benefits, Treasury intends to require recipients to report their use of SLFRF funds to provide assistance with respect to disaster losses. Recipients are further required to notify subrecipients and contractors that, when providing assistance in response to a Stafford Act Declaration, they are responsible for ensuring that beneficiaries disclose any other assistance received for the same disaster losses prior to receiving assistance with SLFRF funds. Treasury further intends to make the reported information available to FEMA, the relevant FEMA Regional Administrator, and other agencies providing assistance with respect to disaster losses, as appropriate.

Non-Federal Matching Requirements. The emergency relief enumerated eligible uses do not add any new authority for recipients to use SLFRF funds to satisfy non-Federal matching requirements of other Federal programs. Instead, as described in the 2022 final rule, recipients may use SLFRF funds under the revenue loss eligible use category to satisfy non-Federal matching requirements. The newly eligible Surface Transportation projects and Title I projects, discussed later in this interim final rule, also provide recipients the ability to use funds to satisfy non-Federal cost share requirements in certain instances. Recipients seeking to use SLFRF funds for non-Federal matching requirements should reference the section titled Use of Funds for Match or Cost-Share Requirements in this interim final rule and the 2022 final rule for additional information.

a. Declared or Designated Natural Disasters

Below, Treasury is providing a non-exhaustive list of eligible uses that recipients may provide as emergency relief from the physical or negative economic impacts of a natural disaster that has a declaration or designation, as described above.

Temporary emergency housing. Recipients may provide emergency relief from the physical or negative economic impacts of a natural disaster in the form of temporary emergency housing to individuals and households including by providing funds for temporary housing for households who are unable to live in their home following a natural disaster. Examples of temporary emergency housing could include rental assistance or reimbursement for hotel costs; providing a temporary housing unit when individuals are facing challenges finding permanent housing due to shortages caused by a natural disaster; establishing other temporary emergency housing, including congregate and non-congregate shelter (*i.e.,* sheltering individuals in motels, hotels, dorms, etc.) before, during, or after a natural disaster; or providing shelter following an evacuation due to a natural disaster. Given the varying potential impacts of a natural disaster, recipients have flexibility to determine the length of time to provide temporary emergency housing based on the impact of the natural disaster and the housing conditions in their jurisdiction.

Food assistance. Recipients may provide emergency relief from the physical or negative economic impacts of a natural disaster in the form of food assistance. As is the case across the SLFRF program, recipients may administer programs through a range of other entities, including nonprofit and for-profit entities, to carry out eligible uses on behalf of the recipient government, including to provide emergency relief in the form of food assistance.

Financial assistance for lost wages. Recipients may provide emergency relief from the physical or negative economic impacts of a natural disaster in the form of financial assistance for lost wages. As with all forms of emergency relief under this eligible use category, financial assistance for lost wages must be related and reasonably proportional to the impact identified. In making this determination, recipients should consider all sources of available relief and other resources available to the potential beneficiaries of financial assistance.

Generally, Federal financial assistance programs directed toward individuals are designed to target individuals with a specific set of circumstances or to provide those who earn up to a specific income threshold with a specified amount of assistance. For example, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116–136, 134 Stat. 281 (March 27, 2020) provided an eligible individual a refundable tax credit of up to $1,200 ($2,400 for eligible individuals filing a joint tax return), plus $500 per qualifying child of the eligible individual. The credit was reduced for taxpayers with adjusted gross income that exceeded a threshold. The threshold was $150,000 in the case of a joint return, $112,500 in the case of a head of household, and $75,000 otherwise. An advance refund of this credit, referred to by the IRS as an Economic Impact Payment, was made during 2020.[43]

Recipients may provide financial assistance for lost wages by providing supplemental benefits to individuals who are participating in state unemployment insurance programs or

[39] *See* 5 U.S.C. 5155(b)(1).

[40] *See* 5 U.S.C. 5155(b)(3).

[41] 44 CFR 206.191(d).

[42] As provided in FEMA's guidance, ''If following the delivery sequence concept would adversely affect the timely receipt of essential assistance by a disaster victim, an agency may offer assistance which is the primary responsibility of another agency.'' 44 CFR 206.191(d)(4).

[43] For more information on Treasury's Economic Impact Payments provided in response to the COVID–19 public health emergency, *see https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/economic-impact-payments.*

the Department of Labor's Disaster Unemployment Assistance (DUA) program at the time the natural disaster occurred or following the natural disaster. Supplemental benefits can be provided to any person who is impacted by the natural disaster and receiving state unemployment insurance program benefits or DUA program benefits.

The amount of financial assistance for lost wages paid as a supplemental benefit to participants in the programs discussed above must not exceed $400 a week for the duration of the need for emergency relief. This limit was determined to be reasonably proportional through the review of other assistance for lost wages, such as the FEMA COVID–19 Assistance Program for Lost Wages,[44] which offered participants the option to provide claimants a lost wages supplement of up to $400, providing additional financial assistance for individuals who were participants in other Federal financial assistance programs during the height of the COVID–19 emergency. To provide other types of direct financial assistance to individuals impacted by natural disasters, please refer to the section titled Cash Assistance below.

Other immediate needs. As discussed above, natural disasters cause varied damage to persons, property, and infrastructure. Recipients may provide emergency relief from the physical or negative economic impacts of natural disasters for other immediate needs not discussed above. Below, this interim final rule discusses examples of eligible uses available to state, local, and Tribal governments using SLFRF funds to address other immediate needs.

Emergency Protective Measures. Recipients may use SLFRF funds to provide emergency protective measures, such as those described in Category B of FEMA's Public Assistance program to respond before, during, or after a natural disaster.[45] By referencing Category B eligible uses as an illustrative list of the types of emergency protective measure recipients may pursue with SLFRF funds, Treasury is seeking to simplify the administrability of this eligible use through a framework that may already be familiar to recipients. As noted above, recipients are not required to comply with the requirements associated with FEMA's Public Assistance program and are not required to receive pre-approval from FEMA or Treasury to use SLFRF funds for this purpose. Category B of FEMA's Public Assistance program includes assistance like emergency access, medical care and transport, emergency operations center related costs and other activities traditionally undertaken as part of emergency response. In considering what ''other activities'' are eligible under this category, recipients are encouraged to refer to Chapter 7 Section II of FEMA's Public Assistance Program and Policy Guide, which discusses Category B Emergency Protection Measures.[46] For Category B Emergency Protection Measures that are only eligible under FEMA's Public Assistance program as direct Federal assistance, recipients may use SLFRF funds to provide these services directly, such as emergency communications or public transportation.

Other examples of emergency protective measures include: transporting and pre-positioning equipment and resources; flood fighting; firefighting; purchasing and distributing supplies and commodities; provision of medical care and transport; evacuation and sheltering; provision of childcare; demolition of structures; search and rescue to locate survivors, household pets, and service animals requiring assistance; use or lease of temporary generators for facilities that provide essential community services; dissemination of information to the public to provide warnings and guidance about health and safety hazards; searching to locate and recover human remains; storage and interment of unidentified human remains; mass mortuary services; construction of emergency berms or temporary levees to provide protection from floodwaters or landslides; emergency repairs necessary to prevent further damage, such as covering a damaged roof to prevent infiltration of rainwater; buttressing, shoring, or bracing facilities to stabilize them or prevent collapse; emergency slope stabilization; mold remediation; extracting water and clearing mud, silt, or other accumulated debris from eligible facilities; taking actions to save the lives of animals; and snow removal.

Debris Removal. Recipients may use SLFRF funds for debris removal activities. Generally, this includes the clearance, removal, and disposal of vegetative debris (including tree limbs, branches, stumps, or trees), construction and demolition debris, sand, mud, silt, gravel, rocks, boulders, white goods, and vehicle and vessel wreckage. These eligible uses are described further in Category A of FEMA's Public Assistance program.[47] As noted above, recipients are not required to receive pre-approval from FEMA or Treasury to use SLFRF funds for these eligible uses. Recipients are also not required to comply with the requirements associated with FEMA's Public Assistance program.

Public Infrastructure Repair. Recipients may use SLFRF funds to restore public infrastructure damaged by a natural disaster, including roads, bridges, and utilities. Recipients may restore public infrastructure to its pre-disaster size, capacity, and function in accordance with applicable laws, codes, and standards. As part of restoring public infrastructure damaged by a natural disaster, recipients also may undertake activities that make this restored infrastructure more resilient to future natural disasters, helping to mitigate the impacts of future natural disasters. For more information on how to incorporate mitigation activities into a public infrastructure project, please see the section titled Threat of Future Natural Disaster: Mitigation Activities below.

Increased operational and payroll costs. When providing emergency relief from the physical or negative economic impacts of natural disasters, recipients may need to increase government services due to suddenly lacking or limited resources or may need to leverage existing government services or government facilities to be responsive as quickly and effectively as possible. Recipients may use SLFRF funds for increased operating costs, including payroll costs and costs for government facilities and government services used before, during, or after a natural disaster. This may include social services that are directly responsive to an impact from the disaster, representing an increased cost of providing those services due to the disaster.

Cash Assistance. Recipients may use SLFRF funds to provide cash assistance for uninsured or underinsured expenses caused by the disaster such as repair or replacement of personal property and vehicles, or funds for moving and storage, medical, dental, childcare, funeral expenses, behavioral health services, and other miscellaneous items. The eligible uses are generally modeled on FEMA's Individuals and Households program, which provides money and services to individuals who have experienced a disaster whose property has been damaged or destroyed and whose losses are not covered by

[44] Memorandum from President Trump on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019 (Aug. 8, 2020).

[45] FEMA, FP 104–009–02, Public Assistance Program and Policy Guide Version 4 (2020).

[46] *See id.*

[47] *See id.*

insurance.[48] Consistent with the provision of emergency relief discussed throughout this section, recipients are not required to comply with the requirements associated with FEMA's Individuals and Households program to use SLFRF funds for these eligible uses. Furthermore, recipients are not required to receive pre-approval from FEMA or Treasury to use SLFRF funds for these eligible uses.

Recognizing that low-income households often experience deeper challenges recovering financially from a natural disaster,[49] recipients may also design cash assistance programs that serve low-income households that have been impacted by a natural disaster. Consistent with Treasury's definition of low-income household in the public health and negative economic impacts eligible use category in the 2022 final rule, for this purpose a low-income household is one with (i) income at or below 185 percent of the Federal Poverty Guidelines for the size of its household based on the most recently published poverty guidelines by the Department of Health and Human Services or (ii) income at or below 40 percent of area median income for its county and size of household based on the most recently published data by the Department of Housing and Urban Development. Treasury will presume that cash assistance provided to low-income households impacted by a natural disaster is related and reasonably proportional emergency relief to address the negative economic impacts of natural disasters.

In designing a cash assistance program targeted to low-income households impacted by a natural disaster, recipients are not required to apply a specific dollar threshold for permissible payments and instead, recipients have flexibility in determining the appropriate level of cash assistance. This approach enables recipients to respond to the particularized natural disaster impacts for their low-income community members.

Home Repairs for Uninhabitable Primary Residences. Recipients may use SLFRF funds to rebuild homes or provide home repairs not covered by insurance to make residences that meet the criteria below habitable again. The residence must be a primary residence and be uninhabitable as a result of a natural disaster. As part of making home repairs, recipients may undertake activities that make restored homes more resilient to future natural disasters, helping to mitigate the impacts of future natural disasters. For more information on how to incorporate mitigation activities into home repair projects, please see the section titled Threat of Future Natural Disaster: Mitigation Activities below. This eligible use is generally modeled off of FEMA's Individuals and Households program, which provides money and services to individuals who have experienced a disaster whose property has been damaged or destroyed and whose losses are not covered by insurance.[50] Uses of funds that are eligible under FEMA's Individuals and Households program are eligible under the SLFRF, but recipients are not required to comply with the requirements associated with FEMA's Individuals and Households program and are not required to receive pre-approval from FEMA or Treasury to use SLFRF funds for these eligible uses.

b. Threat of Future Natural Disaster: Mitigation Activities

In addition to the emergency relief described above, recipients also may provide emergency relief to lessen or avert the threat of a natural disaster and its potential physical or negative economic impacts through mitigation activities. Some examples of eligible mitigation activities include the eligible project types described in FEMA's Hazard Mitigation Assistance Guidance, such as structure elevation, mitigation reconstruction, dry flood proofing, structural retrofitting, non-structure retrofitting, wind retrofit, and infrastructure retrofit.[51] Recipients are not required to receive pre-approval from FEMA or Treasury to use SLFRF funds for these eligible uses. Recipients are also not required to comply with the other requirements associated with FEMA's Hazard Mitigation Assistance programs.

Mitigation activities may be stand-alone projects that reduce or eliminate the potential impacts of the threat of a natural disaster or may be incorporated into repair or reconstruction projects that address the impacts of a natural disaster. For example, if a recipient is repairing the roof of a home damaged by a wildfire, the roof can be strengthened or fireproofed to make it more resilient to future wildfires as well. Similarly, recipients repairing roads damaged by flooding can incorporate drainage or pervious pavement that would result in a reduced or eliminated impact of flooding in the future, thereby decreasing future costs of repair and impact to the community. As discussed above, when identifying the threat of a natural disaster, a recipient must have documented evidence that historical patterns or predictions that reasonably demonstrate the likelihood of future occurrence of a natural disaster in the community.

Mitigation Activities with Capital Expenditures Exceeding $1 Million. In the case of mitigation activities with total expected capital expenditures of $1 million or greater, recipients other than Tribal governments must complete and meet the substantive requirements of a Written Justification for the capital expenditures in their project. Recipients will submit this Written Justification to Treasury as part of the Project & Expenditure report. Treasury will amend the Compliance and Reporting Guidance to describe how recipients will submit this information.

As discussed in Timeline for Use of SLFRF Funds section, SLFRF funds for this eligible use must be obligated by December 31, 2024, and expended by December 31, 2026. Capital expenditures may involve long lead-times, and the Written Justification may support recipients in analyzing proposed capital expenditures to confirm that they conform to the obligation and expenditure timing requirements. Further, such large projects may be less likely to be reasonably proportional to the potential impacts identified. Treasury is adopting the Written Justification requirement in recognition of this and the need for consistent documentation and reporting to support monitoring and compliance with the ARPA and this interim final rule. For projects with capital expenditures that only repair or restore infrastructure to pre-disaster conditions and do not include mitigation activities, recipients are not required to complete a Written Justification.

As noted above, Tribal governments are not required to complete the Written Justification for mitigation activities with total capital expenditures of $1 million or greater. Tribal governments generally have limited administrative capacity due to their small size and corresponding limited ability to supplement staffing for short-term programs. In addition, Tribal governments are already subject to

[48] FEMA, A guide to the Disaster Declaration process and Federal Disaster Assistance, *https://www.fema.gov/pdf/rrr/dec_proc.pdf.*

[49] Caroline Ratcliffe et al., Urban Institute, Insult to Injury Natural Disasters and Residents' Financial Health 7 (2019).

[50] FEMA, A Guide to the Disaster Declaration Process and Federal Disaster Assistance, *https://www.fema.gov/pdf/rrr/dec_proc.pdf.*

[51] FEMA, Hazard Mitigation Assistance Guide Hazard Mitigation Grant Program, Pre-Disaster Mitigation Program, and Flood Mitigation Assistance Program (2015), *https://www.fema.gov/sites/default/files/2020-07/fy15_HMA_Guidance.pdf.*

unique considerations that require additional administrative processes and administrative burden for Tribal government decision making, including capital expenditures. Tribal governments generally are subject to a jurisdictionally complex set of rules and regulations in the case of improvements to land for which the title is held in trust by the United States for a Tribe (Tribal Trust Lands). This includes the requirement in certain circumstances to seek the input or approval of one or more Federal agencies such as the Department of the Interior, which holds fee title of Tribal Trust Lands.

As a result of their limited administrative capacity and the unique and complex rules and regulations applicable to Tribal governments operating on Tribal Trust Lands, Tribal governments would experience significant and redundant administrative burden by also being required to complete a Written Justification for applicable capital expenditures. While Tribal governments are not required to complete the Written Justification, associated substantive requirements continue to apply, including the requirement that a capital expenditure must be related and reasonably proportional to the extent and type of the threat or impact being addressed. Note that, as a general matter, Treasury may also request further information on SLFRF expenditures and projects, including capital expenditures, as part of the regular SLFRF reporting and compliance process, including to assess their eligibility under this interim final rule.

Written Justification Requirements for Mitigation Capital Expenditures. For non-Tribal government recipients pursuing mitigation activities where a Written Justification is required, the Written Justification must (1) describe the emergency relief provided by the mitigation activity; (2) explain why a capital expenditure is appropriate to address the need for emergency relief; and (3) compare the proposed mitigation activity capital expenditure against alternative capital expenditures that could be made. The information required by the Written Justification reflects the framework applicable to all uses under the emergency relief from natural disasters eligible use category, providing justification for the relatedness and reasonable proportionality of the capital expenditure in response to the potential impact identified.

1. *Description of emergency relief to be provided and potential impact to be addressed:* Recipients should provide a description of the specific mitigation activities that provide emergency relief and explain why emergency relief is needed to lessen or avert the potential impacts of the natural disaster that is threatened to occur in the future. When appropriate, recipients may provide quantitative information on the extent and type of assistance needed to provide emergency relief, such as the number of individuals or entities that may be affected. As discussed above, when recipients identify a natural disaster that is threatened to occur in the future, recipients must document evidence of historical patterns or predictions of natural disasters that would reasonably demonstrate the likelihood of future occurrence of a natural disaster in their communities. In the Written Justification, recipients should use this evidence, along with considerations of efficacy, cost, cost effectiveness, and time to delivery, to support their determinations that mitigation activities would be related and reasonably proportional.

2. *Explanation of why a mitigation capital expenditure is appropriate:* Recipients should provide an assessment demonstrating why a mitigation activity capital expenditure is appropriate to address the specified potential impact identified. This should include an explanation of why existing capital equipment, property, or facilities would be inadequate to addressing the potential impact of the threat of a natural disaster and why policy changes or additional funding to pertinent programs or services would be insufficient without the corresponding capital expenditures. Recipients are not required to demonstrate that the potential impacts would be irremediable but for the additional capital expenditure; rather, they may show that other interventions would be inefficient, costly, or otherwise not reasonably designed to remedy the need for emergency relief without additional capital expenditure.

3. *Comparison of the proposed capital expenditure against alternative capital expenditures:* Recipients should provide an objective comparison of the proposed mitigation capital expenditure against at least two alternative capital expenditures and demonstrate why their proposed capital expenditure is superior to alternative capital expenditures that could be made. Specifically, recipients should assess the proposed capital expenditure against at least two alternative types or sizes of capital expenditures that are potentially effective and reasonably feasible. Where relevant, recipients should compare the proposal against the alternative of improving existing capital assets already owned or leasing other capital assets. Recipients should use quantitative data when available, although they are encouraged to supplement with qualitative information and narrative description. Recipients that complete analyses with minimal or no quantitative data should provide an explanation for doing so.

In determining whether their proposed mitigation activity capital expenditure is superior to alternative capital expenditures, recipients should consider the following factors against each selected alternative.

a. A comparison of the effectiveness of the capital expenditures in addressing the need for mitigation identified. Recipients should generally consider the effectiveness of the mitigation capital expenditures in addressing the potential impacts of the threatened natural disasters over the useful life of the capital asset and may consider metrics such as the number of individuals or entities served, when such individuals or entities are estimated to be served, the relative time horizons of the project, and consideration of any uncertainties or risks involved with the capital expenditure.

b. A comparison of the expected total cost of the capital expenditures. Recipients should consider the expected total cost of the mitigation capital expenditure required to construct, purchase, install, or improve the capital assets intended to address the need for emergency relief from the threat of the natural disaster identified. Recipients should include pre-development costs in their calculation and may choose to include information on ongoing operational costs, although this information is not required. Recipients should balance the effectiveness and costs of the proposed capital expenditure against alternatives and demonstrate that their proposed capital expenditure is superior. Further, recipients should choose the most cost-effective option unless it substantively reduces the effectiveness of the capital investment in addressing the need for emergency relief from the threat of the natural disaster identified.

Because, in all cases, uses of SLFRF funds to provide emergency relief from natural disasters must be related and reasonably proportional to actual or potential physical or negative economic impacts of a natural disaster, some capital expenditures may not be eligible.

In selecting the $1 million threshold, Treasury recognized that mitigation activity capital expenditures vary widely in size and therefore would

benefit from tiered treatment to implement eligibility standards while minimizing administrative burden. The $1 million threshold for whether a recipient needs to complete a Written Justification will allow recipients a simplified pathway to complete smaller projects.

Expenditures from closely related activities directed toward a common purpose are considered part of the scope of one project. These expenditures can include capital expenditures, as well as expenditures on related programs, services, or other interventions. A project includes expenditures that are interdependent (*e.g.,* acquisition of land, construction of the facility on the land, and purchase of equipment), or are of the same or similar type and would be utilized for a common purpose (*e.g.,* acquisition of barricades that would be used to provide emergency relief from natural disasters). Recipients must not segment a larger project into smaller projects in order to evade review. A recipient undertaking a set of identical or similar projects may complete one Written Justification comprehensively addressing the entire set of projects.

Treasury employs a risk-based approach to overall program management and monitoring, which may result in heightened scrutiny on larger projects. Accordingly, recipients pursuing projects with larger mitigation capital expenditures should complete more detailed analyses for their Written Justification, commensurate with the scale of the project.

Strong Labor Standards in Construction. As discussed in the 2022 final rule, Treasury continues to encourage recipients to carry out public infrastructure and mitigation activities in ways that produce high-quality work, avert disruptive and costly delays, and promote efficiency. Treasury encourages recipients to use strong labor standards, including project labor agreements and community benefits agreements that offer wages at or above the prevailing rate and include local hire provisions. Treasury also recommends that recipients prioritize in their procurement decisions employers that can demonstrate that their workforce meets high safety and training standards (*e.g.,* professional certification, licensure, and/or robust in-house training), that hire local workers and/or workers from historically underserved communities, and that directly employ their workforce or have policies and practices in place to ensure contractors and subcontractors meet high labor standards. Treasury further encourages recipients to prioritize employers (including contractors and subcontractors) without recent violations of Federal and state labor and employment laws.

Treasury believes that such practices will promote effective and efficient delivery of high-quality projects and support the economic recovery through strong employment opportunities for workers. Such practices will reduce likelihood of potential project challenges like work stoppages or safety accidents, while ensuring a reliable supply of skilled labor and minimizing disruptions, such as those associated with labor disputes or workplace injuries. That will, in turn, promote on-time and on-budget delivery.

Furthermore, among other requirements contained in 2 CFR part 200, Appendix II, all contracts made by a recipient or subrecipient in excess of $100,000 with respect to projects that involve employment of mechanics or laborers must include a provision for compliance with certain provisions of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR part 5). Treasury will continue to seek information from recipients on their workforce plans and public infrastructure and mitigation activities undertaken with SLFRF funds.

5. Administration

As discussed above, generally, the emergency relief from natural disasters eligible use category is subject to the same program administration requirements as the existing eligible uses in the SLFRF program, as discussed in the 2022 final rule, including the obligation deadline of December 31, 2024 and expenditure deadline of December 31, 2026. As discussed in this interim final rule, recipients may use SLFRF funds under this eligible use category for costs incurred beginning December 29, 2022, regardless of the date of the declared disaster. As with all other eligible uses in the SLFRF program, the general restrictions on use outlined in the 2022 final rule apply to funds expended under the emergency relief from natural disasters eligible use category. Additionally, recipients may reference the section titled Distinguishing Subrecipients versus Beneficiaries of the 2022 final rule for clarification of the distinction between subrecipients and beneficiaries.

Recipients are not required to obtain project pre-approval from Treasury or any other Federal agency when using SLFRF funds for natural disaster projects unless otherwise required by Federal law. While reference to FEMA, the Department of Labor, or other Federal emergency assistance programs is provided to assist recipients in understanding the types of emergency relief projects eligible to be funded with SLFRF funds, recipients do not need to apply for funding from the applicable state programs or through any Federal programs. Similarly, this interim final rule generally does not incorporate program requirements or guidance that attach to other Federal emergency programs. However, as noted above, recipients should be aware of other Federal or state laws or regulations that may apply to projects, independent of SLFRF funding conditions, that may require approval from another Federal or state agency.

Question 1: Are there other types of services or costs that Treasury should consider as enumerated eligible uses to provide emergency relief from the physical or negative economic impacts of natural disasters? Describe how these provide emergency relief from natural disasters.

Question 2: What, if any, additional criteria should Treasury consider to ensure that emergency relief responds to the physical or negative economic impacts of natural disasters?

Question 3: What additional clarity or guidance would benefit recipients in identifying eligible mitigation activities?

B. Using Funds for Surface Transportation and Title I Projects

To support SLFRF recipients in meeting the infrastructure needs of their communities, the 2023 CAA also provided the authority for recipients to use SLFRF funds for certain infrastructure projects, including projects eligible under certain programs administered by the Department of Transportation (Surface Transportation projects) and projects eligible under Title I of the Housing and Community Development Act of 1974 (Title I projects).[52] The 2023 CAA imposes requirements on SLFRF funds used for Surface Transportation projects and Title I projects beyond those requirements that apply to all other SLFRF eligible use categories. In the sections separately discussing Surface Transportation projects and Title I projects below, this interim final rule summarizes the types of eligible projects within each category, provides references to relevant guidance for the projects, and discusses how the requirements imposed by the 2023 CAA apply to each category.

The 2023 CAA provides that the total amount of SLFRF funds that a recipient

[52] *See* 42 U.S.C. 802(c)(5) and 803(c)(6).

may use for Surface Transportation projects and Title I projects together shall not exceed the greater of $10 million and 30% of a recipient's SLFRF allocation. This limitation does not apply to SLFRF funds used for the other eligible uses in the SLFRF program, including funds used for the provision of government services under the revenue loss eligible use category.

This limitation applies to the total amount of SLFRF funds that a recipient may use for Surface Transportation projects and Title I projects taken together. For example, an SLFRF recipient with an allocation of $20 million would have $10 million (as $10 million is greater than 30% of the recipient's allocation—$6 million) to direct to Surface Transportation projects and Title I projects. This recipient could direct, for example, $5 million toward Surface Transportation projects and $5 million toward Title I projects, or $3 million toward Surface Transportation projects and $7 million toward Title I projects. This same recipient may choose to spend additional funding over and above this $10 million on projects that might otherwise be eligible as Surface Transportation or Title I projects under a different eligible use category, such as the revenue loss eligible use category, under which recipients may use SLFRF funds for the provision of government services.

The 2023 CAA provides that, except as otherwise determined by the Secretary or the head of a Federal agency to whom oversight and administration of the requirements have been delegated, the requirements of other laws, including titles 23, 40, and 49 of the U.S. Code, title I of the Housing and Community Development Act of 1974 (HCDA), and the National Environmental Policy Act of 1969 (NEPA), apply to recipients' use of SLFRF funds for Surface Transportation projects and Title I projects. These requirements include the project approval and certification requirements of titles 23, 40, and 49 of the U.S. Code and title I of the HCDA and the regulations adopted thereunder.[53] The application of the Surface Transportation project approval requirements to the SLFRF program means that recipients must obtain the approval of the Secretary or the head of the Federal agency to whom authority has been delegated by the Secretary prior to obligating and expending funds on Surface Transportation projects. Title I of the HCDA provides for project-level approval only in the case of project environmental review. The application of this requirement to the SLFRF program means that recipients must comply with the environmental review requirements set forth in the HUD statute and regulations, submit a certification to Treasury, and receive approval prior to obligating and expending funds on Title I projects, as discussed below.

The provisions of the 2023 CAA reflect an intent that the usual requirements that apply to Surface Transportation projects funded by DOT should generally also apply to such projects as funded by Treasury under the SLFRF program but also a recognition that the DOT regulatory requirements would need to be harmonized with the particular structure of the SLFRF program. Treasury interprets the ''except as otherwise determined'' clause referenced above to permit Treasury to determine not to apply certain requirements of the cross-referenced statutes when such requirements would conflict with the existing SLFRF framework or otherwise would be likely to preclude recipients from exercising the additional authorities provided by the 2023 CAA.

As a general matter, DOT must approve recipients' use of funds for projects funded by DOT. However, under the existing SLFRF framework, Treasury provided funds to recipients either in full or in two tranches rather than disbursing funds to recipients after approving the use of funds for particular projects, and recipients must obligate and expend such funds by set deadlines. If the SLFRF program did not have obligation and expenditure deadlines, recipients might have time to go through a process of receiving Treasury approval under Pathway Two prior to using the funds that they had already received on Surface Transportation projects. But it is possible that recipients will seek to use funds under Pathway Two for hundreds of Surface Transportation projects in total, and application of the statutory and regulatory approval requirements to such a large volume of projects likely would preclude recipients from carrying out such projects while meeting the statutory deadlines for obligation and expenditure of funds. To ensure that recipients are able to exercise the additional authorities provided by the 2023 CAA prior to the December 31, 2024 obligation deadline, Treasury has determined not to require recipients to obtain the approval of the Secretary prior to obligating and expending funds on Surface Transportation projects that present less risk, as described under the streamlined framework of Pathway Two in the section that follows. Treasury expects far fewer recipients to seek to use SLFRF funds for higher-risk projects involving greater complexity. By not applying the approval requirements to the more numerous but less risky types of projects, Treasury will avoid the likelihood that most recipients would effectively be unable to engage in any Surface Transportation projects other than those qualifying for Pathway One.

The approval requirements will apply to Surface Transportation projects that do not meet the streamlined framework criteria, and as discussed further below, Treasury will design a process, based in part on the comments to this interim final rule, for recipients seeking to fund these larger, more complex projects. Similarly, as discussed further below, project-level certification requirements related to environmental review contemplated by title I of the HCDA will apply to the use of SLFRF funds for the Title I projects eligible use category. Treasury provides more information regarding approval and certification requirements applicable to Surface Transportation projects and Title I projects, respectively, in the sections titled Pathway Two: Surface Transportation Projects Not Receiving Funding from DOT and Applicable Requirements for Title I Projects below.

Recipients using funds for Surface Transportation projects that are subject to approval requirements must satisfy NEPA environmental review requirements. Recipients using funds for Surface Transportation projects that are not subject to approval requirements (pursuant to the streamlined approach described under Pathway Two in the section that follows) are not required to conduct NEPA environmental reviews. Recipients using funds for Title I projects must satisfy NEPA environmental review requirements based on the procedures set forth in title I of the HCDA, the associated regulations, and as implemented by Treasury. For more information about how the requirements of NEPA apply to Surface Transportation projects and Title I projects, respectively, refer to the sections titled Pathway Two: Applicable Requirements and Applicable Requirements for Title I Projects below. As discussed in Treasury's guidance to date, NEPA does not apply to the other eligible uses in the SLFRF program as described in the 2022 final rule, though recipients that blend SLFRF funds with

[53] The application of these approval and certification requirements to SLFRF for these projects is indicated by the statute's specific reference to NEPA. NEPA only applies to federal actions such as a federal agency approval. Without application of the approval requirements of the cross-referenced statutes, there would be no generally applicable federal action associated with the use of SLFRF funds for Surface Transportation projects and Title I projects.

other Federal funds may be subject to additional requirements associated with the other Federal funds.[54]

As is the case with all projects using SLFRF funds, projects must comply with applicable Federal statutes, regulations, and executive orders, including environmental laws and Federal civil rights and nondiscrimination requirements,[55] which include prohibitions on discrimination on the basis of race, color, national origin, sex (including sexual orientation and gender identity), religion, disability, age, or familial status (having children under the age of 18).[56] State, Tribal, and local procurement, contracting, and conflicts-of-interest laws and regulations, including, for example, required procurement processes for contractor selection or competitive price setting, also may apply to recipients' use of SLFRF funds.

The 2023 CAA provides that SLFRF funds used for Surface Transportation projects and Title I projects must supplement, not supplant other Federal, state, territorial, Tribal, and local government funds (as applicable) that are otherwise available for these projects. This interim final rule discusses below how the supplement, not supplant provision applies to uses of funds for Surface Transportation projects and Title I projects. The non-supplant requirement does not apply to the other SLFRF eligible use categories, including the emergency relief from natural disasters eligible use category.

The 2023 CAA provides that funds used for Surface Transportation projects and Title I projects must be obligated by December 31, 2024 and expended by September 30, 2026. The expenditure deadline for these eligible uses provided by the 2023 CAA is earlier than the December 31, 2026 expenditure deadline associated with the other eligible uses in the program, including emergency relief from natural disasters.

The 2023 CAA provides that Treasury may delegate to the appropriate Federal agency oversight and administration of the requirements associated with the use of funds for Surface Transportation projects and Title I projects. As discussed below, Treasury is delegating oversight and administration of Surface Transportation projects under Pathway One (described below) to the Department of Transportation (DOT). Recipients that direct SLFRF funds toward Surface Transportation projects under Pathway One will be required to complete the existing DOT reporting requirements that already apply to projects funded by DOT and to report certain information to Treasury. See the sections titled Pathway One: Delegation of Authority and Discussion of Revenue Loss and Program Administration Provisions for further information.

Below, this interim final rule discusses how recipients may use SLFRF funds for Surface Transportation projects and Title I projects, respectively.

1. Surface Transportation Projects

Background

As added by the 2023 CAA, sections 602(c)(5) and 603(c)(6) of the Social Security Act provide that state, local, and Tribal governments may use SLFRF funds, subject to limitations, for surface transportation infrastructure projects (Surface Transportation projects) eligible under certain programs administered by DOT. As described above, recipients may only use the greater of 30% of their SLFRF award and $10 million, not to exceed a recipient's allocation, for all Surface Transportation projects (described in this section) and Title I projects (described in the section that follows) taken together.

Under the Surface Transportation projects eligible use category, SLFRF funds may be used for a project eligible under any of sections 117, 119, 124, 133, 148, 149, 151(f), 165, 167, 173, 175, 176, 202, 203, and 204 of title 23 of the U.S. Code; an activity to carry out section 134 of title 23 of the U.S. Code; a project eligible under the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) grant program; a project eligible for credit assistance under the Transportation Infrastructure Finance and Innovation Act (TIFIA) program under chapter 6 of title 23 of the U.S. Code; a project that furthers the completion of a designated route of the Appalachian Development Highway System under section 14501 of title 40 of the U.S. Code; a project eligible under any of sections 5307, 5309, 5311, 5337, 5339, and 6703 of title 49 of the U.S. Code; or a project eligible under the bridge replacement, rehabilitation, preservation, protection, and construction program under paragraph (1) under the heading ''HIGHWAY INFRASTRUCTURE PROGRAM'' under the heading ''FEDERAL HIGHWAY ADMINISTRATION'' under the heading ''DEPARTMENT OF TRANSPORTATION'' under title VIII of division J of the Infrastructure Investment and Jobs Act.

The statute also provides that, to the extent consistent with guidance or rules issued by the Secretary or the head of a Federal agency to which the Secretary has delegated authority, recipients may use SLFRF funds to satisfy a non-Federal share requirement applicable to a project eligible under section 117 of title 23, sections 5309 or 6701 of title 49, or a project eligible for credit assistance under the TIFIA program under chapter 6 of title 23. Additionally, in the case of a project eligible for credit assistance under the TIFIA program, recipients may use SLFRF funds to repay a loan provided under such program.

The 2023 CAA provides that the requirements of the relevant titles of the U.S. Code and the National Environmental Policy Act of 1969 apply to the use of the SLFRF for Surface Transportation projects, except as otherwise determined by the Secretary or the head of a Federal agency to whom oversight and administration of the requirements have been delegated. Additionally, SLFRF funds may only be used to supplement, and not supplant, other Federal, state, territorial, Tribal, and local government funds (as applicable) that are otherwise available for the eligible project.

Overview

There are different ways in which recipients may use SLFRF funds for Surface Transportation projects under the new authority provided by the 2023 CAA. In this interim final rule, Treasury has organized discussion of the Surface Transportation projects eligible use category in terms of three ''pathways.''

First, recipients may use SLFRF funds (i) in the case of existing eligible projects that receive funding from DOT, to expand the project or to cover additional unexpected costs associated with the project and (ii) in the case of eligible projects that have not yet received but will receive funding from DOT prior to December 31, 2024, the obligation deadline for the SLFRF program, to contribute SLFRF funds to expand the scope of the project, to cover additional unexpected costs, or in other

[54] For additional information about blending and braiding SLFRF funds with other funding sources, refer to SLFRF Final Rule FAQ 4.8, available at *https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-FAQ.pdf*.

[55] Applicable federal civil rights and non-discrimination laws include Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. 3602, et seq; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; Title IX of the Education Amendments Act of 1972, 20 U.S.C. 1681; and the Age Discrimination Act of 1975, 42 U.S.C. 6101 et. seq.

[56] As described in SLFRF Final Rule FAQ 12.1, award terms and conditions for Treasury's pandemic recovery programs, including SLFRF, do not impose antidiscrimination requirements on Tribal governments beyond what would otherwise apply under Federal law.

ways that supplement DOT funding, as described in the section titled Prohibition on Supplanting Other Funds. In each case, the Surface Transportation project must be subject to DOT's oversight during the period that SLFRF funds are used for the project. Recipients pursuing Surface Transportation projects that are receiving or will receive funding from DOT should be prepared to work with DOT to determine whether the use of SLFRF funds for a particular project meets the relevant requirements. In addition, the project must meet the requirements and restrictions that apply to Surface Transportation projects funded through the SLFRF program described further below. Furthermore, in the case of projects funded under certain DOT programs like INFRA and RAISE, the addition of Federal funds—including SLFRF funds—to an existing project is subject to approval from DOT. Throughout this interim final rule, Treasury refers to this eligible use as ''Pathway One.''

Second, this interim final rule lays out a pathway for all SLFRF recipients, including those that may not typically or currently be a direct recipient of DOT funding, to use SLFRF funds to finance Surface Transportation projects that will be overseen and administered by Treasury. Within this pathway, Treasury is articulating a streamlined framework for recipients to use up to $10 million in SLFRF funds per project on Surface Transportation projects that do not include DOT funding but meet certain parameters. Though these projects do not include DOT funding, recipients may choose to blend SLFRF funds with other sources of funds to carry out the projects. Recipients using SLFRF funds for these projects are not required to consult with DOT and instead these projects will be administered and overseen by Treasury. Throughout this interim final rule, Treasury refers to this eligible use as ''Pathway Two.'' For additional information, refer to the section titled Pathway Two: Surface Transportation Projects not Receiving Funding from DOT.

Recipients interested in financing Surface Transportation projects outside of the parameters of the streamlined framework in Pathway Two may submit a notice of intent to Treasury, as described further below in the section titled Pathway Two: Surface Transportation Projects not Receiving Funding from DOT. Based on these notices of intent and comments to this interim final rule, Treasury will provide instructions as to how recipients may apply for approval to carry out their proposed projects and guidance as to any additional requirements associated with such projects.

Third, recipients may use SLFRF funds to repay a TIFIA loan or to satisfy a non-Federal share requirement for projects under four Surface Transportation programs: INFRA Grants, Fixed Guideway Capital Investment Grants, Mega Grants, and projects eligible for credit assistance under the TIFIA program. Recipients should consult with DOT before pursuing projects under this third pathway. Throughout this interim final rule, Treasury refers to this eligible use as ''Pathway Three.'' For more information, refer to the section titled Pathway Three: Non-Federal Share Requirements for Certain Surface Transportation Requirements.

In the following sections, this interim final rule discusses the specific types of Surface Transportation projects that are eligible uses of SLFRF funds and the applicable requirements and limitations.

Prohibition on Supplanting Other Funds

For all three pathways for Surface Transportation projects, recipients must comply with the requirement provided in the 2023 CAA that funds used for Surface Transportation projects shall ''supplement, and not supplant, other Federal, State, territorial, Tribal, and local government funds (as applicable) otherwise available for such uses.'' The phrase ''other . . . funds available for such uses'' refers to (i) in the case of non-Federal funds, non-SLFRF funds that have been obligated for specific uses that are eligible under the Surface Transportation projects eligible use category or (ii) in the case of Federal funds, funds that a Federal agency has committed to a particular project pursuant to an award agreement or otherwise, including funds identified in an awarded DOT grant agreement for use on Surface Transportation projects.

Under prong (i), for the purpose of identifying non-Federal funds that have been obligated for specific uses, the definition of ''obligation'' used in the 2022 final rule applies, which is ''an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment.'' [57] As such, a recipient may not de-obligate funds that were obligated for specific uses that are eligible under this section (*e.g.,* by cancelling, amending, renegotiating, or otherwise revising or abrogating a contract, subaward, or similar transaction that requires payment) and replace those previously obligated funds with SLFRF funds under this eligible use category.

The restriction in prong (ii) on replacing funds that a Federal agency has committed to a particular project pursuant to an award agreement or otherwise applies to all funding sources covered by the commitment. For example, for DOT-funded projects subject to a grant agreement, the restriction extends to DOT funds, other Federal funds, and any other funds identified by the recipient for the purpose of satisfying cost-share requirements of the project.

Thus, a recipient may not de-obligate funds and replace those previously obligated funds with SLFRF funds under this eligible use category. Nor may a recipient use SLFRF to replace Federal or non-Federal funds identified in a Federal commitment, such as an award agreement. However, a recipient may use SLFRF funds under this eligible use category:

(1) to provide additional funding to a project without reducing the amount of other funds obligated to such project, thereby funding additional activities or expanding the scope of projects; or

(2) to undertake a project for which funds have not been previously obligated or identified in a Federal commitment, such as an award agreement.

For example, consider a municipal road project. The recipient has not yet entered into an award agreement with DOT but is expecting that Federal funds from DOT will make up a certain amount of the project funds and is planning on using local funds to satisfy cost-share requirements. Because the recipient has not yet entered into an award agreement with DOT, even if the project is included in the transportation improvement program (TIP) or a statewide transportation improvement program (STIP), the recipient may choose to alter the funding mixture to include SLFRF funding, after consulting with DOT. However, if in that same scenario, the recipient had entered into an award agreement with DOT that included a certain amount of DOT funding and a remaining amount of funds from local sources, then the funds for the project may not be replaced with SLFRF funds. The recipient could not supplant Federal or non-Federal funds identified to DOT as part of the grant award or terminate or renegotiate an existing contract for the construction of the project and use SLFRF funds to replace the funds previously identified or obligated for that purpose. In this scenario, recipients would be able to use

[57] See Final Rule FAQ 13.17 for additional information about obligations. This approach applies a concrete standard that is known to SLFRF recipients and administrable by Treasury.

SLFRF funds to expand the scope of a project or cover unexpected costs, after consulting with DOT.

In the case of projects previously included within a TIP or STIP that have received funding from DOT, recipients should reflect increased overall project funding resulting from the addition of SLFRF funds within the STIP or TIP, even when the sources of project funding may have changed prior to identification in the DOT grant award or obligation.

a. Pathway One: Surface Transportation Projects Receiving Funding From DOT

This section of the interim final rule describes how recipients may use SLFRF funds under Pathway One (i) in the case of existing eligible projects that are receiving funding from DOT to expand the project or to cover additional unexpected costs associated with the project and (ii) in the case of eligible projects that have not yet but will receive funding from DOT prior to December 31, 2024, the obligation deadline for the SLFRF program, to contribute SLFRF funds to the project, to expand the project, to cover additional unexpected costs, or in other ways that supplement DOT funding. In each case, the Surface Transportation project must be subject to DOT's oversight during the period that SLFRF funds are used for the project. Recipients seeking to use SLFRF funds for Surface Transportation projects under Pathway One should consult with DOT and refer to the requirements discussed in the following subsection. Generally, and as discussed further below, when using SLFRF funds under Pathway One, the statutory requirements that normally apply when carrying out Surface Transportation projects funded by DOT continue to apply. In the case of some DOT-funded programs like INFRA and RAISE, the addition of other Federal funds—including SLFRF funds—to an existing project is subject to approval from DOT. This interim final rule describes how recipients may use SLFRF funds under Pathway One, summarizes the programs under which recipients may direct SLFRF funds toward eligible projects, and outlines the requirements associated with this pathway. Recipients using SLFRF funds under Pathway One must comply with the requirement that SLFRF funds supplement and not supplant other funds, described above.

In the case of existing projects currently receiving funding from DOT, recipients may use SLFRF funds to expand the project and to cover additional unexpected costs associated with the project. Using SLFRF funds for these purposes is a way for recipients to supplement but not supplant funds in existing projects receiving funding from DOT. In each case, the project must meet the requirements and restrictions that apply to Surface Transportation projects funded through the SLFRF program.

For eligible projects that have not yet but will receive funding from DOT prior to the SLFRF program's December 31, 2024, obligation deadline, recipients also may contribute SLFRF funds to the project, as long as the project meets the requirements and restrictions that apply to Surface Transportation projects funded through the SLFRF program, including the non-supplant requirements. For these projects that have not yet been funded, recipients may have more flexibility to contribute SLFRF funds for purposes beyond expanding the scope of the project and covering additional unexpected costs, because there may be more ways to supplement DOT funding without supplanting other funds. For example, in addition to using SLFRF funds to expand project scope or to cover additional unexpected costs that may arise, recipients may also be able to commit SLFRF funds in the initial planning phase of the project as part of the recipient's cost-share obligation, to the extent that DOT rules permit Federal funds to constitute a portion of the project's cost sharing or matching requirement. Recipients should note that planned contributions of SLFRF funds to a project that has not yet received funding from DOT will affect the determination of total Federal funds that would support the project and may affect calculations of the non-Federal funds cost-share contribution required in order to be in compliance with DOT requirements.

Under Pathway One, recipients may use SLFRF funds for projects eligible under the programs described below. This interim final rule briefly summarizes each program and references existing implementation guidance, where available. Recipients should refer to the relevant program guidance for DOT programs of interest for further information and detail about the types of projects eligible under those programs.

• *INFRA Grants* [58]—602(c)(5)(B)(i) of the Social Security Act—Also known as Nationally Significant Multimodal Freight & Highway Projects, INFRA awards are competitive grants for multimodal freight and highway projects of national or regional significance to improve the safety, efficiency, and reliability of the movement of freight and people in and across rural and urban areas. For additional information about INFRA Grants, see *USDOT INFRA Grant Program*.[59]

• *National Highway Performance Program (NHPP)* [60]—602(c)(5)(B)(ii) of the Social Security Act—The NHPP provides formula funding with the purposes of providing support for the condition and performance of the National Highway System (NHS) or for the construction of new facilities on the NHS; ensuring that investments of Federal-aid funds in highway construction are directed to support progress toward the achievement of performance targets established in an asset management plan of a state for the NHS; and providing support for activities to increase the resiliency of the NHS to mitigate the cost of damages from sea level rise, extreme weather events, flooding, wildfires, or other natural disasters. For additional information about NHPP, see *Implementation Guidance for the National Highway Performance Program (NHPP) as Revised by the Bipartisan Infrastructure Law*.[61]

• *Bridge Investment Program (BIP)* [62]—602(c)(5)(B)(iii) of the Social Security Act—The BIP awards competitive discretionary grants to improve the safety, efficiency, and reliability of the movement of people and freight by funding projects to replace, rehabilitate, preserve, or protect bridges in the National Bridge Inventory, including projects to replace or rehabilitate bridge-sized culverts for the purpose of improving flood control and improved habitat connectivity. It has a focus on improving the condition of bridges in poor condition and supporting activities to prevent bridges in fair condition from dropping to poor condition. For additional information on the BIP, see *Bridge Investment Program (BIP) Questions and Answers (Q&As)*.[63]

[58] *See* 23 U.S.C. 117.

[59] *See* the U.S. Department of Transportation's INFRA Grants Program website at *https://www.transportation.gov/grants/infra-grants-program.*

[60] *See* 23 U.S.C. 119.

[61] U.S. Department of Transportation, Federal Highway Administration, Implementation Guidance for the National Highway Performance Program (NHPP) as Revised by the Bipartisan Infrastructure Law (Jun. 1, 2022), *https://www.fhwa.dot.gov/specialfunding/nhpp/bil_nhpp_implementation_guidance-05_25_22.pdf.*

[62] *See* 23 U.S.C. 124.

[63] U.S. Department of Transportation, Federal Highway Administration, Bridge Investment Program (BIP) Questions and Answers (Q&As) (Aug. 18, 2022), *https://www.fhwa.dot.gov/bridge/bip/qa.cfm.*

• *Surface Transportation Block Grant Program (STBG)*[64]—602(c)(5)(B)(iv) of the Social Security Act—The STBG provides flexible funding that may be used for projects to preserve and improve the conditions and performance on any Federal-aid highway, bridge and tunnel projects on any public road, pedestrian and bicycle infrastructure, and transit capital projects, including intercity bus terminals. For additional information on the STBG, see *Implementation Guidance for the Surface Transportation Block Grant Program (STBG) as Revised by the Bipartisan Infrastructure Law*.[65]

• *Highway Safety Improvement Program (HSIP)*[66]—602(c)(5)(B)(vi) of the Social Security Act—The HSIP provides formula funding with the purpose of helping to achieve a significant reduction in traffic fatalities and serious injuries on all public roads, including non-state-owned public roads and roads on Tribal land. HSIP funds are typically available for defined highway safety improvement projects, as well as ''specified safety projects.'' For additional information on the HSIP, see the *Highway Safety Improvement Program (HSIP) Eligibility Guidance*.[67]

• *Congestion Mitigation and Air Quality Improvement Program (CMAQ)*[68]—602(c)(5)(B)(vii) of the Social Security Act—The CMAQ provides a flexible funding source for transportation projects and programs to help meet the requirements of the Clean Air Act. Funding is available to reduce congestion and improve air quality for areas that do not meet the National Ambient Air Quality Standards for ozone, carbon monoxide, or particulate matter (nonattainment areas) and for former nonattainment areas that are now in compliance (maintenance areas). A wide range of transportation projects leading to reduction in emissions are eligible for support under the CMAQ, including projects involving new transit, alternative fuels, shared micro-mobility, traffic flow improvements, and demand management. For additional information on CMAQ, see the *Congestion Mitigation and Air Quality (CMAQ) Improvement Program Fact Sheet*.[69]

• *Charging and Fueling Infrastructure Discretionary Grant Program (CFI Program)*[70]—602(c)(5)(B)(viii) of the Social Security Act—Established in the Bipartisan Infrastructure Law, the CFI Program provides competitive grants to strategically deploy publicly accessible electric vehicle charging and alternative fueling infrastructure in the places people live and work—urban and rural areas alike—in addition to along designated Alternative Fuel Corridors. For additional information about the CFI Program, see *Charging and Fueling Infrastructure Grant Program*.[71]

• *Territorial and Puerto Rico Highway Program*[72]—602(c)(5)(B)(ix) of the Social Security Act—The Territorial and Puerto Rico highway program allocates funds to the Commonwealth of Puerto Rico for a highway program, as well as to American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands to assist in constructing and improving a system of arterial and collector highways and necessary inter-island connectors. For additional information on the Territorial and Puerto Rico Highway program, see the *Territorial and Puerto Rico Highway Program Fact Sheet*.[73]

• *National Highway Freight Program (NHFP)*[74]—602(c)(5)(B)(x) of the Social Security Act—The NHFP provides funding intended to improve the condition and performance of the National Highway Freight Network (NHFN) and support several goals, including:

○ investing in infrastructure and operational improvements that strengthen economic competitiveness, reduce congestion, reduce the cost of freight transportation, improve reliability, and increase productivity;

○ improving the safety, security, efficiency, and resiliency of freight transportation in rural and urban areas;

○ improving the state of good repair of the NHFN;

○ using innovation and advanced technology to improve NHFN safety, efficiency, and reliability;

○ improving the efficiency and productivity of the NHFN;

○ improving State flexibility to support multi-State corridor planning and address highway freight connectivity; and

○ reducing the environmental impacts of freight movement on the NHFN.

For additional information on the NHFP, see *Implementation Guidance for the National Highway Freight Program as Revised by the Bipartisan Infrastructure Law*.[75]

• *Rural Surface Transportation Grant Program*[76]—602(c)(5)(B)(xi) of the Social Security Act—The Rural Surface Transportation Grant Program provides competitive grants to support projects to improve and expand the surface transportation infrastructure in rural areas to increase connectivity, improve the safety and reliability of the movement of people and freight, and generate regional economic growth and improve quality of life. Grant funds typically support highway, bridge, or tunnel projects eligible under the NHPP, the STBG program, or the Tribal Transportation Program; highway freight projects eligible under the NHFP; highway safety improvement projects; projects on a publicly-owned highway or bridge improving access to certain facilities that support the economy of a rural area; integrated mobility management systems, transportation demand management systems, or on-demand mobility services. For additional information about the Rural Surface Transportation Grant Program, see *the Rural Surface Transportation Grant website*.[77]

• *Carbon Reduction Program (CRP)*[78]—602(c)(5)(B)(xii) of the Social Security Act—Established in the Bipartisan Infrastructure Law,[79] CRP provides funds by formula for a wide-range of projects designed to reduce transportation emissions, defined as carbon dioxide emissions from on-road highway sources. For additional

[64] *See* 23 U.S.C. 133.

[65] U.S. Department of Transportation, Federal Highway Administration, Implementation Guidance for the Surface Transportation Block Grant Program (STBG) as Revised by the Bipartisan Infrastructure Law (Jun. 1, 2022), *https://www.fhwa.dot.gov/specialfunding/stp/bil_stbg_implementation_guidance-05_25_22.pdf.*

[66] *See* 23 U.S.C. 148.

[67] U.S. Department of Transportation, Federal Highway Administration, Highway Safety Improvement Program (HSIP) Eligibility Guidance (Feb. 2, 2022), *https://safety.fhwa.dot.gov/hsip/rulemaking/docs/BIL_HSIP_Eligibility_Guidance.pdf.*

[68] *See* 23 U.S.C. 149.

[69] U.S. Department of Transportation, Federal Highway Administration, Congestion Mitigation and Air Quality (CMAQ) Improvement Program Fact Sheet (Feb. 8, 2022), *https://www.fhwa.dot.gov/bipartisan-infrastructure-law/cmaq.cfm.*

[70] *See* 23 U.S.C. 151(f).

[71] U.S. Department of Transportation, Federal Highway Administration, Charging and Fueling Infrastructure Grant Program (Mar. 30, 2023), *https://www.fhwa.dot.gov/environment/cfi/.*

[72] *See* 23 U.S.C. 165

[73] U.S. Department of Transportation, Federal Highway Administration, Territorial and Puerto Rico Highway Program Fact Sheet (Feb. 24. 2022), *https://www.fhwa.dot.gov/bipartisan-infrastructure-law/territorial_puerto_rico_hp_fact_sheet.cfm.*

[74] *See* 23 U.S.C. 167.

[75] U.S. Department of Transportation, Federal Highway Administration, Implementation Guidance for the National Highway Freight Program as Revised by the Bipartisan Infrastructure Law (Dec. 14, 2022), *https://ops.fhwa.dot.gov/freight/documents/NHFP_Implementation_Guidance.pdf.*

[76] *See* 23 U.S.C. 173.

[77] *See* the U.S. Department of Transportation's Rural Surface Transportation Grant website at *https://www.transportation.gov/grants/rural-surface-transportation-grant.*

[78] *See* 23 U.S.C. 175.

[79] Public Law 117–58.

information on eligible projects under CRP, see the *Carbon Reduction Program (CRP) Implementation Guidance.*[80]

• *Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT)*[81]—602(c)(5)(B)(xiii) of the Social Security Act—Established in the Bipartisan Infrastructure Law, the PROTECT Program provides both formula funding and competitive funding for projects that, among other activities, provide resilience improvements; strengthen and protect evacuation routes; and protect at-risk coastal infrastructure. For additional information on the PROTECT Formula Program, see *Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) Formula Program Implementation Guidance.*[82]

• *Tribal Transportation Program (TTP)*[83]—602(c)(5)(B)(xiv) of the Social Security Act—TTP provides formula funding to Tribal governments to aid in providing safe and adequate transportation and public road access to and within Indian reservations, Indian lands, and Alaska Native Village communities, contributing to the economic development, self-determination, and employment of Indians and Native Americans. TTP funds a wide range of eligible transportation activities including the construction and maintenance of roads and bridges. For additional information about TTP, see *Tribal Transportation Program Fact Sheet.*[84]

• *Federal Lands Transportation Program (FLTP)*[85]—602(c)(5)(B)(xv) of the Social Security Act—FLTP provides funds to improve the transportation infrastructure owned and maintained by Federal agencies with land and natural resource management responsibilities. Eligible projects under FLTP include construction and maintenance of transit facilities and transportation projects eligible under Title 23 that are on a public network that provides access to, adjacent to, or through Federal lands. For additional information on FLTP, see *Implementation Guidance for the Federal Lands Transportation Program.*[86]

• *Federal Lands Access Program (FLAP)*[87]—602(c)(5)(B)(xvi) of the Social Security Act—FLAP provides formula funding to improve transportation facilities that provide access to, are adjacent to, or are located within Federal lands. FLAP supplements state and local resources for public roads, transit systems, and other transportation facilities, with an emphasis on high-use recreation sites and economic generators. For additional information on FLAP, see the *Implementation Guidance for the Federal Lands Access Program.*[88]

• *Rebuilding American Infrastructure with Sustainability and Equity (RAISE) Grant Program*—602(c)(5)(B)(xvii) of the Social Security Act—The RAISE Grant Program helps communities build transportation projects that have significant local or regional impact and improve safety and equity. RAISE provides funds through competitive grants to state, local, Tribal, and territorial governments, among others, for surface transportation capital projects, including highway, bridge, or other road projects eligible under title 23 of the U.S. Code; public transportation projects eligible under chapter 53 of title 49 of the U.S. Code; passenger and freight rail transportation projects; port infrastructure investments; the surface transportation components of an airport project eligible for assistance under part B of subtitle VII of title 49 of the U.S. Code; intermodal projects; projects to replace or rehabilitate a culvert or prevent stormwater runoff; projects investing in surface transportation facilities that are located on Tribal land; and other surface transportation infrastructure projects that the Secretary of Transportation considers to be necessary to advance the goals of the program—including public road and non-motorized projects that are not otherwise eligible under title 23 of the U.S. Code, transit-oriented development projects, mobility on-demand projects that expand access and reduce transportation cost burden, and intermodal projects. The addition of Federal funds, including SLFRF funds, to an existing RAISE project is subject to the Department of Transportation's approval. For more information on RAISE grants, see *Notice of Funding Opportunity for the Department of Transportation's National Infrastructure Investments (i.e., the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) Grant Program) under the Infrastructure Investment and Jobs Act (''Bipartisan Infrastructure Law''), Amendment No. 2.*[89]

• *Transportation Infrastructure Finance and Innovation Act (TIFIA)*[90]—602(c)(5)(B)(xviii) of the Social Security Act—The TIFIA Program provides Federal credit assistance in the form of direct loans, loan guarantees, and standby lines of credit to finance surface transportation projects of national and regional significance. Eligible projects typically include highways and bridges; intelligent transportation systems; intermodal connectors; transit vehicles and facilities; intercity buses and facilities; freight transfer facilities; pedestrian bicycle infrastructure networks; transit-oriented development; rural infrastructure projects; passenger rail vehicles and facilities; surface transportation elements of port projects; and airports that meet certain standards of credit worthiness and readiness. For additional information about TIFIA, see *TIFIA Program Overview.*[91]

• *Urbanized Formula Grants*[92]—602(c)(5)(B)(xx) of the Social Security Act—The Urbanized Area Formula Funding Program makes Federal resources available for transit capital assistance in urbanized areas and for transportation-related planning.[93]

[80] U.S. Department of Transportation, Federal Highway Administration, Carbon Reduction Program (CRP) Implementation Guidance (Apr. 21, 2022), *https://www.fhwa.dot.gov/environment/sustainability/energy/policy/crp_guidance.pdf.*

[81] *See* 23 U.S.C. 176.

[82] U.S. Department of Transportation, Federal Highway Administration, Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) Formula Program Implementation Guidance (Jul. 29, 2022), *https://www.fhwa.dot.gov/environment/sustainability/resilience/policy_and_guidance/protect_formula.pdf.*

[83] *See* 23 U.S.C. 202.

[84] U.S. Department of Transportation, Federal Highway Administration, Tribal Transportation Program Fact Sheet (Oct. 26, 2022), *https://www.fhwa.dot.gov/bipartisan-infrastructure-law/ttp.cfm.*

[85] *See* 23 U.S.C. 203.

[86] U.S. Department of Transportation, Federal Highway Administration, Implementation Guidance for the Federal Lands Transportation Program (Jun. 29, 2022), *https://highways.dot.gov/sites/fhwa.dot.gov/files/docs/federal-lands/programs/federal-lands-transportation-program/8186/fltp-guidance-cleared.pdf.*

[87] *See* 23 U.S.C. 204.

[88] U.S. Department of Transportation, Federal Highway Administration, Implementation Guidance for the Federal Lands Access Program (Aug. 6, 2018), *https://highways.dot.gov/sites/fhwa.dot.gov/files/docs/federal-lands/programs/federal-lands-access-program/6971/flap-implem-guidance.pdf.*

[89] U.S. Department of Transportation, Notice of Funding Opportunity for the Department of Transportation's National Infrastructure Investments (*i.e.,* the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) Grant Program) under the Infrastructure Investment and Jobs Act (''Bipartisan Infrastructure Law''), Amendment No. 2 (Jan. 3, 2023), *https://www.transportation.gov/sites/dot.gov/files/2023-02/RAISE%202023%20NOFO%20Amendment2.pdf.*

[90] *See* 23 U.S.C. Chapter 6.

[91] *See* the U.S. Department of Transportation's TIFIA Program Overview website at *https://www.transportation.gov/buildamerica/financing/tifia.*

[92] *See* 49 U.S.C. 5307.

[93] While Urbanized Area Formula Grants typically may be used to support operating expenses, operating expenses are not an eligible use of SLFRF spending for projects eligible under section 602(c)(5)(B)(xx) of the Social Security Act. See operating expenses within the Pathway One applicable requirements section for more information.

Eligible activities under the Urbanized Formula grants typically include: planning, engineering, design, and evaluation of transit projects and other technical transportation-related studies; capital investments in bus and bus-related activities such as replacement, overhaul, and rebuilding of buses, crime prevention and security equipment and construction of maintenance and passenger facilities; and capital investments in new and existing fixed guideway systems including rolling stock, overhaul and rebuilding of vehicles, track, signals, communications, and computer hardware and software. In addition, associated transit improvements and certain expenses associated with mobility management programs are eligible under the program. For additional information about Urbanized Formula Grants, see *Urbanized Area Formula Program Guidance.*[94]

• *Fixed Guideway Capital Investment Grants*[95]—602(c)(5)(B)(xxi) of the Social Security Act—The Fixed Guideway Capital Investment Grants Program is a discretionary grant program that funds transit capital investments, including heavy rail, commuter rail, light rail, streetcars, and bus rapid transit. More details are available in the Federal Transit Administration's *Capital Investment Grants Policy Guidance.*[96]

• *Formula Grants for Rural Areas*[97]—602(c)(5)(B)(xxii) of the Social Security Act—The Formula Grants for Rural Areas Program provides capital and planning assistance to support public transportation in rural areas with populations of less than 50,000, where many residents often rely on public transit to reach their destinations.[98] The program also provides funding for training and technical assistance through the Rural Transportation Assistance Program. Eligible activities typically include planning, capital, job access and reverse commute projects, and the acquisition of public transportation services. For additional information about Formula Grants for Rural Areas, see *Formula Grants Rural Areas Program Guidance.*[99]

• *State of Good Repair Grants*[100]—602(c)(5)(B)(xxiii) of the Social Security Act—The State of Good Repair Grants Program provides capital assistance for maintenance, replacement, and rehabilitation projects of high-intensity fixed guideway and bus systems to help transit agencies maintain assets in a state of good repair. Capital projects eligible for State of Good Repair Grants funds typically include projects to replace and rehabilitate rolling stock; track; line equipment and structures; signals and communications; power equipment and substations; passenger stations and terminals; security equipment and systems; maintenance facilities and equipment; and operational support equipment computer hardware and software. For additional information about State of Good Repair Grants, see *State of Good Repair Grant Program Guidance.*[101]

• *Grants for Buses and Bus Facilities*[102]—602(c)(5)(B)(xxiv) of the Social Security Act—The Grants for Buses and Bus Facilities Program provides funding to help support capital projects to replace, rehabilitate, and purchase buses, vans, and related equipment, and to construct bus-related facilities, including technological changes or innovations to modify low or no emission vehicles or facilities. For additional information about Grants for Buses and Bus Facilities, see *Buses and Bus Facilities Program Guidance.*[103]

• *National culvert removal, replacement, and restoration grant program (Culvert AOP Program)*[104]—602(c)(5)(B)(xxv) of the Social Security Act—Established by the Bipartisan Infrastructure Law, the Culvert AOP Program awards grants for projects for the replacement, removal, and repair of culverts or weirs that meaningfully improve or restore fish passage for anadromous fish. Anadromous fish species are born in freshwater such as streams and rivers, spend most of their lives in the marine environment, and migrate back to freshwater to spawn. For additional information on the Culvert AOP Program, see the *National Culvert Removal, Replacement, and Restoration Grants (Culvert AOP Program)* website.[105]

• *Bridge Replacement, Rehabilitation, Preservation, Protection, and Construction Program (Bridge Formula Program or BFP)*[106]—602(c)(5)(B)(xxvii) of the Social Security Act—Established by the Bipartisan Infrastructure Law, BFP provides formula funds for highway bridge replacement, rehabilitation, preservation, protection, and construction projects on public roads. For additional information of BFP, see *Bridge Formula Program (BFP) Implementation Guidance.*[107]

• Additionally, as provided by section 602(c)(5) of the Social Security Act, Surface Transportation projects also include activities to carry out metropolitan transportation planning[108] and projects that further the completion of a designated route of the Appalachian Development Highway System (ADHS)[109]—a system of designated corridors and roadways within the 13 States that make up the Appalachian Region. With regard to metropolitan transportation planning, requirements leading to the development of transportation improvement plans are described in section 134 of title 23 of the U.S. Code and section 5303 of title 49 of the U.S. Code.

b. Pathway One: Applicable Requirements

Recipients using SLFRF funds for Surface Transportation projects under Pathway One must comply with certain

[94] U.S. Department of Transportation, Federal Transit Administration, Urbanized Area Formula Program Guidance, 79 FR 2930 (Feb. 27, 2020), *https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/urbanized-area-formula-program-program-guidance-and.*

[95] *See* 49 U.S.C. 5309.

[96] U.S. Department of Transportation, Federal Transit Administration, Capital Investment Grants Policy Guidance (Jan. 12, 2023), *https://www.transit.dot.gov/sites/fta.dot.gov/files/2023-01/CIG-Policy-Guidance-January-2023.pdf.*

[97] *See* 49 U.S.C. 5311.

[98] While Rural Area Formula Grants typically may be used to support operating expenses, operating expenses are not an eligible use of SLFRF spending for projects eligible under section 602(c)(5)(B)(xxii) of the Social Security Act. See operating expenses within the Pathway One applicable requirements section for more information.

[99] U.S. Department of Transportation, Federal Transit Administration, Formula Grants Rural Areas Program Guidance and Application Instructions, 79 FR 63663 (Feb. 27, 2020), *https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/formula-grants-rural-areas-program-guidance-and-application.*

[100] *See* 49 U.S.C. 5337.

[101] U.S. Department of Transportation, Federal Transit Administration, State of Good Repair Grant Program Guidance and Application Instructions (May 29, 2020), *https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/state-good-repair-grant-program-guidance-and-application.*

[102] *See* 49 U.S.C. 5339.

[103] U.S. Department of Transportation, Federal Transit Administration, Buses and Bus Facilities Program Guidance and Application Instructions (Feb. 27, 2020), *https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/bus-and-bus-facilities-program-guidance-and-application.*

[104] *See* 49 U.S.C. 6703.

[105] U.S. Department of Transportation, Federal Highway Administration, National Culvert Removal, Replacement, & Restoration Grants (Culvert Hydraulics Aquatic Organisms Passage Program) website Program Overview (Jan. 31, 2023), *https://www.fhwa.dot.gov/engineering/hydraulics/culverthyd/aquatic/culvertaop.cfm.*

[106] *See* title VIII of division J of Public Law 117–58.

[107] U.S. Department of Transportation, Federal Highway Administration, Bridge Formula Program (BFP) Implementation Guidance (Jan. 14, 2022), *https://www.fhwa.dot.gov/bridge/bfp/20220114.cfm.*

[108] *See section* 602(c)(5)(B)(v) of the Social Security Act. *See also* 23 U.S.C. 134 for more details.

[109] *See* section 602(c)(5)(B)(xix) of the Social Security Act. *See also* 40 U.S.C. 14501 for more details on the Appalachian Development Highway System.

requirements and restrictions established by the 2023 CAA, in addition to the other applicable provisions of section 602 and 603 of the Social Security Act, the 2022 final rule, and recipients' award terms and conditions. As described earlier in this interim final rule, recipients may only use the greater of 30% of their award and $10 million (not to exceed their total award) for Surface Transportation projects (described in this section) and Title I projects (described in the following section), taken together. As also described earlier in this interim final rule, recipients using SLFRF funds for Surface Transportation projects must obligate funds by December 31, 2024, and expend funds by September 30, 2026. In the section that follows, this interim final rule describes the additional requirements that apply to Surface Transportation projects funded with SLFRF funds under Pathway One.

Pathway One: Application of Titles 23, 40, and 49 of the U.S. Code. Sections 602(c)(5)(C)(iii) and 603(c)(6)(B)(iii) of the Social Security Act provide that the requirements of titles 23, 40, and 49 of the U.S. Code apply to Surface Transportation projects, except as otherwise determined by the Secretary or the head of a Federal agency to which the Secretary has delegated authority. When using SLFRF funds under Pathway One, the statutory requirements that normally apply when carrying out such projects continue to apply. Recipients should consult with DOT before using SLFRF funds for these projects. The responsibility for completing or ensuring compliance with all requirements falls to the recipient, as would typically be the case for a DOT-funded project in the absence of SLFRF funds. Immediately below, this interim final rule summarizes some of the requirements that generally apply:

- Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act) [110]—The Uniform Act is a Federal law that establishes minimum standards for Federally funded programs and projects that require the acquisition of real property or displace persons from their homes, businesses, or farms. The Act's protections and assistance apply to the acquisition, rehabilitation, or demolition of real property for Federal or Federally funded projects. The provisions of the Uniform Act and its implementing regulations apply to all activities funded with a recipient's SLFRF award, as described in the SLFRF award terms and conditions.
- Prevailing Wage and Employee Protection Requirements—The Surface Transportation projects are generally subject to wage and employee protection requirements, including the requirements of 23 U.S.C. 113 and 49 U.S.C. 5333(a) and (b), applying Davis-Bacon prevailing wage protections for highway and transit projects, respectively, receiving Federal financial assistance.
- Title VI of the Civil Rights Act of 1964—Title VI of the Civil Rights Act of 1964 states that no person in the Unites States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the recipient receives Federal assistance. As with all activities funded with a recipients' SLFRF award, the requirements of Title VI and Treasury's implementing regulations at 31 CFR part 22 apply to SLFRF funds used for Surface Transportation projects.
- Buy America Provisions—Buy America requirements were established pursuant to section 165 of the Surface Transportation Assistance Act of 1982 to ensure that transportation infrastructure projects are built with American-made products.[111] These requirements have been implemented by various DOT modes through statute and regulation.[112]
- Planning Requirements—Generally, projects that are eligible for funding under title 23 of the U.S. Code or 49 U.S.C. Chapter 53 must meet planning requirements laid out in law or regulation, including the requirement that the project be included within a Statewide Transportation Improvement Program, which is a statewide prioritized listing or program of transportation projects covering a period of four years that is consistent with the long-range statewide transportation plan, metropolitan transportation plans, and relevant Transportation Improvement Program. Recipients using SLFRF funds for Surface Transportation projects under Pathway One must continue to comply with applicable planning requirements.

Pathway One: Limitations on Operating Expenses. Sections 602(c)(5) and 603(c)(6) of the Social Security Act provide that SLFRF funds may not be used for operating expenses of the Surface Transportation projects. Specifically, recipients that use SLFRF funds for projects eligible under Urbanized Formula Grants, Fixed Guideway Capital Investment Grants, Formula Grants for Rural Areas, State of Good Repair Grants, or Grants for Buses and Bus Facilities may not use SLFRF funds for operating expenses of these projects. DOT typically defines operating expenses as those costs necessary to operate and manage a public transportation system. Operating expenses usually include costs such as driver salaries, the cost of fuel, and the cost of equipment and supplies having a useful life of less than one year. For this purpose, operating expenses do not include preventive maintenance activities. This limitation does not apply to other Surface Transportation projects or to other uses of SLFRF funds, including under the revenue loss eligible use category.

Pathway One: Projects that Demonstrate Progress Towards a State of Good Repair or Support Achieving Performance Targets. Section 602(c)(5)(C)(iii)(III) of the Social Security Act provides that, except as otherwise determined by the Secretary or the head of the Federal agency to which the Secretary has delegated authority, states may use funds for Surface Transportation projects, as applicable, that demonstrate progress in achieving a state of good repair as required by the state's asset management plan under 23 U.S.C. 119(e) and that support the achievement of one or more performance targets of the state established under 23 U.S.C. 150. Treasury interprets this provision to impose a mandatory requirement for states to comply with one of the two prongs in section 602(c)(5)(C)(iii)(III). Treasury understands the statute's provision that states ''may'' use funds for applicable projects that meet this requirement to mean that states may only use funds for such projects that meet this requirement, because this provision is included in the section titled ''Application of Requirements'' alongside two other subparagraphs that impose mandatory requirements when recipients use funds on Surface Transportation projects and because otherwise, the provision would have no practical effect.[113] But Treasury reads

[110] 42 U.S.C. 4601 *et seq.*

[111] *See* Public Law 97–424, 96 Stat. 2097 (Jan. 6, 1983).

[112] *See, e.g.,* 23 U.S.C. 313 (Federal Highway Administration Buy America statute); 49 U.S.C. 5323(j) (Federal Transit Administration Buy America statute); 49 CFR part 661 (Federal Transit Administration Buy America regulation); and 23 CFR 635.410 (Federal Highway Administration Buy America regulation).

[113] To treat the provisions of section 602(c)(5)(C)(iii)(III) as completely optional would give these provisions no meaning, because states would be permitted to carry out projects in the manner contemplated by the provision regardless of whether the statute identified this ability or not. Such a reading would render the provisions as

the word ''and'' as disjunctive, such that states need only comply with either subparagraph (aa) or (bb).[114] While it may be possible for a state to carry out some types of Surface Transportation projects in a way that both demonstrates progress in achieving a state of good repair as required by the state's asset management plan under 23 U.S.C. 119(e) and that supports the achievement of one or more performance targets of the state established under 23 U.S.C. 150, Treasury is concerned that an interpretation that requires states to meet both criteria would effectively read certain programs out of the list of programs that Congress specifically provided in section 602(c)(5)(B) of the Social Security Act.

This interim final rule provides that only projects eligible under title 23 of the U.S. Code, or that otherwise would be subject to the requirements of title 23, will be subject to the requirement to either demonstrate progress in achieving a state of good repair under 23 U.S.C. 119(e) or support the achievement of one or more state performance targets under 23 U.S.C. 150. Section 602(c)(5)(C)(iii)(III) of the Social Security Act provides that this requirement applies to Surface Transportation projects ''as applicable,'' and it would not make sense for these conditions to apply to projects eligible under titles 40 or 49 of the U.S. Code as that would effectively make such projects unavailable to states, despite the inclusion of these types of projects in section 602(c)(5)(B) of the Social Security Act.

Pathway One: Application of Non-Federal Cost Share Requirements to SLFRF Funds. Generally, the non-Federal cost share provisions associated with projects and programs administered by DOT require a certain percentage of funds to be contributed from non-Federal sources. When other Federal funds are added to a transportation infrastructure project, the total amount of Federal funds associated with the project increases. In the case of some programs, this addition increases the overall amount of funds required from non-Federal sources, as is the case with the State of Good Repair Grant Formula Program (49 U.S.C. 5337(e)), the Railcar Vehicle Replacement Program (49 U.S.C. 5337(f)), and Grants for Buses and Bus Facilities Program (49 U.S.C. 5339). In the case of other programs, the addition of Federal funds, like SLFRF, will not increase the overall amount of funds required from non-Federal sources.

As described above, the requirements of titles 23, 40, and 49 of the U.S. Code apply to recipients using SLFRF funds for Surface Transportation projects under Pathway One, except as otherwise determined by the Secretary. This provision permits Treasury to determine not to apply certain requirements of the cross-referenced statutes when such requirements would conflict with the existing SLFRF framework or otherwise are likely to preclude recipients from to exercising the additional authorities provided by the statute. For these reasons, recipients using SLFRF funds for Surface Transportation projects under Pathway One will not be required to contribute cost-sharing or matching funds alongside those SLFRF funds. In other words, the use of SLFRF funds on its own will not result in the application of an additional cost-share requirement beyond the cost-share requirement that already applies to DOT grantees carrying out projects with DOT funds. This approach is consistent with the way recipients are permitted to use SLFRF funds under the 2022 final rule, which does not require recipients to provide cost sharing or matching funds in order to use their SLFRF funds.[115] If Treasury were to apply cost-share requirements to the SLFRF funds used in Pathway One, on top of the cost-share requirements that already apply to the projects as funded by DOT, recipients would be required to source additional matching funds before being able to carry out a Surface Transportation project, which would frustrate the flexibility provided by the statutory framework and inhibit SLFRF recipients' ability to use funds already received prior to the approaching obligation and expenditure deadlines.

Because SLFRF funds are Federal funds, using SLFRF funds under Pathway One will still impact the cost-share requirements that apply to certain Surface Transportation projects due to differences in applicable non-Federal cost share requirements across DOT projects and programs. In some cases, DOT programs are capped in the amount of Federal funds that may be used in a project, regardless of whether those funds are provided by DOT or another Federal source. This is true, for example, of the State of Good Repair Grant Formula Program (49 U.S.C. 5337(e)), the Railcar Vehicle Replacement Program (49 U.S.C. 5337(f)), and Grants for Buses and Bus Facilities Program (49 U.S.C. 5339) noted above. In those and other similar scenarios, recipients can contribute SLFRF funds up to the maximum Federal funds limit without an accompanying increase in non-Federal share, but once that maximum is reached, the statutory cost share applicable to the project will apply to the SLFRF funds. However, in the case of many other programs, the approach described above will provide an avenue for recipients to use funds for Surface Transportation projects under Pathway One without requiring additional non-Federal share contributions. Recipients using SLFRF funds for Surface Transportation projects under Pathway One must consult with DOT to determine the applicable non-Federal cost share requirements.

Pathway One: Delegation of Authority. Sections 602(c)(5)(C)(iv) and 603(c)(6)(B)(iv) of the Social Security Act provide that the Secretary may delegate oversight and administration of the requirements applicable to Surface Transportation projects to the appropriate Federal agency. Given DOT's expertise and experience with oversight and administration of their own infrastructure projects, Treasury is delegating authority for oversight and administration of Surface Transportation projects under Pathway One. As such, recipients proposing to spend SLFRF on such projects must follow DOT guidance for determining the eligibility of using SLFRF funds for a proposed project. Recipients using SLFRF funds for such projects will be required to comply with the relevant existing DOT reporting requirements associated with an existing Surface Transportation project that is receiving DOT funds. Recipients using SLFRF funds under Pathway One will also be required to report certain information to Treasury, including, among other things, the amount of SLFRF funds directed toward Surface Transportation projects and Title I projects to ensure that recipients comply with the cap on funds associated with these eligible use categories. See the section titled Reporting for additional information. Treasury and DOT will work together to issue guidance to provide recipients additional clarity on how the delegation

surplusage. Instead, statutes should be read to give effect to all provisions, ''so that no part will be inoperative or superfluous.'' *See, e.g., Ysleta Del Sur Pueblo* v. *Texas*, 596 U.S. _, 124 S. Ct. 1929, 1939 (2022) (internal citation omitted).

[114] As discussed in *United States* v. *Fisk*, 70 U.S. 445, 447 (1865), it can be necessary ''to construe 'or' as meaning 'and,' and again 'and' as meaning 'or'" (emphasis omitted). While the word ''and'' usually is conjunctive and the literal meaning of the words ''and'' and ''or'' generally should be followed, it may be appropriate to interpret ''and'' as disjunctive when the statutory meaning is questionable or confusing. *See also* Singer, Norman J. et al., *Sutherland Statutes and Statutory Construction* § 21:14 (7th ed. 2010).

[115] *See* section 7 of the SLFRF Award Terms and Conditions.

of oversight and administration will apply to Pathway One projects.

c. Pathway Two: Surface Transportation Projects Not Receiving Funding From DOT

This section describes Pathway Two, through which recipients may use SLFRF funds for Surface Transportation projects that are not receiving funding from DOT, whether or not SLFRF funds are blended with other sources of funds. This second pathway is available to all SLFRF recipients, including those that do not routinely apply for or receive funding directly from DOT.

In this interim final rule, Treasury is articulating a streamlined framework under Pathway Two for recipients to undertake certain projects that are expected to pose less financial, compliance, and environmental risk. In this streamlined framework, Treasury has determined not to require recipients to submit an application to, or receive approval from, Treasury to conduct a project that meets certain criteria, as discussed further below.

To pursue projects outside the thresholds described in the streamlined framework, recipients must submit a notice of intent to Treasury through the process described further below. Treasury will evaluate the projects included in these notices of intent, along with comments to this interim final rule, to design and implement the framework for approving these projects. For information, refer to the section titled Pathway Two: Notice of Intent for Projects Outside Streamlined Framework.

As summarized earlier, Treasury has determined to adopt a streamlined approach for projects that qualify for the RAISE grant program and that meet criteria that indicate lower risk. Projects eligible under the DOT RAISE program are among the types of projects added by the 2023 CAA as eligible uses of SLFRF. Under the RAISE program, as detailed in the RAISE Notice of Funding Opportunity, recipients must submit applications to DOT and receive approval from DOT for their proposed projects.

In this streamlined approach, Treasury has determined not to require recipients to submit an application to, or receive approval from, Treasury to conduct a project that would be eligible under the RAISE grant program and meets the other criteria applicable to the streamlined framework, as would normally be required when DOT administers the program pursuant to the RAISE Notice of Funding Opportunity. Depending on the nature of the project, a recipient may nevertheless be required to obtain approval pursuant to a specific requirement under titles 23, 40 or 49 or the regulations adopted by DOT thereunder. For example, a project that involves new construction, reconstruction, resurfacing (except for maintenance resurfacing), restoration, or rehabilitation of a national highway must meet the design standards approved by DOT; if the recipient wishes to vary from these standards, it must apply to DOT for an exception.[116]

The eligibility of projects under the RAISE program is described in the ''*Notice of Funding Opportunity for the Department of Transportation's National Infrastructure Investments (i.e., the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) Grant Program) under the Infrastructure Investment and Jobs Act (''Bipartisan Infrastructure Law''), Amendment No. 2*'' (2023 RAISE Grant NOFO) under ''*3. Other*'' in ''*C. Eligibility Information.*'' [117] These projects include highway, bridge, or other road projects eligible under title 23 of the U.S. Code; public transportation projects eligible under chapter 53 of title 49 of the U.S. Code; passenger and freight rail transportation projects; port infrastructure investments; the surface transportation components of an airport project eligible for assistance under part B of subtitle VII of title 49 of the U.S. Code; intermodal projects; projects to replace or rehabilitate a culvert or prevent stormwater runoff; projects investing in surface transportation facilities that are located on Tribal land; and other surface transportation infrastructure projects that the Secretary of Transportation considers to be necessary to advance the goals of the RAISE program—including public road and non-motorized projects that are not otherwise eligible under title 23 of the U.S. Code, transit-oriented development projects, mobility on-demand projects that expand access and reduce transportation cost burden, and intermodal projects.

For a RAISE-eligible project to qualify for the streamlined approach, it must satisfy the following criteria:

- *Contribute no more than $10 million in SLFRF funds.* The recipient's contribution of SLFRF funding to the project under Pathway Two must not exceed $10 million.
- *Limited to activities that typically do not have a significant environmental impact.* The entire project scope must be limited to the set of actions or activities identified by DOT as meeting the criteria for categorical exclusion as listed under 23 CFR 771.116(c)(1)–(22), 771.117(c)(1)–(30), and 771.118(c)(1)–(16). The recipient also must determine that those actions do not involve unusual circumstances, as described in 23 CFR 771.116(b), 771.117(b), and 771.118(b). Such unusual circumstances include significant environmental impacts; substantial controversy on environmental grounds; significant impact on properties protected by section 4(f) of the Department of Transportation Act of 1966 [118] or section 106 of the National Historic Preservation Act (NHPA); [119] or inconsistencies with any Federal, state, or local law, requirement, or administrative determination relating to the environmental aspects of the action. In considering whether the effects of a proposed action are significant, recipients should analyze the potentially affected environment and degree of the effects of the action consistent with how a Federal agency would analyze it, as described in 40 CFR 1501.3(b). For example, an action may be significant if—in the short-term or the long-term and either individually or cumulatively—it greatly alters or impacts planned growth or land use for the area; requires the relocation of large numbers of people; has a strong effect on any natural, cultural, recreational, historic, or other resource; significantly impacts air, noise, or water quality; greatly affects travel patterns; or has some other form of environmental impact that is significant.

Without the streamlined framework, recipients likely would not be able to engage within required timelines in the types of projects that Congress has authorized.[120] As approximately 30,000 SLFRF recipients could seek to use funds for hundreds of Surface Transportation projects under Pathway Two, application of the statutory and regulatory approval requirements to such a volume of projects likely would preclude recipients from carrying out such projects while meeting the statutory deadlines for obligation and expenditure of funds. By contrast, Treasury expects far fewer recipients to seek to use SLFRF funds for higher-risk projects involving greater complexity, given the approaching obligation deadline of December 31, 2024. The

[116] *See* 23 CFR part 625.

[117] U.S. Department of Transportation, FY 2023 RAISE Grants Notice of Funding Opportunity, *https://www.transportation.gov/sites/dot.gov/files/2023-02/RAISE%202023%20NOFO%20Amendment2.pdf.*

[118] *See* 23 U.S.C. 138.

[119] *See* 54 U.S.C. 306108.

[120] Although Treasury is only adopting the streamlined approach for projects eligible for the RAISE program, as discussed above, this program includes most eligible types of projects.

approval requirements apply to Surface Transportation projects that do not meet the above streamlined framework criteria, and Treasury will design a process for recipients seeking to finance larger projects, based in part on the comments to this interim final rule, as discussed further below.

Recipients using SLFRF funds for an eligible project under Pathway Two must maintain records to support their determination that the project meets the relevant requirements and the criteria described above, including qualifying as an ''eligible project'' under the RAISE grant program, not exceeding $10 million in SLFRF funds, and being limited to activities that typically do not have a significant environmental impact as outlined above. Recipients should be prepared to attest to having completed these determinations as part of their ongoing reporting to Treasury. Treasury will amend its reporting guidance to provide reporting requirements applicable to projects conducted under Pathway Two.

Treasury aligned the streamlined framework for projects under Pathway Two with the projects available under the RAISE grant program because these projects substantially overlap with the projects available under the other programs referenced in section 602(c)(5)(B) of the Social Security Act. Furthermore, the RAISE program's availability on a competitive basis to most SLFRF recipients means that the program and its requirements are already familiar to many recipients, enabling them to quickly and clearly assess the eligibility of a proposed project and meet the obligation and expenditure deadlines.

Based on Treasury's initial conversations with DOT and stakeholders with an interest in Surface Transportation projects, it is Treasury's expectation that compliance with the streamlined framework will substantially address the risks and policy concerns associated with projects that the requirement to submit an application for DOT approval under the RAISE program is meant to address.

The requirement to obtain DOT approval allows DOT to assess whether the project meets eligibility requirements, whether a recipient has the financial and technical capability to design and carry out the project, whether the recipient has received required permits and will comply with applicable law, and how the project will impact the environment.[121] Environmental risk is addressed by the requirement to qualify for one of the NEPA categorical exclusions, absent any unusual circumstances, which is cross-referenced in the third criterion. Categorical exclusions (absent unusual circumstances) represent the class of actions that DOT has determined, after review by the Council on Environmental Quality, do not typically individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental assessment nor an environmental impact statement is normally required under DOT's environmental review process.[122] Further, the risk of a project being ineligible for a specific DOT program is less of a concern under Pathway Two than it would be under certain specific DOT programs, given that the scope of eligible projects as added by the 2023 CAA is so wide. There is generally less risk of a recipient not having the financial or technical capabilities to complete a project in the case of a project that would meet the $10 million threshold.

As noted above, projects eligible under the RAISE grant program substantially overlap with the projects available under the other programs referenced in section 602(c)(5)(B) of the Social Security Act, and the program is available on a competitive basis to most SLFRF recipients. These projects, therefore, represent the types of projects that SLFRF recipients may be expected to undertake under Pathway Two, and Treasury qualitatively reviewed recent RAISE grants as well as earlier grants awarded through the similar TIGER and BUILD programs, covering fiscal years 2012 through 2022, to develop a better understanding of the types of projects that recipients may choose to undertake.[123] Treasury observed that projects funded by these grants generally present reduced financial complexity and compliance risk and are narrower in scope. Adjusted for inflation, applicants awarded less than $10 million in TIGER, BUILD, or RAISE grant funding have generally carried out a wide range of projects including: road repairs, sidewalk installment and replacement, bike and pedestrian trails, pedestrian bridges, replacement of existing vehicle bridges, intermodal or transit-oriented infrastructure build-outs, marine facility investments, and railway repairs and expansion. These projects were generally focused on maintenance or upgrades of existing infrastructure and thus were significantly less likely to expand the overall footprint of surface transportation projects. This suggests that these types of projects tend to carry fewer complexities and are the types of Surface Transportation projects with which nearly all SLFRF recipients are familiar as part of the normal course of maintaining surface transportation in their respective geographic areas.

Approximately half of TIGER, BUILD, and RAISE awards under $10 million fund transportation infrastructure; the other half are planning or research grants. Treasury observed in its review that nearly 80% of the transportation infrastructure awards under $10 million did not meaningfully expand the footprint of existing infrastructure. Furthermore, of the awards that may have required a footprint expansion, nearly half of those awards were for bike and pedestrian trails and bridges, which are expected to be less environmentally impactful, time intensive, and complex than new roads, vehicle bridges, rail lines, or multimodal infrastructure. Based on this analysis, nearly 90% of awards did not require an expansion of the footprint of a project and over 75% of projects were maintenance or upgrade oriented. When reviewing awards above $10 million, Treasury found increasing complexity among awards that was not present in significant numbers below the $10 million threshold. This complexity involved awards that crossed multi-jurisdictional boundaries or significantly expanded the footprint, such as bridge reconstruction and widening over a major river between two states and a project for a multimodal transportation center.

Although compliance with the streamlined framework criteria does not alone address these risks as fully as agency review of the project would, Treasury believes it reasonable to permit projects funded with $10 million or less in SLFRF funds and that fit within the DOT NEPA categorical exclusions to go forward without the application of approval requirements to enable recipients to successfully pursue these projects within the time remaining in the program.

Pathway Two: Notice of Intent for Projects Outside Streamlined

[121] Given that RAISE is a competitive grant program, the approval process also involves the selection of the most meritorious projects, but this objective is not relevant to the SLFRF program, under which recipients are provided funds by Treasury in advance for projects of their own choosing.

[122] *See* 23 CFR 771.116, 771.117, and 771.118.

[123] The TIGER, BUILD, and RAISE grant programs are discretionary grants awarded by DOT to fund road, rail, transit, and port projects that promise to achieve national objectives. The programs have different names but share similar goals and eligibility requirements. The names reflect the changing priorities and themes of the DOT over time. The programs were first created in 2009 as part of the American Recovery and Reinvestment Act of 2009 and have since funded hundreds of projects in all 50 states, the District of Columbia, and Puerto Rico.

Framework. As described earlier, Treasury recognizes that recipients may want to use SLFRF funds (without any funding from DOT) to pursue projects that do not meet the three criteria for the streamlined framework described above (*i.e.,* a project not eligible under the RAISE program, a project above the $10 million threshold, or a project including activities that do not fall within the categorical exclusions). To do so, recipients must submit a notice of intent to Treasury. The notice of intent must be submitted to *NOI-SLFRF@Treasury.gov* and is due by December 20, 2023. Ideally, the notice of intent will provide the following information:

- Project description, including description of how the project meets the applicable requirements under the relevant Surface Transportation program;
- Dollar value of SLFRF-financed portion of the project, including confirmation that the SLFRF-funded portion will not exceed the greater of $10 million or 30% of the recipient's total SLFRF award;
- Total expected project cost;
- Presence of other Federal funding;
- Status of NEPA review;
- Recipients' plans to source the project in accordance with the Buy America requirements set forth in titles 23, 40, and 49 of the U.S. Code, as applicable;
- Brief assessment of project readiness, including recipient's assessment of its ability to obligate and expend funds for the SLFRF-financed portion of the project in accordance with the December 31, 2024 obligation deadline and September 30, 2026, expenditure deadline; and
- Brief assessment of recipient's institutional, managerial, and financial capability to ensure proper planning, management, and completion of the project.

Treasury will evaluate the projects included in these notices of intent, along with comments to this interim final rule, to design and implement a framework for approving these projects.

d. Pathway Two: Applicable Requirements

Recipients using SLFRF funds under Pathway Two must comply with certain requirements and restrictions. These requirements and restrictions are in addition to the eligibility criteria applicable to the streamlined Pathway Two framework discussed above. As described earlier in this interim final rule, recipients may only use the greater of 30% of their award and $10 million (not to exceed their award) for Surface Transportation projects (described in this section) and Title I projects (described in the following section), taken together. For example, an SLFRF recipient with an allocation of $20 million would have $10 million (as $10 million is greater than 30% of the allocation, or $6 million) to direct to Surface Transportation projects and Title I projects. If this recipient chose to expend $10 million toward a Surface Transportation project under the streamlined framework in Pathway Two, it would have expended the full amount of SLFRF funds available under the cap and would not be able to pursue any additional Surface Transportation projects or any Title I projects. Recipients using SLFRF funds under Pathway Two must also comply with the requirement that SLFRF funds supplement and not supplant other funds, described earlier in this interim final rule. Also as described earlier in this interim final rule, for Surface Transportation projects, recipients must obligate funds by December 31, 2024, and expend funds by September 30, 2026. In the section that follows, this interim final rule describes how the requirements of NEPA and titles 23, 40, and 49 of the U.S. Code apply to SLFRF funds used for Surface Transportation projects under Pathway Two.

Pathway Two: NEPA. As described above, recipients using funds for Surface Transportation projects that qualify for the streamlined framework under Pathway Two, and that are therefore not subject to approval requirements, are not required to conduct NEPA environmental reviews. Recipients are reminded, however, that projects supported with payments from SLFRF may still be subject to NEPA review and other environmental statutes such as section 106 of the NHPA that impose conditions on a Federal agency's approval of a project if they are also funded by other Federal financial assistance programs or have certain Federal licensing or registration requirements. In addition, a project that qualifies for the streamlined framework may still be subject to limitations or prohibitions as a result of the application of other environmental statutes.

For projects under Pathway Two outside of the streamlined framework, recipients must submit a notice of intent as outlined above, and the requirements of NEPA and other environmental laws, such as section 106 of the NHPA, that impose limits on a Federal agency's approval of a project, apply to these Surface Transportation projects. Treasury will provide additional information about the application and administration of environmental requirements to projects under Pathway Two not qualifying for the streamlined framework at a later date, following review of the comments to this interim final rule and the notices of intent submitted by recipients.

Pathway Two: Application of Titles 23, 40, and 49 of the U.S. Code. The 2023 CAA provides that, except as otherwise determined by the Secretary, the requirements of titles 23, 40, and 49 of the U.S. Code apply to SLFRF funds used for Surface Transportation projects. Generally, the requirements provided within the following sections of titles 23, 40, and 49 apply to recipients' use of SLFRF funds under Pathway Two, because these sections govern the types of Surface Transportation projects that recipients may undertake pursuant to the 2023 CAA:

- Title 23: All parts of title 23
- Title 40: Chapters 141 and 145
- Title 49: Chapters 53, 55, 67, 471, and subtitle V

More specifically, applicable provisions include those relating to the following requirements:

- Underlying project requirements. For example, if a recipient intends to use SLFRF funds under Pathway Two for an INFRA project that would be eligible under title 23 (as contemplated by the RAISE program), then in addition to complying with the requirements established in the RAISE NOFO, the recipient must also comply with the project eligibility and execution requirements that govern the INFRA program, set forth at 23 U.S.C. 117.
- Design, planning, construction, operation, maintenance, vehicle weight limit, and toll requirements with respect to particular projects. For a discussion of planning requirements specifically related to STIPs and TIPs, please see below.
- Location requirements for particular projects. For example, pursuant to 23 U.S.C. 133(c), recipients of the Surface Transportation Block Grant program may not undertake a project on a road functionally classified as a local road or a rural minor collector unless the road was on a Federal-aid highway system on January 1, 1991, subject to certain exceptions. Recipients using SLFRF funds for projects pursuant to sections 602(c)(5)(B)(iv) and 603(c)(6)(A) of the Social Security Act as added by the 2023 CAA, which provided that projects eligible under the Surface Transportation Block Grant program are eligible uses of the SLFRF, must comply with the location requirements of 23 U.S.C. 133(c) with respect to such projects. Recipients seeking to use funds

under the streamlined framework under Pathway Two are reminded that the ''public road and nonmotorized projects not otherwise eligible under title 23'' prong of the 2023 RAISE NOFO would include local road projects.

• Project approval requirements. The approval requirements of titles 23, 40, and 49 of the U.S. Code apply to Pathway Two projects other than those that qualify for the streamlined framework described above. Treasury has determined not to require recipients to submit an application to, or receive approval from, Treasury to conduct a project that would be eligible under the RAISE grant program and meets the criteria of the streamlined framework of Pathway Two. As discussed above, depending on the nature of the project, a recipient may nevertheless be required to obtain approval pursuant to a specific requirement under titles 23, 40 or 49 or the regulations adopted by DOT thereunder.

• Procurement requirements. For example, the requirements of 23 U.S.C. 112 generally apply. Please see discussion below in the section titled Pathway Two: Buy America Requirements for a discussion of the specific applicability of Buy American requirements under 23 U.S.C. 313 and the Infrastructure Investment and Jobs Act.

• Wage and labor requirements. For example, the requirements of 23 U.S.C. 113, imposing Davis-Bacon prevailing wage protections for highway projects, apply.

• Compliance requirements. Compliance provisions apply to the extent that they require recipients to establish and maintain measures to oversee the eligible projects that they are undertaking.

• Definitions of terms used in the provisions above.

In addition, the RAISE program includes eligibility for projects with applicable requirements that are found outside of titles 23, 40, and 49. If a recipient would like to use SLFRF funds for a project eligible under the RAISE program but governed by laws outside titles 23, 40, and 49, the general principles described above for titles 23, 40, and 49 will apply, and recipients may ask Treasury for more detail about the specific requirements that apply to the particular project.

Recipients using SLFRF funds for Surface Transportation projects under Pathway Two must meet the relevant requirements outlined above, which will depend on the project type and whether the project ordinarily would be overseen by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), Federal Railroad Administration (FRA), or other relevant DOT administrations. For example, for projects that ordinarily would be overseen by FHWA, applicable Federal laws include those set forth in title 23 of the U.S. Code, chapters 141 and 145 of title 40 of the U.S. Code (if undertaking a project related to the completion of a designated route of the Appalachian Development Highway System), chapter 67 of title 49 of the U.S. Code (if undertaking a project related to national culvert removal, replacement, or restoration), and applicable regulations.[124] For projects that ordinarily would be overseen by the FTA, applicable Federal laws include the requirements of chapters 53, 55, and 67 of title 49 of the U.S. Code and chapter VI of title 49 of the Code of Federal Regulations. For projects that ordinarily would be overseen by the FRA, applicable Federal laws include those described in chapters 55 and 67 and subtitle V of title 49 of the U.S. Code.

Restrictions that apply to projects regardless of the source of funds of the project apply as they would to any other project carried out by a recipient. For example, the design and construction standards set forth in 23 CFR part 625 apply to construction, reconstruction, resurfacing (except for maintenance resurfacing), restoration, or rehabilitation of a highway that is part of the national highway system, regardless of what funds are used for such activities.[125] For all of the requirements under titles 23, 40, and 49 that apply to recipients' use of funds to undertake projects under this framework, the associated DOT regulations also apply, unless Treasury states otherwise.[126]

Pathway Two: Inapplicable requirements of title 23, 40, and 49 of the U.S. Code. The Secretary has determined that certain sections of the relevant chapters of titles 23, 40, and 49 of the U.S. Code do not apply to recipients' use of SLFRF funds for Surface Transportation projects under Pathway Two when such requirements would conflict with the existing SLFRF framework or otherwise are likely to preclude recipients from exercising the additional authorities provided by the statute. For these reasons, the following types of provisions generally do not apply:

• Grant size requirements. Limitations on the size of grants that DOT can award to grantees do not apply to SLFRF recipients using funds to carry out Surface Transportation projects. For example, under the Rural Surface Transportation Grant Program, DOT generally may only award grants in amounts not less than $25 million.[127] SLFRF recipients are not subject to this funding minimum when using SLFRF funds for projects eligible under the Rural Surface Transportation Grant Program. These limitations conflict with the SLFRF statutory framework and are likely to preclude recipients from exercising the additional authorities provided by the statute: they apply by their terms to DOT rather than to recipients, and recipients have already received their SLFRF payments from Treasury. Instead, recipients are subject to the aggregate limit on the use of SLFRF for Surface Transportation projects and Title I projects discussed above. Recipients wishing to use the streamlined framework for a particular project are also limited to using $10 million of the SLFRF for such project.

• Allocation requirements that require states to distribute funds received under certain programs to their local governments or to spend funds received under certain programs for the benefit of particular areas. Treasury has determined for example, that the requirements of 23 U.S.C. 133(h) are not applicable to the SLFRF program, as they conflict with the SLFRF statutory framework and are likely to preclude certain recipients from exercising the additional authorities provided by the statute. The 2023 CAA amendments make clear that SLFRF recipients are permitted to use funds for projects carried out by the recipient itself. Furthermore, all SLFRF recipients are eligible to use their funds for Surface Transportation projects, so it is unnecessary to require states to further distribute amounts for the specific benefit of their localities that may not receive DOT funding directly. Finally, even if Treasury were to apply these allocation requirements to the SLFRF program, a state that wanted to use

[124] For an illustrative list of the other applicable laws, rules, regulations, executive orders, polices, guidelines, and requirements as they relate to a RAISE grant project overseen by the FHWA, *see https://www.transportation.gov/grants/raise/raise-fy2022-fhwa-exhibits-october-18-2022.*

[125] *See* 23 CFR 625.3(d). Application of these requirements to projects funded under the SLFRF includes the provision for determinations by the Division Administrator in certain instances as provided for by 23 CFR 625.3(e).

[126] The 2023 CAA provides that the requirements of titles 23, 40, and 49 of the U.S. Code apply to funds used for Surface Transportation projects, except as otherwise determined by the Secretary. Treasury is also applying the associated regulations because they generally inform and provide context for how to apply with the requirements set forth in the statute.

[127] *See* 23 U.S.C. 173(i).

SLFRF funds for a project eligible under a program subject to an allocation requirement could in most if not all cases avoid the requirement by citing a different program without an allocation requirement as the authority for its uses of funds.

- Non-Federal cost-share requirements. As discussed under Pathway One, titles 23, 40, and 49 include cost-share requirements that generally apply to projects under transportation programs. However, recipients using SLFRF funds for Surface Transportation projects under Pathway Two are not required to contribute cost-sharing or matching funds alongside those SLFRF funds. This approach is consistent with the way recipients spend SLFRF funds under the 2022 final rule, which does not require recipients to provide cost sharing or matching funds in order to use their SLFRF funds.[128] If Treasury were to apply cost-share requirements to the SLFRF funds used in Pathway Two, recipients would be required to source additional matching funds before being able to carry out a Surface Transportation project, which would frustrate the flexibility provided by the 2023 CAA and inhibit recipients' ability to use funds already received prior to the approaching obligation and expenditure deadlines.
- Reporting requirements that would normally apply when DOT provides funding for a project. SLFRF recipients generally are not required to report their use of SLFRF funds for a project under Pathway Two to DOT or any other agency other than Treasury. Instead, recipients are required to provide a detailed accounting of their uses of funds and report such information as Treasury shall require pursuant to section 602(d)(2) and 603(d). Treasury will amend its reporting guidance to provide reporting requirements applicable to projects conducted under Pathway Two.

Pathway Two: STIP and TIP. The statutory provisions of titles 23, 40, and 49 related to STIP and TIP inclusion, generally do not apply to SLFRF funds used for Surface Transportation projects under Pathway Two. Typically, applicants for RAISE funding need to demonstrate that a project that is required to be included in the relevant state, metropolitan, and local planning documents has been or will be included in such documents. Such local planning documents include the STIP or TIP. This requirement for inclusion in planning documents provides useful context on how specific projects fit within broader transportation investments. The requirement that certain projects be addressed in these planning documents, however, is inconsistent with the 2023 CAA amendments' provision of authority to local governments themselves to undertake Surface Transportation projects with funds on hand rather than through funding overseen by state or regional entities and therefore would likely preclude certain recipients from exercising the additional authorities provided by the statute. Accordingly, these planning requirements do not apply to recipients' use of SLFRF funds for Surface Transportation projects under Pathway Two.

However, as discussed above, requirements that apply to projects regardless of the source of funds of the project apply as they would to any other project carried out by a recipient. Pursuant to 23 CFR 450.218(h), a STIP must contain all regionally significant projects requiring an action by the FHWA or FTA despite source of funds, and must also contain (if appropriate and included in any TIPs), all regionally significant projects proposed to be funded with Federal funds, among others. [129] For this reason, if a project receiving SLFRF funds under this framework is regionally significant and requires an action by the FHWA or the FTA, it will still be required to be included in the STIP or TIP. If a project receiving SLFRF funds under this framework is included in a TIP, for informational and conformity purposes, it also may be required to be included in the STIP.

Pathway Two: Buy America Requirements. Under titles 23 and 49 of the U.S. Code, programs overseen by the FHWA, FTA, and FRA are subject to Buy America domestic content procurement preference provisions related to steel, iron, and manufactured goods. These Buy America provisions provide that DOT shall not obligate funds to carry out projects under titles 23 and 49 unless steel, iron, and manufactured products used in such project are produced in the United States.[130] Recipients generally must satisfy the Buy America requirements of titles 23, 40, and 49 of the U.S. Code when funds are used on Surface Transportation projects under Pathway Two. However, recipients are not required to satisfy the Buy America requirements in the case of Surface Transportation projects meeting the criteria for streamlined projects under Pathway Two that result in lower-risk uses of funds. Treasury expects that recipients may seek to use funds for hundreds of lower-risk projects, and application of the Buy America requirements to such a volume of projects likely would preclude recipients from carrying out such projects while meeting the statutory deadlines for obligation and expenditure of funds. Treasury expects that developing the recipient compliance process and addressing requests for waivers for potentially hundreds of lower-risk projects in time for recipients to carry out such projects while meeting the statutory deadlines for obligation and expenditure of funds could inhibit recipients' ability to use SLFRF funds in the time remaining in the program in line with the flexibility provided by the statutory framework. By contrast, Treasury expects far fewer recipients to seek to use SLFRF funds for higher-risk projects involving greater complexity, in light of the approaching obligation deadline of December 31, 2024, and expenditure deadline of September 30, 2026. The Buy America requirements apply to Surface Transportation projects that do not meet the criteria, and Treasury will work with recipients seeking to fund projects outside of the streamlined framework, as discussed further above.

Pathway Two: Projects that demonstrate progress towards a state of good repair or support achieving performance targets. Consistent with the requirements applicable to Pathway One, states using SLFRF funds under Pathway Two for Surface Transportation projects eligible under title 23 of the U.S. Code, or that otherwise would be subject to the requirements of title 23, must either demonstrate progress in achieving a state of good repair or support the achievement of one or more performance targets. This requirement would not apply when states use SLFRF funds for Surface Transportation projects eligible under programs authorized by laws outside of title 23 of the U.S. Code, for the reasons discussed above.

[128] *See* section 7 of the SLFRF Award Terms and Conditions.

[129] ''Regionally significant project'' is defined in 23 CFR 450.104 to mean ''a transportation project . . . that is on a facility that serves regional transportation needs (such as access to and from the area outside the region; major activity centers in the region; major planned developments such as new retail malls, sports complexes, or employment centers; or transportation terminals) and would normally be included in the modeling of the metropolitan area's transportation network. At a minimum, this includes all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.''

[130] *See* 23 U.S.C. 313 for FHWA, 49 U.S.C. 5323 for FTA, and 49 U.S.C. 22905(a) and 49 U.S.C. 24395 for FRA.

Pathway Two: Limitations on Operating Expenses. Consistent with the requirements described in Pathway One, recipients may not use SLFRF funds under this pathway for operating expenses in projects that would be eligible under Urbanized Formula Grants, Fixed Guideway Capital Investment Grants, Formula Grants for Rural Areas, State of Good Repair Grants, or Grants for Buses and Bus Facilities. For this purpose, operating expenses do not include preventive maintenance activities. Public transportation projects eligible under chapter 53 of title 49 of the U.S. Code are eligible projects under the RAISE grant program and therefore are available for SLFRF recipients to pursue under Pathway Two, pursuant to other requirements as outlined above. Given the statutory limitation on using SLFRF funds for operating expenses on projects eligible under the above-mentioned programs, such limits also apply to projects eligible under the programs with statutory limitations on using SLFRF funds for operating expenses that recipients may pursue under Pathway Two. This limitation does not apply to other Surface Transportation projects under Pathway Two or to other uses of SLFRF funds, including under the revenue loss eligible use category.

e. Pathway Three: Non-Federal Share Requirements for Certain Surface Transportation Projects

This section discusses the third pathway for using SLFRF funds for Surface Transportation projects. Sections 602(c)(5)(A) and 603(c)(6)(A) of the Social Security Act provide that SLFRF funds may be used to satisfy non-Federal share requirements for projects eligible under INFRA Grants (23 U.S.C. 117), Fixed Guideway Capital Investment Grants (49 U.S.C. 5309), or Mega Grants (49 U.S.C. 6701), as well as projects eligible for credit assistance under the TIFIA program (23 U.S.C. chapter 6). Recipients may also use SLFRF funds to repay a loan provided under the TIFIA program. These eligible activities are referred to as Pathway Three.

Recipients may use SLFRF funds under Pathway Three for projects that have, or will prior to the SLFRF obligation deadline, receive funding from DOT under one of the above-referenced programs. Recipients must comply with the requirement that they may only use the greater of 30% of their award and $10 million for Surface Transportation projects and Title I projects, taken together. Recipients using SLFRF funds under Pathway Three must also comply with the requirement that SLFRF funds supplement and not supplant other funds, described earlier in this interim final rule.

As discussed above, the requirements of titles 23, 40, and 49 of the U.S. Code include cost-share requirements that generally apply to projects under transportation programs, and these requirements apply to the use of SLFRF for Surface Transportation projects. However, given the specific provision in sections 602(c)(5)(A) and 603(c)(6)(A) of the Social Security Act that SLFRF may be used to meet the non-Federal share requirements of the three programs referenced above, if a recipient uses SLFRF funds to satisfy the non-Federal share requirements for projects eligible under one of those programs, DOT will not treat the SLFRF funds as Federal funds for this limited purpose and will credit SLFRF toward applicable cost-share or non-Federal match requirements accordingly. For example, under the INFRA program, Federal funds other than the participating DOT funds generally do not satisfy non-Federal cost share requirements, and Federal funds together must contribute not more than 80% of a project's costs. SLFRF funds used to cover the applicable non-Federal cost share requirements of a project under Pathway Three will not be treated as Federal funds and therefore are not considered against the 80% limit on Federal funding sources. Recipients using SLFRF funds to satisfy non-Federal cost share requirements under Pathway Three must consult with DOT to understand the applicable non-Federal cost share requirements and how SLFRF funds may be used for these purposes.

Although the statute expressly permits recipients to use SLFRF funds to satisfy non-Federal cost share requirements for the above-referenced programs, as with any use of funds to meet non-Federal cost share requirements, the requirements associated with the project, as administered by DOT, continue to apply to the use of all the funding for the project unless otherwise provided by DOT.

Under Pathway Three, recipients will be required to comply with the relevant existing DOT reporting requirements associated with the Surface Transportation project for which they are using SLFRF funds for non-Federal share requirements. Recipients will be required to report certain information to Treasury, including the amount of SLFRF funds directed toward Surface Transportation projects and Title I projects, to ensure that recipients comply with the cap on funds associated with these eligible use categories.

As discussed in the 2022 final rule, recipients may continue to use SLFRF funds available under the revenue loss eligible use category to satisfy non-Federal matching requirements. See the 2022 final rule for further information.

Question 1: What, if any, additional clarification should Treasury provide as relates to determining whether Surface Transportation projects are eligible uses of the SLFRF?

Question 2: What additional information or clarification is needed for recipients to understand the applicable program requirements for Pathway One for Surface Transportation projects?

Question 3: What are the advantages and disadvantages of the eligibility criteria for the streamlined framework outlined in Pathway Two? Do these criteria adequately account for project risk in a manner that is both accurate and administrable? Why or why not?

Question 4: What additional information or clarification is needed for recipients to understand the applicable program requirements for Pathway Two?

Question 5: With respect to Pathway Two, what information should Treasury consider in developing the framework for projects outside the streamlined framework, in addition to the information that recipients will provide in the notices of intent? What types of projects do recipients intend to pursue under Pathway Two that would not be covered by the streamlined approach?

2. Title I Projects

Background

The 2023 CAA amends sections 602 and 603 of the Social Security Act to permit recipients to use SLFRF funds for certain infrastructure projects, including projects eligible under Title I of the Housing and Community Development Act of 1974 (Title I projects).[131] As described earlier in this interim final rule, recipients may only use the greater of 30% of their SLFRF award and $10 million, not to exceed a recipient's allocation, for all Surface Transportation projects (described in the prior section) and Title I projects (described in this section) taken together.

In title I of the HCDA (Title I), Congress consolidated several complex and overlapping Federal assistance programs focused on community development into a more flexible block of funds distributed through a formula

[131] *See* 42 U.S.C. 5301 *et seq.*

allocation, known as the Community Development Block Grant (CDBG) and administered by the Department of Housing and Urban Development (HUD).[132] Annual allocations through the CDBG program are based on population and various other measures, including poverty, age of housing, and housing overcrowding.[133] CDBG funds are available to states and units of general local government (cities and counties); Tribal governments are eligible for Indian CDBG (ICDBG) grants that are awarded on a mainly competitive basis in the form of single purpose grants, and occasionally on a noncompetitive, first-come first-served basis to alleviate imminent threats to public health or safety.[134]

There are varied ways that different government entities may be eligible for CDBG.[135] To reflect the structure of the SLFRF program, under which each recipient received an individual award from Treasury and expends funds on its own behalf, Treasury's implementation of the Title I eligible use category for non-Tribal recipients aligns to HUD's treatment of entitlement grants under CDBG. For Tribal governments using SLFRF funds under the Title I eligible use category, Treasury's implementation generally reflects HUD's treatment of Tribal government grantees under ICDBG single purpose grants, as further described below.

As discussed in the 2022 final rule, various types of activities that are eligible under the CDBG program are also eligible uses of the SLFRF program under the public health and negative economic impacts eligible use category, including homeownership assistance, investing in affordable housing preservation and repairs, and rehabilitation or demolition of blighted or abandoned properties. As noted above, the 2023 CAA did not alter the existing four eligible use categories under the SLFRF program, and the eligible uses articulated in the 2022 final rule in the public health and negative economic impacts eligible use category remain unchanged. As such, recipients wishing to pursue these types of projects with SLFRF funds may want to continue doing so under the public health and negative economic impacts eligible use category rather than complying with the additional requirements of the new Title I projects eligible use category.

The new Title I projects eligible use category makes additional activities available to SLFRF recipients, up to the cap on funds for this eligible use category. As described in the section titled Use of Funds to Satisfy Non-Federal Share Requirements, this includes using SLFRF funds for non-Federal match or cost-share requirements of a Federal financial assistance program in support of activities that would be eligible under Title I.[136] By permitting state, local, and Tribal governments to use SLFRF funds for Title I projects, the statute provides additional flexibility for recipients to use SLFRF funds to meet the needs of their communities and provides clarity for recipients that may already have experience pursuing projects under Title I. The Title I requirements for programs administered by HUD are already familiar to many SLFRF recipients, which will help state, local, and Tribal governments to supplement funding more easily for existing projects under Title I or to pursue new projects using a familiar set of program requirements. Below, this interim final rule discusses eligible projects and applicable requirements for the Title I eligible use category.

Unlike Pathway Two for Surface Transportation projects, discussed in the previous section, the interim final rule does not provide a ''streamlined framework'' for Title I projects. Title I projects differ from Surface Transportation projects in several meaningful ways. First, as discussed above, the project approval and certification requirements of titles 23, 40, and 49 of the U.S. Code and title I of the HCDA generally must be satisfied prior to recipients obligating and expending funds on Surface Transportation projects and Title I projects. However, under CDBG, there is no formal approval on a project-by project-basis by HUD other than in the case of projects subject to certain environmental reviews.[137] Accordingly, it is more feasible for recipients to determine to use SLFRF funds for Title I projects, to submit required environmental information prior to undertaking projects, and to obtain Treasury approval, all in time for the 2024 obligation and 2026 expenditure deadlines, even if a large number of SLFRF recipients decide to spend funds under this eligible use category. Second, as mentioned above, many of the eligible activities under Title I projects are already available to SLFRF recipients under the public health and negative economic impacts eligible use category, including using funds for capital expenditures, for which recipients are able to use their full SLFRF award toward eligible uses and are not subject to the limitations discussed in this section. In the case of Surface Transportation projects, recipients are only able to undertake similar activities as a government service through the revenue loss eligible use category. For these reasons, Treasury anticipates that recipients will undertake fewer projects under the Title I projects eligible use category.

Prohibition on Supplanting Other Funds. The 2023 CAA provides that funds used for Title I projects shall ''supplement, and not supplant, other Federal, State, territorial, Tribal, and local government funds (as applicable) otherwise available for such uses.'' The phrase ''other . . . funds available for such uses'' refers to (i) in the case of non-Federal funds, non-SLFRF funds that have been obligated for specific uses that are eligible under the Title I eligible use category or (ii) in the case of Federal funds, funds that a Federal agency has committed to a particular project pursuant to an award agreement or otherwise.

Under prong (i), for the purpose of identifying non-Federal funds that have been obligated for specific uses, the definition of ''obligation'' used in the 2022 final rule applies, which is ''an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment.'' [138] As such, under prong (i),

[132] *See* 42 U.S.C. 5301.

[133] *See* 42 U.S.C. 5306.

[134] *See* 24 CFR 1003.100(a).

[135] HUD's implementation of CDBG varies based on the type of CDBG grantees, with specific treatment for entitlement grants (including metropolitan city and urban county grantees), nonentitlement funds (including HUD-administered Small Cities and Insular Area programs), and state-administered CDBG nonentitlement funds. For example, in the state CDBG program, a state's primary function is to administer CDBG grants for non-entitlement units of government, rather than to undertake eligible activities as grantees themselves. Meanwhile, entitlement grantees of CDBG are able to expend their CDBG allocations directly and without being subject to certain limitations that exist under the state CDBG program.

[136] SLFRF funds also remain available under the revenue loss eligible use category up to the amount of revenue lost due to the pandemic for the provision of government services. As described in the 2022 final rule, the provision of government services means any service traditionally provided by a government, which means that recipients could also choose to use SLFRF funds in the revenue loss eligible use category for community development activities.

[137] While CDBG activities are outlined in planning documents submitted to HUD, these planning documents cover a grantee's programmatic plans for all HUD awards (not just those authorized under Title I) on an annual basis with respect to action plans and a multi-year basis with respect to consolidated plans. Based on the structure of the SLFRF program, certification and approval requirements associated with these plans are irrelevant for the SLFRF program. In any event, HUD does not affirmatively approve CDBG grantees' planning documents, but the agency may disapprove plans as necessary.

[138] See Final Rule FAQ 13.17 for additional information about obligations. This approach

a recipient may not de-obligate funds that were obligated for specific uses that are eligible under this section (*e.g.,* by cancelling, amending, renegotiating, or otherwise revising or abrogating a contract, subaward, or similar transaction that requires payment) and replace those previously obligated funds with SLFRF funds under this eligible use category.

The restriction in prong (ii), on replacing funds that a Federal agency has committed to a particular project pursuant to an award agreement or otherwise, applies to all funding sources covered by the commitment. Prong (ii) does not apply to HUD funds provided to a CDBG grantee for activities included in its annual action plan, because imposition of this restriction would be inconsistent with the substantial flexibility that the CDBG program otherwise provides its grantees. For example, a CDBG grantee's annual action plan reflects planned spending on activities across multiple HUD-administered programs, and grantees have significant flexibility to amend plans to reflect adjusted planned spending throughout the year.

Thus, a recipient may not de-obligate funds and replace those previously obligated funds with SLFRF funds under this eligible use category. Nor may a recipient use SLFRF funds to replace Federal or non-Federal funds identified in a Federal commitment, such as an award agreement.

However, a recipient may use SLFRF funds (1) to provide additional funding to a project without reducing the amount of other funds obligated to such project, thereby funding additional activities or expanding the scope of projects; (2) to undertake a project for which funds have not been previously obligated or identified in a Federal commitment, such as an award agreement. For example, if a recipient had obligated non-SLFRF funds for the construction of a community garden, SLFRF funds under this eligible use category could be used to provide additional resources to that project or to undertake a separate eligible project, but the recipient could not terminate or renegotiate an existing contract for the construction of that garden and use SLFRF funds to replace the funds previously obligated for that purpose. SLFRF recipients that are also CDBG grantees (but not ICDBG grantees) should note that HUD program requirements related to timely expenditures of CDBG funds—providing that ''a grantee cannot have more than 1.5 times their annual allocation sitting in their line of credit at the U.S. Treasury''—continue to apply to CDBG funds.[139] Accordingly, Treasury encourages SLFRF recipients that are also CDBG grantees to continue to spend their CDBG funds in compliance with such requirements.

a. Eligible Title I Projects

Recipients may use SLFRF funds for Title I projects, which includes any projects that are currently eligible activities, programs, and projects under CDBG and ICDBG, as described further below. Principally, Title I authorizes CDBG and ICDBG, as well as several other grant programs with largely overlapping eligible activities as CDBG.[140] As discussed below, grants made under these other Title I programs do not cover eligible activities incremental to what is allowable under CDBG and ICDBG, and thus their incorporation here would not make any additional eligible uses under Title I available to SLFRF recipients.

In the Title I eligible use category, recipients may use SLFRF funds for any of the activities listed in section 105(a) of the HCDA (42 U.S.C. 5305(a)). When carrying out these activities, recipients should comply with the related eligibility requirements set forth at 24 CFR 570.201–570.209 with respect to recipients that are not Tribal governments and 24 CFR 1003.201–1003.209 with respect to Tribal governments. Recipients may refer to additional HUD guidance for further information about the projects eligible under CDBG, including guidance about complying with the national objectives and other program requirements.[141] Below is an illustrative list of Title I projects for which recipients may use SLFRF funds pursuant to section 105(a) of the HCDA:

- Acquisition of certain real property for a public purpose, subject to certain limitations;
- Disposition of certain property, subject to certain limitations and rules;
- Acquisition, construction, reconstruction, rehabilitation, or installation of public facilities and improvements, clearance and remediation activities;
- Public services, subject to the limitation discussed below;
- Interim assistance where immediate action is required for certain activities such as street repair, and costs to complete an urban renewal project under Title I;
- Relocation payments for relocated families, businesses, nonprofit organizations, and farm operations, under certain conditions;
- Payments to housing owners for loss of certain rental income;
- Certain housing services;
- Acquisition, construction, reconstruction, rehabilitation, or installation of privately owned utilities;
- Rehabilitation and reconstruction of housing, conversion of structures to housing, or construction of certain housing;
- Homeownership assistance;
- Technical assistance to entities to increase capacity to carry out CDBG-eligible projects;
- Assistance to certain institutions of higher education to carry out eligible activities;
- Administration activities including general management, oversight, and coordination costs, fair housing activities, indirect costs, and submission of applications for Federal programs;
- Planning activities including the development of plans and studies, policy planning, and management and capacity building activities; and
- Satisfying the non-Federal share requirements of a Federal financial assistance program in support of activities that would be eligible under the CDBG and ICDBG programs, as discussed below.

Use of SLFRF Funds to Satisfy Non-Federal Match of Cost-Share Requirements Under Title I. As noted above, recipients may use SLFRF funds, subject to the cap on funds for this eligible use category, to meet the non-Federal match or cost-share requirements of a Federal financial assistance program in support of activities that would be eligible under the CDBG and ICDBG programs and would comply with all applicable CDBG and ICDBG requirements. Recipients should analyze the projects and activities for which they intend to use SLFRF funds to meet non-Federal share

applies a concrete standard that is known to SLFRF recipients and administrable by Treasury.

[139] CDBG grantees have a line of credit that includes the amount of CDBG funds that are available for those grantees. According to program rules on timely expenditures, ''a grantee cannot have more than 1.5 times their annual allocation sitting in their line of credit at the U.S. Treasury.'' Moreover, if a grantee ''chronically has more than 1.5 times their allocation in their line of credit as of 60 days prior to the end of the grantee's program year, HUD can withhold future grants until the grantee effectively spends their existing resources.'' For more information, see Basically CDBG for Entitlements, Chapter 11: Financial Management, Section 11.7 (''Timely Expenditure of Funds'') (Sept. 2017), available at *https://www.hud.gov/sites/documents/DOC_16480.PDF.*

[140] *See* 42 U.S.C. 5301 *et seq.*

[141] *See e.g.,* Department of Housing and Urban Development, Guide to National Objectives and Eligible Activities for CDBG Entitlement Communities, Chapter 2: Categories of Eligible Activities (Jan. 2014), available at *https://www.hud.gov/sites/documents/DOC_17133.PDF.*

requirements to confirm that the project or activity would constitute an eligible activity under section 105 of the HCDA and would comply with HUD's statutory, regulatory, and other requirements applicable to CDBG and ICDBG activities.

As articulated in the 2022 final rule, SLFRF funds remain available under the revenue loss eligible use category to meet non-Federal matching requirements. For discussion of the use of SLFRF funds for non-Federal matching requirements under the revenue loss eligible use category or as otherwise authorized by statute, see the 2022 final rule. For discussion of the use of SLFRF funds for non-Federal matching requirements for Surface Transportation projects, see the Surface Transportation projects section.

Use of Loans and Revolving Loan Funds Towards Eligible Activities Under Title I. CDBG and ICDBG grantees generally may utilize financing vehicles such as loans and revolving loan funds to carry out eligible activities. For example, sections 105(a)(14), (22), and (25) of the HCDA provide that CDBG recipients may use their funds to provide loans or finance revolving loan funds for certain activities.[142]

Recipients using SLFRF funds for Title I projects may extend credit, by making loans using SLFRF funds or using SLFRF to establish revolving loan funds, to support activities that are eligible uses of funds under CDBG. Such activities are subject to Treasury's existing guidance on loans under the SLFRF program,[143] as well as Treasury's guidance on program income, in light of the nature of the SLFRF program where these funds are available for a limited time, not on a recurring basis, and subject to approaching obligation and expenditure deadlines.[144] As a reminder, extensions of credit with SLFRF funds are subject to program requirements as described in the Applicable Requirements for Title I Projects section of this interim final rule and the cap on funds that applies to this eligible use category.

Other Supplemental Assistance. From time to time, Congress appropriates additional funding for certain activities that are generally available under CDBG but are limited to addressing specific challenges that communities face. Even though these activities largely mirror those eligible under Title I, this supplemental assistance is not authorized under Title I. Accordingly, they are not separately eligible categories of activities under Title I for purposes of the SLFRF program. For example, recipients may be familiar with CDBG-Disaster Recovery (CDBG–DR) and CDBG-Mitigation (CDBG–MIT). These forms of supplemental assistance appropriate emergency supplemental funds on a case-by-case basis for specific disasters and permit recipients, in addition to their regular CDBG credit line or ICDBG grants, to spend funds on certain eligible activities related to disaster relief, long-term recovery, restoration of housing and infrastructure, economic revitalization and mitigation. When additional funds are appropriated through CDBG–DR or CDBG–MIT, HUD is typically granted authority to grant waivers and impose alternative requirements to those existing Title I requirements that govern the CDBG and ICDBG programs. Such waivers or alternative requirements are not applicable to this eligible use category, as this supplemental assistance is not a project under Title I and such authority is not provided for in the HCDA, but rather in the individual CDBG–DR or CDBG–MIT appropriations.

Nonetheless, recipients considering using SLFRF funds to respond to both the near- and long-term consequences of disasters are reminded that the eligible activities under section 105 of Title I are very flexible and may address certain disaster relief and disaster mitigation needs. Accordingly, SLFRF recipients may pursue such activities under the Title I projects eligible use as long as all requirements are met. In addition, recipients may provide emergency relief from the physical and negative economic impacts of natural disasters, including mitigation activities, through the eligible use category discussed in the section titled Emergency Relief from Natural Disasters of this interim final rule.

Other Title I Programs Not Available Under the SLFRF Program. Certain sections of Title I authorize HUD to make grants and loans to governments under different programs in addition to CDBG. These programs are listed below and, other than the section 108 Loan Guarantee program, are considered inactive by HUD:

- Special Purpose Grants [145]
- Urban Development Action Grant Program [146]
- John Heinz Neighborhood Development Program [147]
- Section 108 Loan Guarantee Program [148]

While the 2023 CAA amended the SLFRF program to permit recipients to use SLFRF funds for Title I projects, some of these programs address HUD's programmatic authorities rather than expanding eligible uses available to HUD grantees. Therefore, these programs are not relevant for purposes of implementing this Title I eligible use under the SLFRF program. For example, Special Purpose Grants are competitively awarded by HUD to the same recipients as CDBG and ICDBG, as well as an expanded set of recipient types (*e.g.,* Historically Black Colleges and Universities as direct recipients of grants) to undertake certain of the activities available under CDBG. This program expands HUD's grantmaking authority rather than expanding eligible uses available to grantees under Title I, and therefore is not included as a new eligible project under the SLFRF program. Similarly, the John Heinz Neighborhood Development Program authorizes HUD to provide Federal matching funds to eligible neighborhood development organizations on a competitive basis, expanding the entities to which HUD may award grants rather than expanding eligible uses for Title I grantees.

Similarly, the Section 108 Loan Guarantee Program authorizes HUD to provide loan guarantees to recipients of CDBG, as opposed to authorizing an eligible activity by grantees themselves.[149] The Urban Development Action Grant program authorizes HUD to issue grants to cities and urban counties experiencing severe economic distress to help stimulate economic development activity needed to aid in economic recovery by undertaking eligible activities under CDBG, as enumerated under section 105(a) of the HCDA.[150] Both of these programs address HUD's programmatic authority and do not provide HUD grantees eligible activities beyond those already available under CDBG and ICDBG, and therefore these programs are not relevant for purposes of implementing this Title I eligible use under the SLFRF program.

Additionally, HUD can award imminent threat grants under ICDBG to Tribal governments. Imminent threat grants alleviate an imminent threat to public health or safety that requires immediate resolution and are awarded only after the HUD Office of Native American Programs determines that

[142] *See* 42 U.S.C. 5305(a).

[143] *See id.*

[144] *See* id. at FAQ 13.11. How does Treasury treat program income?

[145] *See* 42 U.S.C. 5307.

[146] *See* 42 U.S.C. 5318.

[147] *See* 42 U.S.C. 5318a.

[148] *See* 42 U.S.C. 5308.

[149] *See* 42 U.S.C. 5308.

[150] *See* 42 U.S.C. 5318.

such conditions exist and if funds are available for such grants.[151] Grants made under this program do not authorize eligible activities incremental to what is allowable under ICDBG single purpose grants, and thus their incorporation here would not make any additional eligible uses under Title I available to SLFRF recipients. Accordingly, imminent threat grants are not separately eligible as Title I projects. Given the eligible activities available to ICDBG grantees under imminent threat grants are the same as are available under single purpose grants, Tribal government recipients of SLFRF are still able to use SLFRF funds for projects they generally could fund with ICDBG imminent threat grants under the Title I projects eligible use category. As described further below, the applicability of program requirements for Tribal governments will mirror the program requirements grantees comply with under ICDBG single purpose grants. As noted above, recipients may provide emergency relief from the physical and negative economic impacts of natural disasters, including mitigation activities, through the eligible use category discussed in the section titled Emergency Relief from Natural Disasters of this interim final rule.

Ineligible Activities Under Title I. The HUD regulations implementing the eligible activities under CDBG and ICDBG provide that certain projects are generally not eligible CDBG activities, and accordingly, SLFRF recipients may not use SLFRF funds for those projects.[152] The activities that are generally ineligible under CDBG and ICDBG are the following, subject to certain exceptions as described more fully at 24 CFR 570.207 with respect to SLFRF recipients that are not Tribal governments and 24 CFR 1003.207 with respect to Tribal government recipients:

- Buildings or portions thereof used for the general conduct of government
- General government expenses
- Political activities
- Purchase of equipment
- Operating and maintenance expenses
- New housing construction
- Income payments

Recipients may reference the ''Activities Specified as Ineligible'' section of HUD's Guide to National Objectives and Eligible Activities for CDBG Entitlement Communities for more information.[153] However, while the projects listed above are not eligible uses of SLFRF funds as a Title I project, they still may be eligible uses of SLFRF funds under other SLFRF eligible use categories. See the 2022 final rule for additional information. As with all other eligible uses in the SLFRF program, the general restrictions on use outlined in the 2022 final rule apply to SLFRF funds used for Title I projects, unless the applicable requirements of Title I provide otherwise.

b. Applicable Requirements for Title I Projects

Recipients using SLFRF funds for Title I projects must comply with certain requirements and restrictions. These requirements and restrictions are in addition to the eligibility requirements discussed above. As described earlier in this interim final rule, recipients may only use the greater of 30% of their award and $10 million (not to exceed their award) for Title I projects (described in this section) and Surface Transportation projects (described above), taken together. Also as described earlier in this interim final rule, for Title I projects, recipients must obligate funds by December 31, 2024 and expend funds by September 30, 2026. In the section that follows, this interim final rule describes how the requirements of Title I, NEPA, and the associated implementing regulations apply to SLFRF funds used for Title I projects.

The 2023 CAA provides that, except as otherwise determined by the Secretary, the requirements of Title I and NEPA apply to SLFRF funds used for Title I projects. Accordingly, state, local, and Tribal governments that use SLFRF funds for Title I projects generally must comply with Title I requirements and the associated regulations, except where noted below.[154] In addition, recipients must comply with NEPA requirements, as implemented by Title I and the associated HUD regulations, and as adapted to the SLFRF program by Treasury. Unless Title I provides otherwise or Treasury has otherwise clarified, SLFRF recipients should continue to comply with SLFRF regulations and guidance as found in the 2022 final rule, SLFRF Compliance and Reporting Guidance, and other guidance released by Treasury for SLFRF. In the section that follows, this interim final rule discusses the requirements of Title I that apply to recipients using SLFRF funds under this eligible use category and the requirements of Title I that do not apply to recipients using SLFRF funds under this eligible use category.

Treasury has determined not to apply certain requirements of Title I when such requirements conflict with the existing SLFRF framework or otherwise are likely to preclude recipients from exercising the additional authorities provided by the statute. For example, and as discussed above, Treasury determined that the project-level approval and certification requirements generally must be satisfied prior to recipients obligating and expending funds on Title I projects. Under CDBG, while projects are outlined in planning documents submitted to HUD, there is no formal approval on a project-by project-basis by HUD other than projects subject to certain environmental reviews.[155] Accordingly, only these project-level requirements must be satisfied, as described further below. On the other hand, recipients are not required to provide the Title I certification requirements that apply at the consolidated and annual planning level, because that level of planning and the associated certifications conflict with the SLFRF program framework under which recipients already have funds in hand and are authorized to use funds for discrete projects, rather than being required to design an annual process for how funding will be used. Furthermore, to require recipients to prepare consolidated and annual plans and undergo a public review process likely would preclude recipients from exercising the additional authorities provided by the statute, under which recipients have limited time remaining to determine how to obligate and expend funds. In contrast, certain of the applicable requirements discussed below also would apply at the aggregate CDBG funding level, like the primary objective, but those requirements are more readily adaptable as project-level requirements, consistent with the SLFRF framework, and Treasury has taken that approach as described further below. The requirements of Title I generally apply to recipients using SLFRF funds for Title I projects, with some modification to harmonize the provisions with the SLFRF framework, as discussed further below. The statutory requirements include the following:

[151] *See* 24 CFR 1003.100(a).

[152] *See* 24 CFR 570.207 and 1003.207.

[153] *See e.g.,* Department of Housing and Urban Development, Guide to National Objectives and Eligible Activities for CDBG Entitlement Communities, Chapter 2: Categories of Eligible Activities, 2–87 (Jan. 2014), available at *https://www.hud.gov/sites/documents/DOC_17133.PDF.*

[154] Treasury is applying the regulations associated with the applicable provisions of Title I because they generally inform and provide context for how to apply with the requirements set forth in the statute.

[155] *See* 42 U.S.C. 5304(g) and 24 CFR part 58.

- Activity eligibility requirements, including the following requirements articulated in section 105 of the HCDA:
  - CDBG Primary Objective requirement
  - CDBG National Objectives requirement
  - Public Services Cap
- Definitions relevant for project administration, oversight, and execution
- Procurement requirements
- Wage and labor requirements
- Environmental requirements and related project approval requirements (environmental certifications)

For each of the applicable requirements, the associated HUD regulations generally will apply as well. Specifically, HUD regulations related to these requirements apply where they:

- Enumerate and clarify eligible activities under CDBG
- Specify cost caps or the method to calculate costs caps
- Direct recipients to the applicability of other Federal laws and regulations

CDBG Primary Objective. Section 101(c) of the HCDA describes the ''primary objective'' of Title I as ''the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.'' [156] Section 101(c) of the HCDA further provides that not less than 70% of the aggregate funds provided to non-Tribal CDBG grantees under section 106 of the HCDA shall be used for the support of activities that benefit persons of low and moderate income. Under ICDBG, Tribal governments must use not less than 70% of each single purpose grant to principally benefit low- and moderate-income persons.[157] This 70% threshold requirement is referred to as the ''primary objective'' requirement.

Section 102(a)(20) of the HCDA defines low- and moderate-income persons to mean families and individuals whose incomes do not exceed 80% of median income of the area involved, based on data published most recently by HUD, with adjustments for smaller and larger families; [158] it also authorizes HUD to establish income thresholds that are higher or lower because of unusually high or low incomes in such area.[159] HUD regulations for CDBG grantees implement the statutory definition by aligning low- and moderate-income designations for CDBG activities to Section 8's very low- and low-income thresholds respectively,[160] which HUD publishes annually.[161] CDBG grantees are then required to comply with the requirements of 24 CFR 570.200(a)(3) and its cross-referenced provisions to determine compliance with the primary objective, including requirements associated with area benefit activities, limited clientele activities, housing activities, and job creation or retention activities.

With respect to Tribal governments, HUD awards ICDBG single-purpose grants on a competitive basis and determines that an applicant sufficiently addresses the primary objective based, in part, on data made available by the Federal government, including HUD, and on data provided by Tribes. Specifically, HUD regulations for ICDBG grantees implement the statutory definition of low- and moderate-income persons by defining a ''low and moderate income beneficiary'' as a family, household, or individual whose income does not exceed 80 percent of the median income for the area, as determined by HUD, with adjustments for smaller and larger households or families.[162] The regulations permit HUD to adjust the ceiling based on HUD's findings that such variations are necessary because of unusually high or low household or family incomes. ICDBG grantees then follow the provisions of 24 CFR 1003.208 to determine compliance with the primary objective, including requirements associated with area benefit activities, limited clientele activities, housing activities, and job creation or retention activities. In each of these activity areas, the regulations provide criteria for the activity to be considered to benefit low- and moderate-income persons. In some instances, the criteria rely on Census Bureau data or instead Tribes may provide survey data.[163]

Under the HUD CDBG regulations, non-Tribal CDBG grantees may elect to apply the 70% requirement to their CDBG funds expended over a 1-, 2-, or 3-year period, and a majority of these CDBG grantees elect a 3-year period. For example, a non-Tribal CDBG grantee that elects a 3-year period must use at least 70% of its CDBG funds over that 3-year period to principally benefit low- and moderate-income persons. For ICDBG grants, the 70% requirement applies to each single purpose grant.[164]

Treasury is implementing the primary objective requirement by requiring recipients to direct at least 70% of their SLFRF funds used for Title I projects over the course of the SLFRF program to projects that principally benefit low- and moderate-income persons. Non-Tribal recipients must refer to low- and moderate-income thresholds as defined by HUD regulations at 24 CFR 570.3, which align such income thresholds to data published most recently by HUD for Section 8 low- and very low-income levels. To determine if an activity principally benefits low- and moderate-income persons, the requirements of 24 CFR 570.200(a)(3) apply.

Tribal government recipients must refer to the low- and moderate-income thresholds as defined by HUD at 24 CFR. 1003.4, and to the requirements of 24 CFR 1003.208 to determine if an activity principally benefits low- and moderate-income persons, subject to the following clarification. Recognizing that some Tribes do not have access to the above-referenced Census Bureau data and may not have the ability to conduct a survey within the short-time frame necessary to meet SLFRF obligation deadlines, Treasury is providing an alternative to satisfy the definition of ''low and moderate income'' as part of complying with the primary objective requirement. Instead of relying on Census data, Tribal governments may demonstrate that beneficiaries of Title I assistance are low or moderate income based on an attestation by the Tribe that these beneficiaries are receiving or are eligible to receive needs-based services provided by the Tribe. Needs-based services are defined as services administered by the Tribal government on the basis of an individual's income. Tribal governments undertaking Title I projects may rely on this self-attestation, in lieu of relying on Census Bureau or Section 8 data, when complying with

[156] *See* 42 U.S.C. 5301(c).

[157] *See* 24 CFR 1003.208.

[158] *See* 42 U.S.C. 5302(a)(20)(a).

[159] *See* 42 U.S.C. 5302(a)(20)(b).

[160] *See* 24 CFR 570.3.

[161] HUD's Office of Policy Development and Research publishes annual income limits for certain housing-related programs, and develops these limits based on Median Family Income estimates and Fair Market Rent area definitions. *See https://www.huduser.gov/portal/datasets/il.html#2022_data.*

[162] *See* 24 CFR 1003.4.

[163] *See e.g.,* 24 CFR 1003.208(a)(3), which states that ''in determining whether there is a sufficiently large percentage of low- and moderate-income persons residing in the area served by an activity . . . the most recently available decennial census information shall be used to the fullest extent feasible, together with the Section 8 income limits that would have applied at the time the income information was collected by the Census Bureau. Grantees that believe that the census data does not reflect current relative income levels in an area, or where census boundaries do not coincide sufficiently well with the service area of an activity, may conduct (or have conducted) a current survey of the residents of the area to determine the percent of such persons that are low and moderate income.''

[164] *See* 24 CFR 1003.208.

the primary objective requirement. If a Tribal government prefers to demonstrate that its project satisfies the primary objective in accordance with the terms of 24 CFR 1003.4 and 1003.208, rather than providing the alternative attestation, the Tribe may do so. As described earlier in this section, recipients may use SLFRF funds to supplement, but not supplant, an existing CDBG or ICDBG project. Accordingly, where Tribal governments use SLFRF funds to supplement funds for existing ICDBG projects, the Tribal government may rely on HUD's prior determination of compliance with the requirements of 24 CFR 1003.208 for the existing project, since HUD would have already vetted the existing projects during the ICDBG application process.

As discussed in the 2021 interim final rule, many Tribal communities have households with a wide range of income levels due in part to non-Tribal member, high income residents living in the community.[165] Further, mixed income communities, with a significant share of Tribal members at the lowest levels of income, are often not included in eligible qualified census tracts. Additionally, as discussed in the 2022 final rule, Tribal governments may face administrability challenges with operationalizing an income-based standard, and data on incomes of Tribal members in a respective Tribe is not readily available as presently this data is not collected at the Tribal membership level.[166]

For these reasons, using decennial Census Bureau data in determining if an activity benefits low- and moderate-income beneficiaries as described in 24 CFR 1003.208(a)(3) would present similar challenges for many of the SLFRF Tribal government recipients, where location-based Census data may inaccurately portray the income and economic conditions of a Tribe. Additionally, requiring Tribes to conduct and provide survey data on residents of their areas would frustrate their ability to utilize SLFRF funds for Title I projects within the obligation and expenditure timelines provided by the 2023 CAA. If a Tribe delivers needs-based services (*e.g.,* housing services, child assistance, etc.), the Tribe generally also has verified income eligibility of the recipients of those services, as Tribes ordinarily restrict eligibility for these activities based on the income of applicants.

The total amount of SLFRF funds used for Title I projects from the cost incurred date of December 29, 2022 through September 30, 2026 must meet the primary objective requirements as described above. By applying these requirements over the course of the SLFRF program, this interim final rule aligns CDBG primary objective compliance for SLFRF funds used for Title I projects with the obligation and expenditure deadlines on SLFRF funds in general. Although CDBG state and local government grantees have the option to elect their own 1-, 2-, or 3-year reporting periods, and ICDBG Tribal grantees apply the CDBG primary objective requirement for their specific grant allocations, SLFRF recipients are not required to obligate or expend SLFRF funds on an annual basis and instead must comply with obligation and expenditure deadlines over the full period of performance, with flexibility to adjust and add programs prior to the obligation deadline. This alignment makes the CDBG primary objective requirement administrable by SLFRF recipients over the SLFRF period of performance and coordinates related reporting with SLFRF program closeout timelines. Recipients may reference Chapter 4 of HUD's Guide to National Objectives and Eligible Activities for CDBG Entitlement Communities for more details on how to satisfy the primary objective requirement with their funds. Recipients' use of SLFRF funds for Title I projects and their compliance with the primary objective will be assessed separately from HUD's assessment of CDBG grantees' compliance with requirements for use of their CDBG funds.

CDBG National Objectives. In addition to describing the CDBG primary objective requirement, section 101(c) of the HCDA also provides that states and units of general local governments may only use CDBG funds for the support of community development activities that are directed toward certain specific objectives, which are referred to as the national objectives. HUD regulations provide that the national objectives of the CDBG program are to:

- Benefit low- and moderate-income persons,
- Prevent or eliminate slums or blight, and
- Meet other community development needs having a particular urgency because existing conditions pose a serious and immediate threat to the health or welfare of the community and other financial resources are not available to meet such needs.[167]

ICDBG grantees administering single purpose grants are not subject to the same requirement that activities must align with at least one national objective. As discussed above, Tribal governments administering an ICDBG single purpose grant must use at least 70% of each grant to principally benefit low- and moderate-income persons, but otherwise may use their ICDBG grant aligned to purposes as approved in their ICDBG application.[168]

Treasury is implementing the national objectives requirement by providing that for non-Tribal SLFRF recipients, each Title I project funded by SLFRF funds must satisfy at least one CDBG national objective in accordance with relevant HUD regulations set forth at 24 CFR 570.208.[169] Thus all recipients, except for Tribal governments, using SLFRF funds for Title I projects must meet at least one national objective as described above, and compliance with this requirement will be assessed separately from existing CDBG national objectives requirements applicable to CDBG grantees. Tribal government recipients that use SLFRF funds for Title I projects are not subject to this requirement, reflecting that there is no requirement for Tribal government grantees under ICDBG to use their funds for any specific national objective outside of the primary objective. For more information on the CDBG national objectives, see Chapter 3 of HUD's Guide to National Objectives and Eligible Activities for CDBG Entitlement Communities.[170]

Applicability of Public Services Cap. Section 105(a)(8) of the HCDA provides that the provision of public services is an eligible activity under Title I[171] but that not more than 15% of a grantee's

[165] *See* 86 FR 26786 (May 17, 2021).

[166] For instance, data from the American Community Survey is based on geographical location rather than Tribal membership. U.S. Census Bureau, My Tribal Area, *https://www.census.gov/Tribal/Tribal_glossary.php.*

[167] *See* 24 CFR 570.208(a)–570.208(c) and Department of Housing and Urban Development, Guide to National Objectives and Eligible Activities for CDBG Entitlement Communities, Chapter 3: Meeting a National Objective (Jan. 2014), available at *https://www.hudexchange.info/sites/onecpd/assets/File/CDBG-National-Objectives-Eligible-Activities-Chapter-3.pdf.*

[168] *See* 24 CFR 1003.208.

[169] *See* CFR 570.208 and Department of Housing and Urban Development, Guide to National Objectives and Eligible Activities for CDBG Entitlement Communities, Chapter 2: Categories of Eligible Activities (Jan. 2014), available at *https://www.hudexchange.info/sites/onecpd/assets/File/CDBG-National-Objectives-Eligible-Activities-Chapter-2.pdf.*

[170] *See* Department of Housing and Urban Development, Guide to National Objectives and Eligible Activities for CDBG Entitlement Communities, Chapter 3: Meeting a National Objective (Jan. 2014), available at *https://www.hudexchange.info/sites/onecpd/assets/File/CDBG-National-Objectives-Eligible-Activities-Chapter-3.pdf.*

[171] *See* 42 U.S.C. 5305(a)(8).

CDBG allocation may be spent on eligible ''public services'' activities.[172] This 15% public services cap is applied annually to CDBG grantees and on a grant-by-grant basis for ICDBG grantees.

Treasury is implementing this requirement by providing that not more than 15% of SLFRF funds used for Title I projects over the course of the SLFRF program may be spent under the ''public services'' category, in accordance with relevant HUD regulations set forth at 24 CFR 570.201(e) for non-Tribal recipients and at 24 CFR 1003.201(e) for Tribal recipients. Thus, the total amount of SLFRF funds used for Title I projects for costs incurred from December 29, 2022 through September 30, 2026 must meet the public services cap as described above, and compliance with this requirement will be assessed separately from existing CDBG and ICDBG public services cap compliance on CDBG and ICDBG grantees. The approach to align public services cap compliance to SLFRF program obligation and expenditure deadlines and the accompanying rationale mirror the approach taken for SLFRF recipients' compliance to the CDBG primary objective, as outlined earlier in this section. This alignment makes the public services cap administrable by SLFRF recipients over the SLFRF period of performance and coordinates related reporting with SLFRF program closeout timelines. For more information on activities considered public services for purposes of the 15% cap, or more information on the public services cap itself, see Chapter 7 of HUD's ''Basically CDBG'' Guide.[173]

Applicability of Planning and Administrative Costs Cap. Section 105(a)(13) of the HCDA provides that the payment of reasonable administrative costs and carrying charges related to the planning and execution of community development and housing activities is an eligible activity under Title I.[174] HUD regulations implement this provision for non-Tribal recipients at 24 CFR 570.205 and 570.206 and for Tribal recipients at 24 CFR 1003.205 and 206. In addition, HUD regulations at 24 CFR 570.200(g) provide that non-Tribal grantees may expend no more than 20% of any CDBG annual grant for planning and program administrative costs. HUD regulations for Tribal governments include the same requirement.[175] The planning and administrative cap is applied annually to CDBG grantees and on a grant-by-grant basis for ICDBG grantees.

Treasury is implementing this requirement by providing that not more than 20% of SLFRF funds used for Title I projects over the course of the SLFRF program may be spent on planning and administrative costs, in accordance with relevant HUD regulations set forth at 24 CFR 570.200(g), 570.205, and 570.206 for non-Tribal recipients and at 24 CFR 1003.205 and 1003.206 for Tribal recipients. Thus, the total amount of SLFRF funds used for Title I projects for costs incurred from December 29, 2022 through September 30, 2026 must meet the planning and administrative costs cap as described above, and compliance with this requirement will be assessed separately from existing CDBG and ICDBG planning and administrative costs cap compliance for CDBG and ICDBG grantees. As discussed above, recipients are not required to obligate or expend SLFRF funds on an annual basis and instead must comply with obligation and expenditure deadlines over the full period of performance, with flexibility to adjust and add programs prior to the obligation deadline. Accordingly, this alignment makes the planning and administrative costs cap administrable by SLFRF recipients over the SLFRF period of performance and coordinates related reporting with SLFRF program closeout timelines. For more information on activities considered planning and administrative costs for purposes of the 20% cap, or more information on the planning and administrative costs cap itself, see Chapter 11 of HUD's ''Basically CDBG'' Guide.[176]

While the 20% planning and administrative costs cap will apply to recipients using funds for Title I projects, recipients should note that the 2022 final rule provides additional flexibility for recipients to use SLFRF funds on administrative expenses. In addition to the ability to use SLFRF funds for certain types of administrative expenses under the public health and negative economic impacts eligible use category, Treasury clarified in the 2022 final rule that coverage of direct and indirect administrative expenses is a permissible use of SLFRF funds under other eligible use categories, with further detail provided in Treasury's Compliance and Reporting Guidance. As described in the 2022 final rule, recipients can also use SLFRF funds under the public health and negative economic impacts category to support a broad set of uses to restore and support public sector employment, including filling vacancies or adding additional employees up to 7.5% over pre-pandemic levels. Furthermore, recipients may use earned income from interest earned on SLFRF payments to defray administrative expenses of the program.[177] Finally, recipients may use funds under the revenue loss eligible use category for the provision of government services, which may include various activities, such as administrative expenses.

Labor Standards Requirements. Section 110 of the HCDA provides that Federal prevailing wage rate requirements in accordance with the Davis-Bacon Act and other regulations related to contractors and subcontractors per 40 U.S.C. 3145 apply to construction work financed by Title I.[178] HUD regulations and guides clarify that these labor standards include the Davis-Bacon Act, the Copeland Anti-Kickback Act, the Contract Work Hours and Safety Standards Act, and Section 3 of the Housing and Urban Development Act of 1968, and apply to CDBG projects.[179] Section 107(e)(2) of the HCDA provides the authority to waive the labor standards requirements under section 110 of the HCDA for ICDBG grants, and HUD waives applicability of such labor standards for ICDBG grantees in 24 CFR 1003.603.

Treasury is implementing this requirement by providing that prevailing wage rate requirements in accordance with the Davis-Bacon Act and other labor standards applied by HUD to construction work under Title I apply to Title I projects funded by non-Tribal recipients of the SLFRF program, in accordance with HUD regulations for Title I labor standards requirements set forth at 24 CFR 570.603 for non-Tribal recipients.[180] SLFRF recipients are

[172] *See* 42 U.S.C. 5305(a)(8).

[173] *See* Department of Housing and Urban Development, Basically CDBG for Entitlements, Chapter 7: Public Services (Sept. 2017), available at *https://www.hud.gov/sites/documents/DOC_16476.PDF*.

[174] *See* 42 U.S.C. 5305(a)(13).

[175] *See* 24 CFR 1003.206.

[176] Department of Housing and Urban Development, Basically CDBG for Entitlements, Chapter 11: Financial Management, Sections 11.1–11.2 (Sept. 2017), available at *https://www.hud.gov/sites/documents/DOC_16480.PDF*.

[177] *See* Treasury's SLFRF Final Rule FAQ 2.15: ''Can I use SLFRF funds to raise public sector wages and hire public sector workers?,'' available at *https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-FAQ.pdf*.

[178] *See* 42 U.S.C. 5310.

[179] *See* Department of Housing and Urban Development, Basically CDBG, Chapter 16: Labor Standards, Sections 16.1.1 (Sept. 2017), available at *https://www.hud.gov/sites/documents/CDBG CHAPTER16.PDF*.

[180] In other SLFRF eligible use categories, labor standards requirements pursuant to the Davis-Bacon Act generally do not apply to projects funded solely with SLFRF funds (except for certain SLFRF-funded construction projects undertaken by the District of Columbia). *See* Treasury's SLFRF Final Rule FAQ 6.15: ''Are eligible water, sewer, and broadband infrastructure projects, eligible capital

encouraged to consult HUD guidance that provides general information on labor standards and directs CDBG grantees to do the following:

- Include all applicable labor standards language and the appropriate wage decision in construction bid and contract documents,[181]
- Enforce labor standards requirements during construction, such as good construction management techniques and issuance of notices to proceed and payments tied to compliance with the labor requirements, payroll reviews, and worker interviews,[182]
- Pay any wage restitution promptly where underpayments of wages have occurred and are found during payroll or other reviews,[183] and
- Maintain documentation to demonstrate compliance with labor standards requirements such as bid and contract documents, payroll forms, signed statements of compliance, and documentation of on-site job interviews.[184]

Consistent with the ICDBG program, these labor standards will not apply to Title I projects funded by Tribal government recipients of SLFRF funds.[185] For more information on Title I labor standards requirements, see Chapter 16.1.1 of HUD's ''Basically CDBG'' Guide,[186] HUD's ''Davis-Bacon and Labor Standards: Agency/Contractor Guide,'' [187] and HUD's ''Davis-Bacon and Labor Standards: Contractor Guide Addendum.'' [188]

BEAD Program Requirements. The 2023 CAA provides that the requirements of the Broadband Equity, Access, and Deployment (BEAD) program as outlined in section 60102 of the Infrastructure Investment and Jobs Act (IIJA) apply to recipients undertaking projects with SLFRF funds under Title I that relate to broadband infrastructure.[189] Recipients should refer to program guidance, guides, and FAQs provided by the Department of Commerce's National Telecommunications and Information Administration for more information about BEAD requirements.[190]

As outlined in the 2022 final rule, in addition to broadband-related activities available under eligible Title I projects, recipients also may undertake broadband infrastructure projects to make necessary investments to expand affordable access to broadband internet. Broadband projects available under the broadband eligible use category are not subject to BEAD program requirements and there is no limit on the amount of SLFRF funds a recipient may dedicate to such projects.

Environmental Requirements. The 2023 CAA provides that the requirements of NEPA apply to recipients' use of SLFRF funds for Title I projects. Accordingly, and for the reasons discussed above, recipients using funds for Title I projects must satisfy NEPA environmental review requirements based on the procedures set forth in section 104(g) of the HCDA, as implemented at 24 CFR part 58, and as adapted to the SLFRF program by Treasury.

Section 104(g) of the HCDA authorizes the HUD Secretary, in lieu of the environmental protection procedures otherwise applicable pursuant to NEPA, to promulgate regulations providing for the release of funds for particular projects to recipients of Title I assistance who assume all of the responsibilities for environmental review, decision making, and action pursuant to NEPA. Section 104(g) further provides that the HUD Secretary shall approve the release of funds for projects subject to these procedures 15 days after the grantee has requested release of funds and submitted a certification. The HUD Secretary's approval of the certification is deemed to satisfy her responsibilities under NEPA and other provisions of law identified in the regulations insofar as those responsibilities relate to the release of funds for projects covered by the certification. HUD regulations at 24 CFR part 58 provide additional substantive and procedural information for compliance with this provision, including providing that certain projects do not require grantees to request release of funds or submit a certification.

Before recipients use SLFRF funds for Title I projects that trigger the environmental compliance process contemplated by Title I and 24 CFR part 58, the SLFRF recipients must comply with the environmental review requirements set forth in the HUD statute and regulations, submit a certification to Treasury, and receive approval. Because SLFRF funds have already been distributed to recipients, recipients are not required to submit a request for release of funds. As noted above, under Title I, CDBG grantees directly or indirectly assume all responsibilities for environmental review, decision making, and action pursuant to NEPA, and this approach also applies to recipients using the SLFRF funds for Title I projects. Following issuance of this interim final rule, Treasury will publish guidance describing the environmental compliance process in greater detail, including the certification's contents and the process for submitting it.

As noted above, under the regulations at 24 CFR part 58, certain projects do not require HUD grantees to submit a certification or obtain HUD's approval for funds to be released for a particular project. Similarly, SLFRF recipients are not required to submit certifications or obtain Treasury approval for a Title I project that either is:

- An ''exempt activity'' as contemplated by 24 CFR 58.34(a), or
- ''Categorically excluded'' and not subject to 24 CFR 58.5, as contemplated by 24 CFR 58.35(b), provided that the extraordinary circumstances described in 24 CFR 58.35(c) are not present.

If a project meets either of the two criteria above, recipients may begin using SLFRF funds for the project right away. Recipients should refer to HUD's definition of extraordinary circumstances provided at 24 CFR 58.2(a)(3).[191] If a recipient determines

expenditures under the public health and negative economic impacts eligible use category, and eligible projects under the revenue loss eligible use category subject to the Davis-Bacon Act?,'' available at *https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-FAQ.pdf.*

[181] *See* Department of Housing and Urban Development, Basically CDBG for Entitlements, Chapter 16: Labor Standards, Section 16.1.2 (Sept. 2017), available at *https://www.hud.gov/sites/documents/CDBGCHAPTER16.PDF.*

[182] *See id.* at Section 16.1.3.

[183] *See id.* at Section 16.1.4.

[184] *See id.* at Section 16.1.5.

[185] *See* 24 CFR 1003.603.

[186] *See* Department of Housing and Urban Development, Basically CDBG for Entitlements, Chapter 16: Labor Standards, Sections 16.1.1 (Sept. 2017), available at *https://www.hud.gov/sites/documents/CDBGCHAPTER16.PDF.*

[187] *See* Department of Housing and Urban Development, Davis-Bacon and Labor Standards: Agency Contractor Guide (Aug. 2022), available at *https://files.hudexchange.info/resources/documents/Davis-Bacon-and-Labor-Standards-Agency-and-Contractor-Guide.pdf.*

[188] *See id.*

[189] *See* 42 U.S.C. 802(c)(5)(C)(iii)(II) and 803(c)(6)(B)(iii)(II).

[190] *See* Section 1.2 of NTIA's BEAD Program ''Letter of Intent and Initial Planning Funding Grant Application Guidance,'' available at *https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20Planning%20Application%20Guidance.pdf.*

[191] 24 CFR 58.2(a)(3) defines extraordinary circumstances as a situation in which an environmental assessment (EA) or environmental impact statement (EIS) is not normally required but, due to unusual conditions, an EA or EIS is appropriate. Indicators of unusual conditions are: (i) actions that are unique or without precedent; (ii) actions that are substantially similar to those that normally require an EIS; (iii) actions that are likely to alter existing HUD policy or HUD mandates; or (iv) actions that, due to unusual physical conditions on the site or in the vicinity, have the potential for a significant impact on the environment or in which the environment could have a significant impact on users of the facility.

that its project presents extraordinary circumstances, the recipient must submit a certification to Treasury and receive approval prior to using SLFRF funds for the project, as will be discussed in Treasury's forthcoming guidance regarding the environmental compliance process.

To claim an activity or project as exempt pursuant to 24 CFR 58.34(a), recipients must document in writing their determination that the activity or project is exempt and meets the conditions specified for such exemption. For categorically excluded projects, recipients are required to maintain a well-organized written record of the process and determinations, including those related to the evaluation of whether the project presents extraordinary circumstances, made with respect to the categorical exclusion, which HUD refers to as an Environmental Review Record. Treasury will provide additional information on the Environmental Review Record requirements following issuance of this interim final rule.

Inapplicable sections of Title I. This the following sections of Title I do not apply to SLFRF-funded Title I projects:

- Section 103 of the HCDA (authorizing HUD to make grants)
- Sections 104(a)–(f), (h)–(j), and (l)–(m) of the HCDA (certain CDBG grant prerequisites, including consolidated plan, annual plan, plan publication, citizen participation, and associated certifications; performance and evaluation submission to HUD; revolving loan fund distributions; program income provisions applicable to certain CDBG grantees; eligible CDBG grantees; and community development plans)
- Sections 105(b), (d), (e), and (g) of the HCDA (services provided by HUD; HUD directive to establish regulations and guidance)
- Sections 106–109 of the HCDA (HUD allocation and distribution requirements; other grant programs under Title I; and nondiscrimination requirements)
- Sections 111–122 of the HCDA (noncompliance remedies; other grant authorizations; administrative requirements including as relates to reporting, duplication of benefits, and agency consultation; interstate agreements; transition provisions; emergency funding provisions)

As noted above and discussed further below, Treasury has determined not to apply the foregoing requirements of Title I because such requirements conflict with the existing SLFRF framework or otherwise are likely to preclude recipients from exercising the additional authorities provided by the statute. HUD regulations associated with the statutory provisions noted above also do not apply to recipients using SLFRF funds for Title I projects.

Prerequisite for Receiving, and Distribution of, CDBG Grants. Generally, the requirements under section 104 of the HCDA noted above are prerequisites for receiving annual CDBG allocations or relate to how HUD may distribute funds to its grantees. As discussed above, the planning prerequisites and associated certifications conflict with the SLFRF program framework under which recipients already have funds in hand and are authorized to use funds for discrete projects, rather than being required to design an annual process for how funding will be used. Furthermore, to require recipients to prepare consolidated and annual plans and undergo a public review process likely would preclude recipients from exercising the additional authorities provided by the statute, under which recipients have limited time remaining to determine how to obligate and expend funds. While such requirements will not apply to SLFRF funds used for Title I projects, Treasury encourages recipients to engage with their communities on the projects they are undertaking with SLFRF funds in general. For example, certain SLFRF recipients are required to publish and submit to Treasury a Recovery Plan performance report that must be posted on an easily discoverable web page on the recipient's public-facing website. The Recovery Plan provides the public and Treasury both retrospective and prospective information on the projects recipients are undertaking or planning to undertake with program funding, and how they are planning to ensure program outcomes are achieved in an effective, efficient, and equitable manner.[192]

HUD Programmatic Authority. Certain additional provisions are not applicable to the SLFRF program because they conflict with the SLFRF framework in that they are only relevant in the context of HUD's programmatic authorities rather than Treasury's administration of Title I projects and recipients' use of funds for the eligible projects and activities that the statute makes available. For example, sections 108, 111, 112, and 113 of the HCDA provide certain authorities and impose certain responsibilities on HUD that it would not make sense to impose on Treasury's administration of Title I projects, including those related to providing loan guarantees, remedying noncompliance, providing grants to settle outstanding urban renewal loans, promulgating regulations, and reporting.

Question 1: What, if any, additional clarification should Treasury provide as it relates to determining eligibility of projects under the Title I eligible use, or complying with program requirements such as CDBG national objectives or spending caps?

Question 2: What additional information or clarification is needed for recipients to understand Treasury's guidance on how recipients can use loans and revolving loan funds to support Title I eligible uses?

Question 3: What if any additional flexibilities would benefit recipients in terms of the use of revolving loan funds across the SLFRF program or for particular uses in the Title I projects eligible use category? Please include a discussion of how additional flexibilities would comply with the December 31, 2024 obligation and December 31, 2026 expenditure deadlines.

Question 4: What additional information or clarification is needed for recipients to understand Treasury's guidance on how to comply with environmental review requirements for Title I projects?

Question 5: What activities not already eligible under the public health and negative economic impacts eligible use category, as articulated in the 2022 final rule, are recipients interested in undertaking under the Title I projects eligible use category?

III. Discussion of Revenue Loss and Program Administration Provisions

The 2023 CAA codified the ''standard allowance'' discussed in the 2022 final rule under the revenue loss eligible use category. The section that follows discusses the revenue loss eligible use category as described in the 2022 final rule, as well as the program administration provisions to support recipients in understanding how this interim final rule will interact with previously established elements of the SLFRF program. As noted above, the 2023 CAA generally did not alter the existing eligible uses articulated in the 2022 final rule. Recipients may continue to use SLFRF funds for the eligible uses described under the 2022 final rule.

[192] Treasury publishes the Recovery Plans submitted by recipients each year on its website. For additional detail on Treasury's guidance on SLFRF recipients' compliance and reporting responsibilities, *see https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds/recipient-compliance-and-reporting-responsibilities.*

A. Revenue Loss

Summary of the 2022 final rule: As stated above, the ARPA amended the Social Security Act to provide that SLFRF funds may be used ''for the provision of government services to the extent of the reduction in revenue of such . . . government due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the . . . government prior to the emergency.'' In the 2022 final rule, Treasury provided two options for how recipients may determine their amount of revenue loss. A recipient may claim a standard allowance of up to $10 million in total, not to exceed the recipient's allocation, for the entire period of performance, or calculate revenue loss on an annual basis according to the four-step formula described in the 2022 final rule. The 2022 final rule also provided additional clarifications, including how recipients that are determining revenue loss according to the formula should calculate general revenue and select their calculation date. The 2022 final rule maintained Treasury's definition of government services articulated in the 2021 interim final rule which provided that, generally speaking, services provided by recipient governments are ''government services,'' unless Treasury has stated otherwise.

The 2022 final rule also noted that Treasury intended to amend its reporting forms to provide a mechanism for recipients to make a one-time, irrevocable election to utilize either the revenue loss formula or the standard allowance. Treasury's guidance and Final Rule FAQs included directions for recipients to indicate this choice in their Project and Expenditure Reports due April 30, 2022, and as described in subsequent guidance, recipients were able to update their revenue loss election, as appropriate, in future reporting cycles through the April 2023 reporting period. Upon update, any prior revenue loss election was superseded.

The Consolidated Appropriations Act, 2023: The 2023 CAA provided SLFRF funds may be used ''for the provision of government services up to an amount equal to the greater of—

(i) the amount of the reduction in revenue of such . . . government due to the COVID–19 public health emergency relative to revenue collected in the most recent full fiscal year of such . . . government prior to the emergency; or:

(ii) $10,000,000.''

Thus, the 2023 CAA codified the framework articulated in the 2022 final rule that recipients may determine their revenue loss by calculating revenue loss according to the formula or claiming up to $10 million, not to exceed a recipient's allocation.

Recipients need not make any changes to their current revenue loss determination and may continue with their previous determination. Recipients who would like to update their revenue loss determination will be able to update their revenue loss determination, as appropriate, through the April 2025 reporting period. Upon update, any prior revenue loss election will be superseded. Recipients continue to be required to employ a consistent methodology across the period of performance (*i.e.,* choose either the standard allowance or the full formula) and may not elect one approach for certain reporting years and the other approach for different reporting years.

Recipients must still communicate to Treasury the method for determining revenue loss, calculating according to the formula or claiming up to $10,000,000, not to exceed the recipient's allocation.

B. Program Administration Provisions

1. Timeline for Use of SLFRF Funds

Summary of the 2022 final rule: In the 2022 final rule, Treasury maintained the timeline for using SLFRF funds outlined in the 2021 interim final rule. Recipient may only use funds to cover costs incurred during the period beginning March 3, 2021, and ending December 31, 2024. The final rule provided that a cost shall be considered to have been incurred if the recipient has incurred an obligation with respect to such cost. Under the 2022 final rule, recipients must expend all funds by December 31, 2026. The 2023 CAA did not alter these timelines for existing eligible uses described in the 2022 final rule. The eligible uses added by the 2023 CAA are subject to slightly different treatment, as discussed below.

Consolidated Appropriations Act, 2023: For the three eligible uses added by the 2023 CAA (emergency relief from natural disasters, Surface Transportation projects, and Title I projects), recipients may use SLFRF funds to cover costs incurred beginning December 29, 2022, which is the date that the 2023 CAA was enacted. Consistent with the discussion in the 2021 interim final rule with respect to the original eligible uses, SLFRF funds are available for the new eligible uses on a prospective basis. Similarly, consistent with the 2021 interim final rule, permitting recipients to incur costs beginning December 29, 2022, provides flexibility for recipients that may have been incurring costs in anticipation of the issuance of this interim final rule. Treasury considered adopting March 3, 2021, as the date that recipients may begin incurring costs under the new eligible uses but declined to do so because these eligible uses are available on a prospective basis and because March 3, 2021, would be inconsistent with the non-supplant requirement applicable to the majority of projects and activities available under the new eligible uses.[193]

As discussed earlier in this interim final rule, under the emergency relief from natural disasters eligible use category, recipients must comply with the December 31, 2024, obligation deadline and the December 31, 2026, expenditure deadline articulated in the 2022 final rule. For Surface Transportation projects and Title I projects, funds must be obligated by December 31, 2024 and must be expended by September 30, 2026. This expenditure deadline is three months earlier than the December 31, 2026, expenditure deadline that applies to the other eligible uses.

The 2022 final rule provides that a cost is considered to have been incurred for purposes of the December 31, 2024, statutory deadline if the recipient has incurred an obligation with respect to such cost by December 31, 2024. The 2022 final rule defines an obligation as ''an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment.'' Treasury is maintaining this definition of obligation for the new eligible uses provided in the 2023 CAA.

[193] The statute's application of the non-supplant provision to the Surface Transportation projects eligible use category and Title I projects eligible use category but not to the emergency relief from natural disasters eligible use category makes sense only if recipients may not use SLFRF funds to cover expenses incurred prior to the enactment of the 2023 CAA. The concern that recipients would supplant, after the date of enactment, funds previously dedicated to eligible uses is not particularly relevant in the case of natural disasters, which are generally unexpected and impose extraordinary costs on state, local, and Tribal governments.

The use of December 29, 2022 is also supported by comparing the 2023 CAA amendments to the Infrastructure Investment and Jobs Act (IIJA) amendments to the ARPA from November 2021. In the IIJA, Congress included a ''clarification of authority'' to use SLFRF funds to meet match requirements for authorized Bureau of Reclamation water projects. The clarification stated that the amendments took effect ''as if included in the enactment'' of the ARPA. Accordingly, in the final rule, Treasury incorporated this eligible use and applied the March 3, 2021 cost incurred date that applied to all the other eligible uses in the ARPA. The absence of similar language in the 2023 CAA suggests Congress did not intend to apply the same retroactive approach.

2. Use of Funds for Match or Cost-Share Requirements

Summary of the 2022 final rule: In the 2022 final rule, Treasury discussed its determination that SLFRF funds available for the provision of government services, up to the amount of the recipient's reduction in revenue due to the public health emergency, generally may be used to meet the non-Federal cost-share or matching requirements of other Federal programs. The final rule also clarified that SLFRF funds beyond those that are available under the revenue loss eligible use category for the provision of government services may not be used to meet the non-Federal match or cost-share requirements of other Federal programs other than as specifically provided for by statute. For example, as discussed in the 2022 final rule, section 40909 of the Infrastructure Investment and Jobs Act provides that SLFRF funds may be used to meet the non-Federal match requirements of any authorized Bureau of Reclamation project, and section 60102 of the Infrastructure Investment and Jobs Act provides that SLFRF funds may be used to meet the non-Federal match requirements of the broadband infrastructure program authorized under that section. See the 2022 final rule for further discussion.

The Consolidated Appropriations Act, 2023: As discussed above, the 2023 CAA did not alter the existing eligible uses of SLFRF funds. Recipients may still use SLFRF funds in the revenue loss eligible use category to meet non-Federal matching requirements, as described in the 2022 final rule. As described in the Surface Transportation projects section of this interim final rule, the 2023 CAA provided that recipients may use SLFRF funds for non-Federal matching requirements for certain Surface Transportation programs. As described in the Title I projects section of this interim final rule, the 2023 CAA provided that recipients may use SLFRF funds for Title I projects, which includes using funds for non-Federal cost share and matching requirements of a Federal financial assistance program in support of activities that would be eligible under the CDBG and ICDBG programs. See the sections titled Surface Transportation projects and Title I projects of this interim final rule for further information.

3. Reporting

Summary of the 2022 final rule: The 2022 final rule maintained Treasury's authority to collect information from recipients through requested reports and any additional requests for information. The 2022 final rule also maintained Treasury's flexibility to extend or accelerate reporting deadlines and to modify requested content for the Interim Report, Project and Expenditure reports, and Recovery Plan Performance reports. Since the publication of the 2021 interim final rule, Treasury issued supplementary reporting guidance in the Compliance and Reporting Guidance and in the User Guide: Treasury's Portal for Recipient Reporting (User Guide).[194] Treasury continues to issue updated guidance prior to each reporting period clarifying any modifications to requested report content.

The Consolidated Appropriations Act, 2023: Generally, recipients using SLFRF funds for the eligible uses provided in the 2023 CAA will be required to report on these uses of funds in their Project and Expenditure reports and Recovery Plan Performance reports. For example, recipients using funds to provide emergency relief from natural disasters will generally be required to provide information regarding the declaration or designation associated with a natural disaster and for mitigation activity expenditures greater than $1 million, a written justification. Recipients using funds for Surface Transportation projects under Pathway One will generally be required to confirm which DOT program they are directing funds and attest to meeting additional statutory requirements like supplement, not supplant and state of good repair. Recipients using funds for Surface Transportation projects under Pathway Two will generally be required to provide additional information regarding the parameters of the streamlined framework and attest to meeting additional statutory requirements like supplement, not supplant and state of good repair. Recipients using funds for Title I projects will generally be required to provide information regarding the category of CDBG activities, the primary objective, and the national objectives, and attest to meeting additional statutory requirements like supplement, not supplant and environmental certifications. Like all eligible use categories in the SLFRF program, recipients will be required to provide general financial information and a project description for the new eligible uses categories discussed in this interim final rule. Treasury intends to update its reporting forms, Compliance and Reporting Guidance, and User Guide to further describe recipients' reporting responsibilities for SLFRF funds directed toward these eligible uses.

As described above, Treasury is delegating authority to DOT to oversee and administer Surface Transportation projects under Pathway One. As such, recipients using SLFRF funds for such projects will be required to comply with the relevant existing DOT reporting requirements associated with the Surface Transportation project that is receiving DOT funding for which they are adding SLFRF funds. DOT may provide additional guidance, as appropriate, for recipients using SLFRF funds under Pathway One for a Surface Transportation project that is receiving funding from DOT. Recipients using SLFRF funds under Pathway One will also be required to report certain information to Treasury, including the amount of SLFRF funds directed toward Surface Transportation projects and Title I projects to ensure that recipients comply with the cap on funds associated with these eligible use categories.

Recipients using SLFRF funds under Pathway Two for a Surface Transportation project that is not receiving funding from DOT and funded solely with SLFRF funds will only have reporting responsibilities to Treasury.

Under Pathway Three, recipients will be required to comply with the relevant existing DOT reporting requirements associated with the Surface Transportation project which they are using SLFRF funds for non-Federal share requirements. Recipients will also be required to report certain information to Treasury, including the amount of SLFRF funds directed toward Surface Transportation projects and Title I projects to ensure that recipients comply with the cap on funds associated with these eligible use categories.

4. Uniform Guidance

Summary of the 2022 final rule: The 2022 final rule states that recipients of SLFRF funds are subject to the provisions of the Uniform Guidance (2 CFR part 200) from the date of award to the end of the period of performance on December 31, 2026, unless otherwise specified in this rule or program specific guidance.

The Consolidated Appropriations Act, 2023: Consistent with the 2022 final rule, recipients using SLFRF funds, whether for the eligible uses described in the 2022 final rule or the eligible uses described in this interim final rule, are subject to the provisions of the Uniform

[194] U.S. Department of the Treasury, Recipient Compliance and Reporting Responsibilities (Nov. 5, 2021), *https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds/recipient-compliance-and-reporting-responsibilities.*

Guidance, unless stated otherwise by Treasury.[195] Recipients using SLFRF for Surface Transportation projects and Title I projects, respectively, must also comply with the administrative requirements described above in the Surface Transportation projects and Title I projects sections.

IV. Comments and Effective Date

This interim final rule is being issued without advance notice and public comment to allow for immediate implementation of the changes to the SLFRF program resulting from the amendments made by the State, Local, Tribal, and Territorial Fiscal Recovery, Infrastructure, and Disaster Relief Flexibility Act, part of the Consolidated Appropriations Act, 2023, Public Law 117–328 (Dec. 29, 2022). As discussed below, the requirements of advance notice and public comment do not apply ''to the extent that there is involved . . . a matter relating to agency . . . grants.'' This interim final rule implements statutory conditions on the eligible uses of the SLFRF funds and addresses the potential consequences of ineligible uses. In addition and as discussed below, the Administrative Procedure Act also provides an exception to ordinary notice-and-comment procedures ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' This good cause justification also supports waiver of the 60-day delayed effective date for major rules under the Congressional Review Act at 5 U.S.C. 808(2). Although this interim final rule is effective immediately, comments are solicited from interested members of the public and from recipient governments on all aspects of this interim final rule. These comments must be submitted on or before November 20, 2023.

V. Regulatory Analyses

Executive Orders 12866, 13563, and 14094

Regulatory Impact Assessment

This interim final rule is a ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866 for the purposes of Executive Orders 12866 and 13563 because it may shift how state, local, and Tribal governments spend SLFRF funds annually by $200 million or more, with an effect on the economy.

As explained below, this regulation meets a substantial need: ensuring that recipients—states, territories, Tribal governments, and local governments—of SLFRF funds fully understand the requirements and parameters of the program as set forth in the Social Security Act and are able to deploy funds in a manner that best reflects Congress' intent to provide necessary relief to recipient governments adversely impacted by the COVID–19 public health emergency. Furthermore, as required by Executive Order 12866 as amended, Treasury has weighed the costs and benefits of this interim final rule and varying alternatives and has reasonably determined that the benefits of this interim final rule to recipients and their communities far outweigh any costs. The rule has been reviewed by the Office of Management and Budget (OMB) in accordance with Executive Order 12866 as amended.

Executive Orders 12866, 13563, and 14094

Under Executive Order 12866, as amended by Executive Order 14094, OMB must determine whether this regulatory action is ''significant,'' and therefore, subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 as amended defines a significant regulatory action as an action likely to result in a rule that may, among other things, have an annual effect on the economy of $200 million or more. This interim final rule may shift spending decisions by recipient governments by $200 million, therefore, it is subject to review by OMB under section 3(f)(1) of Executive Order 12866 as amended.

Treasury has also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, section 1(b) of Executive Order 13563 requires that an agency: (1) propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or providing information that enables the public to make choices. Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' OMB's Office of Information and Regulatory Affairs (OIRA) has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

Based on the analysis that follows and the reasons stated elsewhere in this document, Treasury believes that this interim final rule is consistent with the principles set forth in Executive Orders 12866, 13563, and 14094. This Regulatory Impact Analysis discusses the need for regulatory action, the potential benefits, and the potential costs. Treasury has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action, and is issuing this interim final rule only on a reasoned determination that the benefits exceed the costs. In choosing among alternative regulatory approaches, Treasury selected those approaches that would maximize net benefits.

Need for Regulatory Action

This interim final rule implements new eligible uses for the $350 billion SLFRF program provided in the 2023 CAA, which Congress passed to provide additional flexibility in how state, local, and Tribal governments respond to the unique needs of their communities. As the agency charged with execution of these programs, Treasury has concluded that this interim final rule is needed to ensure that recipients of SLFRF funds fully understand the requirements and parameters of the program as modified by the 2023 CAA and deploy funds in a manner that best reflects Congress' mandate for targeted fiscal relief. This interim final rule provides additional flexibility in the use of $350 billion in grant funds already disbursed from the Federal government to state, local, and Tribal governments. As noted earlier,

[195] *See* FAQ Section 13. ''Uniform Guidance'' U.S. Department of the Treasury, Coronavirus State and Local Fiscal Recovery Funds Final Rule: Frequently Asked Questions (Apr. 2023), *https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-FAQ.pdf.*

Treasury has disbursed nearly all of the $350 billion appropriated SLFRF funds. Treasury has sought to implement the program in ways that maximize its potential benefits while minimizing its costs. It has done so by: aiming to target relief in key areas according to the congressional mandate; offering clarity to state, local, and Tribal governments while maintaining their flexibility to respond to local needs; and limiting administrative burdens.

Analysis of Benefits

Relative to a pre-2023 CAA baseline, no additional resources are provided to state, local, and Tribal governments under the SLFRF program. Instead, state, local, and Tribal governments will have additional flexibility in how they use available SLFRF funds, that have already been disbursed, with the option to pursue additional eligible uses under this interim final rule to meet the needs of their communities. Treasury believes that this additional flexibility may generate substantial additional economic activity, although given the flexibility accorded to recipients in the use of funds, it is not possible to precisely estimate the extent to which this will occur and the timing with which it will occur.

This interim final rule provides benefits by implementing the new eligible use categories, as defined in the 2023 CAA: providing emergency relief from natural disasters or the negative economic impacts of natural disasters, using funds for Surface Transportation projects, and using funds for Title I projects.

These benefits are achieved in this interim final rule through a broadly flexible approach that sets clear guidelines on these additional eligible uses of SLFRF funds and provides state, local, and Tribal government officials discretion to direct SLFRF funds to areas of greatest need within their jurisdiction, within available eligible use categories. While preserving recipients' overall flexibility, this interim final rule includes several provisions that implement statutory requirements and will help support use of SLFRF funds to achieve the intended benefits. Preserving flexibility for recipients not only serves an important public policy goal by allowing them to meet particularized and diverse needs of their local communities but also enhances the economic benefits of this interim final rule by allowing recipients to choose eligible uses of funds that provide the highest utility in their jurisdictions.

The remainder of this section clarifies how Treasury's approach to key provisions in this interim final rule will contribute to greater realization of benefits from the program. Treasury considered issuing guidance rather than an interim final rule; however, Treasury determined that issuing an interim final rule that amends the regulatory text of the 2022 final rule was appropriate to bring the regulatory requirements in line with the 2023 CAA.

Emergency Relief From Natural Disasters

The eligible use category for providing emergency relief from natural disasters or the negative economic impacts of natural disasters covers a range of eligible uses of funds, including temporary emergency housing, food assistance, financial assistance for lost wages, other immediate needs, and mitigation activities. Treasury has structured this eligible use to minimize recipient administrative burden while also maintaining flexibility for recipients to provide emergency relief to address the particular needs of their communities after experiencing a natural disaster or prior to a natural disaster that is expected to occur imminently, or to avert the threat of a future natural disaster. In this interim final rule, Treasury enumerated eligible uses of SLFRF funds to provide emergency relief from the physical and negative economic impacts of natural disasters. Some of these enumerated eligible uses include temporary emergency housing, food assistance, financial assistance for lost wages, emergency protective measures, debris removal, repairing damage to public infrastructure, home repairs for uninsured primary residences, cash assistance, and mitigation activities to avert the potential impacts of a future natural disaster. In addition to the enumerated eligible uses, Treasury provides a framework whereby recipient may identify a natural disaster and identify emergency relief that responds to the physical or negative economic impacts of a natural disaster. The emergency relief must be related and reasonably proportional to the to the impact identified. By enumerating eligible uses, Treasury is reducing administrative burden for recipients through a clear list of uses of SLFRF funds they may consider providing as appropriate. By providing a framework for recipients to design their own emergency relief, Treasury is providing flexibility for recipients to direct SLFRF funds to the needs of their unique communities.

Surface Transportation Projects

In the eligible use category Surface Transportation projects, Treasury provides three pathways under which recipients may direct SLFRF funds towards Surface Transportation projects, subject to the cap on SLFRF funds for this eligible use. First, recipients may use SLFRF funds under Pathway One for Surface Transportation projects receiving funding from DOT. Recipients who use SLFRF funds for these projects must comply with all related DOT requirements for these projects. Second, recipients may use SLFRF funds under Pathway Two for Surface Transportation projects, that are not receiving funding from DOT, whether or not SLFRF funds are blended with other sources of funds. This second pathway is available to all SLFRF recipients, including those that do not routinely apply for or receive funding directly from DOT. Treasury is articulating a streamlined framework for recipients to undertake certain projects (1) fit the description of ''eligible projects'' under the RAISE grant program as described in the 2023 Notice of Funding Opportunity; (2) contribute SLFRF funds no greater than $10 million, and (3) with an entire project scope that is limited to actions or activities that typically do not have a significant environmental impact, absent unusual circumstances, as described in 23 CFR 771.116(b), 771.117(b), and 771.118(b). Recipients that use SLFRF funds for these projects must comply certain requirements, as articulated in the Surface Transportation projects section, and only report these projects to Treasury. Recipients seeking to use SLFRF funds for Surface Transportation projects under Pathway Two outside of the parameters of the streamlined framework must submit a notice of intent to Treasury. Treasury will use the notices of intent it receives along with comments on this interim final rule to develop a pathway for these types of projects. Third, recipients may use SLFRF funds under Pathway Three for non-Federal share requirements for certain DOT programs, as well as to repay TIFIA loans. By providing three pathways for recipients to pursue Surface Transportation projects with SLFRF funds, Treasury is providing flexibility for recipients to use SLFRF funds for DOT projects they are already pursuing and for recipient to also pursue new projects, particularly for those recipients that do not have any existing projects funded by DOT, subject to the requirements outlined in the Surface Transportation projects section.

Title I Projects

The Title I projects eligible use category discusses how recipients may direct SLFRF funds toward Title I projects, subject to the cap on funds for this eligible use category. In this eligible use category, Treasury has provided that recipients may use SLFRF funds for CDBG and ICDBG projects, in alignment with the applicable administrative provisions. By aligning with CDBG and ICDBG, programs with which many recipients already are familiar, Treasury is reducing administrative burden. Treasury also discusses the CDBG and ICDBG provisions that apply to SLFRF funds. By analyzing which provisions are applicable to the unique requirements of the SLFRF program, including modifying certain requirements for this eligible use category in light of the SLFRF period of performance and the statutory requirement that SLFRF funds be obligated by December 31, 2024 and expended by September 30, 2026, Treasury is further reducing administrative burden for recipients.

Analysis of Costs

This regulatory action will not generate significant administrative costs relative to a pre-2023 CAA baseline. This interim final rule may result in state, local, and Tribal governments shifting SLFRF funds to new eligible uses included in the Social Security Act but does not result in additional funds being disbursed to SLFRF recipients. In addition, SLFRF recipients generally have already established processes required to administer their SLFRF funds, oversee subrecipients and beneficiaries, and file periodic reports with Treasury. As such, Treasury expects that the total costs required to administer SLFRF funds will not change significantly. Treasury expects that the administrative burden associated with the SLFRF program will remain moderate for a grant program of its size. Under the final rule implementing the SLFRF program as enacted in the ARPA, Treasury noted administrative costs as a generally allowable use of SLFRF funds, which defrays administrative expenses to recipients that may be needed to comply with reporting requirements. Treasury is maintaining this approach to administrative costs in this interim final rule. Treasury has also made clear in guidance that SLFRF funds may be used to cover certain expenses related to administering programs established using SLFRF funds.

Executive Order 13132

Executive Order 13132 (entitled Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state, local, and Tribal governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This interim final rule does not have Federalism implications within the meaning of the Executive order and does not impose substantial, direct compliance costs on state, local, and Tribal governments or preempt state law within the meaning of the Executive Order. The compliance costs are imposed on state, local, and Tribal governments by sections 602 and 603 of the Social Security Act, as modified by the 2023 CAA. Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, Treasury certifies that it has complied with the requirements of Executive Order 13132.

Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* generally requires public notice and an opportunity for comment before a rule becomes effective. However, the APA provides that the requirements of 5 U.S.C. 553 do not apply ''to the extent that there is involved . . . a matter relating to agency . . . grants.'' This interim final rule implements statutory conditions on the eligible uses of the SLFRF grants and addresses potential consequences of ineligible uses. The rule is thus ''both clearly and directly related to a Federal grant program.'' *National Wildlife Federation* v. *Snow*, 561 F.2d 227, 232 (D.C. Cir. 1976). The rule sets forth the ''process necessary to maintain state . . . eligibility for Federal funds,'' id., as well as other ''integral part[s] of the grant program,'' *Center for Auto Safety* v. *Tiemann*, 414 F. Supp. 215, 222 (D.D.C. 1976). As a result, the requirements of 5 U.S.C. 553 do not apply.

The APA also provides an exception to ordinary notice-and-comment procedures ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(3)(B); see also 5 U.S.C. 553(d)(3) (creating an exception to the requirement of a 30-day delay before the effective date of a rule ''for good cause found and published with the rule''). Assuming 5 U.S.C. 553 applied, Treasury would still have good cause under sections 553(b)(3)(B) and 553(d)(3) for not undertaking section 553's requirements. The 2023 CAA amends sections 602 and 603 of the Social Security Act to make SLFRF available to provide emergency relief from natural disasters or their negative economic impacts, along with authority to use funds for an extensive list of eligible uses related to infrastructure, incorporated into the Social Security Act by cross-reference to other statutory provisions. As noted above, Congress authorized use of funds for emergency relief. *American Fed'n of Gov't Employees* v. *Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Expeditious promulgation of the interim final rule would make these funds available to provide emergency relief to natural disasters more quickly and would avoid a delay that would be contrary to the public interest. In addition, SLFRF funds are available to cover costs incurred through December 31, 2024. Following the ordinary requirements of notice-and-comment rulemaking would result in the passage of a significant amount of time before recipients are able to use funds for time sensitive needs related to natural disaster relief, and it would provide recipients a very limited amount of time to plan for and finance newly eligible infrastructure projects before the obligation deadline arrives in the following year. By linking the effectiveness of the amendments with the promulgation of a rule or issuance of guidance on a 60-day timeline, as provided in the 2023 CAA, Congress ''clearly envisioned very speedy adoption of the mandated changes.'' *Petry* v. *Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984). Further, Congress, ''by setting an effective date so close to the date of enactment, expressed its belief that implementation of the amendments to the [program] was urgent.'' *Philadelphia Citizens in Action* v. *Schweiker*, 669 F.2d 877, 884–885 (3d Cir. 1982) (finding good cause under circumstances, including statutory time limits, where APA procedures would have been ''virtually impossible,'' like a circumstance in which an agency promulgated a regulation to implement a statute that was enacted on August 13 and became effective on October 1). Finally, there is an urgent need for States to undertake the planning necessary for sound fiscal policymaking, which requires an understanding of how funds provided under the ARPA will augment and interact with existing budgetary resources. The statutory urgency and practical necessity are good

cause to forego the ordinary requirements of notice-and-comment rulemaking.

Congressional Review Act

The Administrator of OIRA has determined that this rule qualifies under the definition set forth in 5 U.S.C. 804(2) for purposes of Subtitle E of the Small Business Regulatory Enforcement and Fairness Act of 1996 (also known as the Congressional Review Act or CRA). Under the CRA, such a rule generally may take effect no earlier than 60 days after the rule is published in the **Federal Register**. 5 U.S.C. 801(a)(3). Notwithstanding this requirement, the CRA allows agencies to dispense with the requirements of section 801 when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and the rule shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). Pursuant to section 808(2), for the reasons discussed above, Treasury for good cause finds that a 60-day delay to provide public notice is impracticable and contrary to the public interest.

Paperwork Reduction Act

The information collections associated with the SLFRF program have been reviewed and approved by OMB pursuant to the Paperwork Reduction Act (44 U.S.C. Chapter 35) (PRA) and assigned control number 1505–0271. Under the PRA, an agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a valid OMB control number. This interim final rule is not altering the previously approved information collections for the SLFRF program. The table below includes the estimates of hourly burden under this program that have been approved in previously approved information collections.

Reporting	Number respondents	Number responses per respondent	Total responses	Hours per response	Total burden in hours	Cost to respondents ($48.80 per hour*)
Recipient Payment Form	5,050	1	5,050	.25 (15 minutes)	1,262.5	$61,610
Acceptance of Award Terms	5,050	1	5,050	.25 (15 minutes)	1,262.5	61,610
Title VI Assurances	5,050	1	5,050	.50 (30 minutes)	2,525	123,220
Tribal Employment Information Form	584	1	584	.75 (45 minutes)	438	21,374
Request for Extension Form	96	1	96	1	96	4,685
Annual Recovery Plan Performance Report	430	1	430	100	43,000	2,098,400
NEU Distribution Template	55	2	110	10	1,100	53,680
Non-UGLG Distribution Template	55	2	110	5	550	26,840
Transfer Forms	1,500	1	1,500	1	1,500	73,200
NEU Agreements and Supporting Documentation	26,000	1	26,000	.5	13,000	634,400
Project and Expenditure Report (quarterly)	2,000	4	8,000	6	48,000	2,342,400
Project and Expenditure Report (annual)	29,000	1	29,000	6	174,000	8,491,200
Total	64,770		78,880		284,209	13,869,339

*Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, Accountants and Auditors, on the internet at *https://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm* (visited March 28, 2020). Base wage of $33.89/hour increased by 44 percent to account for fully loaded employer cost of employee compensation (benefits, etc.) for a fully loaded wage rate of $48.80.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604.

Rules that are exempt from notice and comment under the APA or any other law are also exempt from the RFA requirements, including the requirement to conduct a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Because this rule is exempt from the notice and comment requirements of the APA, Treasury is not required to conduct a regulatory flexibility analysis.

List of Subjects in 31 CFR Part 35

Community development, Disaster assistance, Executive compensation, State and Local Governments, Public health emergency, Tribal governments, Transportation.

For the reasons stated in the preamble, the United States Department of the Treasury amends 31 CFR part 35 as follows:

PART 35—PANDEMIC RELIEF PROGRAMS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 42 U.S.C. 802(f); 42 U.S.C. 803(f); 31 U.S.C. 321; 12 U.S.C. 5701–5710; Division N, Title V, Subtitle B, Pub. L. 116–260, 134 Stat. 1182 (12 U.S.C. 4703a); Section 104A, Pub. L. 103–325, 108 Stat. 2160, as amended (12 U.S.C. 4701 *et seq.*); Pub. L. 117–2, 135 Stat. 4 (42 U.S.C. 802 *et seq.*).

■ 2. Revise Subpart A to read as follows:

Subpart A—Coronavirus State and Local Fiscal Recovery Funds

Sec.
35.1 Purpose.
35.2 Applicability.
35.3 Definitions.
35.4 Reservation of authority, reporting.
35.5 Use of funds.
35.6 Eligible uses.
35.7 Pensions.
35.8 Tax.
35.9 Compliance with applicable laws.
35.10 Recoupment.
35.11 Payments to States.
35.12 Distributions to nonentitlement units of local government and units of general local government.

Authority: 42 U.S.C. 802(f); 42 U.S.C. 803(f); section 102(c) of Division LL of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328).

§ 35.1 Purpose.

This part implements sections 602 and 603 of the Social Security Act, as added by section 9901 of the American Rescue Plan Act (Subtitle M of Title IX of Pub. L. 117–2) and amended by section 102 of Division LL of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328).

§ 35.2 Applicability.

This part applies to states, territories, Tribal governments, metropolitan cities, nonentitlement units of local government, counties, and units of general local government that accept a

payment or transfer of funds made under section 602 or 603 of the Social Security Act.

§ 35.3 Definitions.

Baseline means tax revenue of the recipient for its fiscal year ending in 2019, adjusted for inflation in each reporting year using the Bureau of Economic Analysis's Implicit Price Deflator for the gross domestic product of the United States.

Capital expenditures has the same meaning given in 2 CFR 200.1.

County means a county, parish, or other equivalent county division (as defined by the Census Bureau).

Covered benefits include, but are not limited to, the costs of all types of leave (vacation, family-related, sick, military, bereavement, sabbatical, jury duty), employee insurance (health, life, dental, vision), retirement (pensions, 401(k)), unemployment benefit plans (Federal and State), workers' compensation insurance, and Federal Insurance Contributions Act taxes (which includes Social Security and Medicare taxes).

Covered change means a change in law, regulation, or administrative interpretation that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase. A change in law includes any final legislative or regulatory action, a new or changed administrative interpretation, and the phase-in or taking effect of any statute or rule if the phase-in or taking effect was not prescribed prior to the start of the covered period.

Covered period means, with respect to a state or territory, the period that:

(1) Begins on March 3, 2021; and

(2) Ends on the last day of the fiscal year of such State or territory in which all funds received by the State or territory from a payment made under section 602 or 603 of the Social Security Act have been expended or returned to, or recovered by, the Secretary.

COVID–19 means the Coronavirus Disease 2019.

COVID–19 public health emergency means the period beginning on January 27, 2020, and lasting until the termination of the national emergency concerning the COVID–19 outbreak declared pursuant to the National Emergencies Act (50 U.S.C. 1601 *et seq.*).

Delivery sequence means the order in which disaster relief agencies and organizations provide assistance pursuant to 44 CFR 206.191.

Deposit means an extraordinary payment of an accrued, unfunded liability. The term deposit does not refer to routine contributions made by an employer to pension funds as part of the employer's obligations related to payroll, such as either a pension contribution consisting of a normal cost component related to current employees or a component addressing the amortization of unfunded liabilities calculated by reference to the employer's payroll costs.

Disaster loss means a loss suffered as a result of a major disaster or emergency declared under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170).

Eligible employer means an employer of an eligible worker who performs essential work.

Eligible workers means workers needed to maintain continuity of operations of essential critical infrastructure sectors, including health care; emergency response; sanitation, disinfection, and cleaning work; maintenance work; grocery stores, restaurants, food production, and food delivery; pharmacy; biomedical research; behavioral health work; medical testing and diagnostics; home- and community-based health care or assistance with activities of daily living; family or childcare; social services work; public health work; vital services to Tribes; any work performed by an employee of a State, local, or Tribal government; educational work, school nutrition work, and other work required to operate a school facility; laundry work; elections work; solid waste or hazardous materials management, response, and cleanup work; work requiring physical interaction with patients; dental care work; transportation and warehousing; work at hotel and commercial lodging facilities that are used for COVID–19 mitigation and containment; work in a mortuary; and work in critical clinical research, development, and testing necessary for COVID–19 response.

(1) With respect to a recipient that is a metropolitan city, nonentitlement unit of local government, or county, workers in any additional non-public sectors as each chief executive officer of such recipient may designate as critical to protect the health and well-being of the residents of their metropolitan city, nonentitlement unit of local government, or county; or

(2) With respect to a State, territory, or Tribal government, workers in any additional non-public sectors as each Governor of a State or territory, or each Tribal government, may designate as critical to protect the health and well-being of the residents of their State, territory, or Tribal government.

Emergency relief means assistance that is needed to save lives and to protect property and public health and safety, or to lessen or avert the threat of catastrophe.

Essential work means work that:

(1) Is not performed while teleworking from a residence; and

(2) Involves:

(i) Regular in-person interactions with patients, the public, or coworkers of the individual that is performing the work; or

(ii) Regular physical handling of items that were handled by, or are to be handled by patients, the public, or coworkers of the individual that is performing the work.

Funds means, with respect to a recipient, amounts provided to the recipient pursuant to a payment made under section 602(b) or 603(b) of the Social Security Act or transferred to the recipient pursuant to section 603(c)(4) of the Social Security Act.

General revenue means money that is received from tax revenue, current charges, and miscellaneous general revenue, excluding refunds and other correcting transactions and proceeds from issuance of debt or the sale of investments, agency or private trust transactions, and intergovernmental transfers from the Federal Government, including transfers made pursuant to section 9901 of the American Rescue Plan Act. General revenue also includes revenue from liquor stores that are owned and operated by state and local governments. General revenue does not include revenues from utilities, except recipients may choose to include revenue from utilities that are part of their own government as general revenue provided the recipient does so consistently over the remainder of the period of performance. Revenue from Tribal business enterprises must be included in general revenue.

Infrastructure Investment and Jobs Act means the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429 (Nov. 15, 2021).

Intergovernmental transfers means money received from other governments, including grants and shared taxes.

Low-income household means a household with:

(1) Income at or below 185 percent of the Federal Poverty Guidelines for the size of its household based on the poverty guidelines published most recently by the Department of Health and Human Services; or

(2) Income at or below 40 percent of the Area Median Income for its county and size of household based on data published most recently by the

Department of Housing and Urban Development.

Micro-business means a small business that has five or fewer employees, one or more of whom owns the small business.

Moderate-income household means a household with:

(1) Income at or below 300 percent of the Federal Poverty Guidelines for the size of its household based on poverty guidelines published most recently by the Department of Health and Human Services; or

(2) Income at or below 65 percent of the Area Median Income for its county and size of household based on data published most recently by the Department of Housing and Urban Development.

Metropolitan city has the meaning given that term in section 102(a)(4) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(4)) and includes cities that relinquish or defer their status as a metropolitan city for purposes of receiving allocations under section 106 of such Act (42 U.S.C. 5306) for fiscal year 2021.

Natural disaster means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, or fire, in each case attributable to natural causes, that causes or may cause substantial damage, injury, or imminent threat to civilian property or persons. ''Natural disaster'' may also include another type of natural catastrophe, attributable to natural causes, that causes or may cause substantial damage, injury, or imminent threat to civilian property or persons.

Net reduction in total spending is measured as the State or territory's total spending for a given reporting year excluding its spending of funds, subtracted from its total spending for its fiscal year ending in 2019, adjusted for inflation using the Bureau of Economic Analysis's Implicit Price Deflator for the gross domestic product of the United States for that reporting year.

Nonentitlement unit of local government means a ''city,'' as that term is defined in section 102(a)(5) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(5)), that is not a metropolitan city.

Nonprofit means a nonprofit organization that is exempt from Federal income taxation and that is described in section 501(c)(3) or 501(c)(19) of the Internal Revenue Code.

Obligation means an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment.

Operating expenses means costs necessary to operate and manage a public transportation system, including driver salaries, fuel, and items having a useful life of less than one year. Operating expenses do not include preventive maintenance activities.

Pension fund means a defined benefit plan and does not include a defined contribution plan.

Period of performance means the time period described in § 35.5 during which a recipient may obligate and expend funds in accordance with sections 602(c)(1), 602(c)(5)(E), 603(c)(1), and 603(c)(6)(D) of the Social Security Act and this subpart.

Premium pay means an amount of up to $13 per hour that is paid to an eligible worker, in addition to wages or remuneration the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID–19 public health emergency. Such amount may not exceed $25,000 in total over the period of performance with respect to any single eligible worker. Premium pay may be awarded to non-hourly and part-time eligible workers performing essential work. Premium pay will be considered to be in addition to wages or remuneration the eligible worker otherwise receives if, as measured on an hourly rate, the premium pay is:

(1) With regard to work that the eligible worker previously performed, pay and remuneration equal to the sum of all wages and remuneration previously received plus up to $13 per hour with no reduction, substitution, offset, or other diminishment of the eligible worker's previous, current, or prospective wages or remuneration; or

(2) With regard to work that the eligible worker continues to perform, pay of up to $13 per hour that is in addition to the eligible worker's regular rate of wages or remuneration, with no reduction, substitution, offset, or other diminishment of the worker's current and prospective wages or remuneration.

Qualified census tract has the same meaning given in 26 U.S.C. 42(d)(5)(B)(ii)(I).

Recipient means a State, territory, Tribal government, metropolitan city, nonentitlement unit of local government, county, or unit of general local government that receives a payment made under section 602(b) or 603(b) of the Social Security Act or transfer pursuant to section 603(c)(4) of the Social Security Act.

Reporting year means a single year or partial year within the covered period, aligned to the current fiscal year of the State or territory during the covered period.

Secretary means the Secretary of the Treasury.

State means each of the 50 States and the District of Columbia.

Small business means a business concern or other organization that:

(1) Has no more than 500 employees or, if applicable, the size standard in number of employees established by the Administrator of the Small Business Administration for the industry in which the business concern or organization operates, and

(2) Is a small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632).

Surface Transportation project means any of the following:

(1) A project eligible under 23 U.S.C. 117;

(2) A project eligible under 23 U.S.C. 119;

(3) A project eligible under 23 U.S.C. 124, as added by the Infrastructure Investment and Jobs Act;

(4) A project eligible under 23 U.S.C. 133;

(5) An activity to carry out 23 U.S.C. 134;

(6) A project eligible under 23 U.S.C. 148;

(7) A project eligible under 23 U.S.C. 149;

(8) A project eligible under 23 U.S.C. 151(f), as added by the Infrastructure Investment and Jobs Act;

(9) A project eligible under 23 U.S.C. 165;

(10) A project eligible under 23 U.S.C. 167;

(11) A project eligible under 23 U.S.C. 173, as added by the Infrastructure Investment and Jobs Act;

(12) A project eligible under 23 U.S.C. 175, as added by the Infrastructure Investment and Jobs Act;

(13) A project eligible under 23 U.S.C. 176, as added by the Infrastructure Investment and Jobs Act;

(14) A project eligible under 23 U.S.C. 202;

(15) A project eligible under 23 U.S.C. 203;

(16) A project eligible under 23 U.S.C. 204;

(17) A project eligible under the program for national infrastructure investments commonly known as the ''Rebuilding American Infrastructure with Sustainability and Equity'' grant program;

(18) A project eligible for credit assistance under the Transportation Infrastructure Finance and Innovation Act program under 23 U.S.C. chapter 6;

(19) A project that furthers the completion of a designated route of the

Appalachian Development Highway System under 40 U.S.C. 14501;

(20) A project eligible under 49 U.S.C. 5307;

(21) A project eligible under 49 U.S.C. 5309;

(22) A project eligible under 49 U.S.C. 5311;

(23) A project eligible under 49 U.S.C. 5337;

(24) A project eligible under 49 U.S.C. 5339;

(25) A project eligible under 49 U.S.C. 6703, as added by the Infrastructure Investment and Jobs Act;

(26) A project eligible under the bridge replacement, rehabilitation, preservation, protection, and construction program under paragraph (1) under the heading 'HIGHWAY INFRASTRUCTURE PROGRAM' under the heading 'FEDERAL HIGHWAY ADMINISTRATION' under the heading 'DEPARTMENT OF TRANSPORTATION' under title VIII of division J of the Infrastructure Investment and Jobs Act; and

(27) A project eligible under 49 U.S.C. 6701 for the purpose set forth in § 35.6(h)(1)(i)(C).

Tax revenue means revenue received from a compulsory contribution that is exacted by a government for public purposes excluding refunds and corrections and, for purposes of § 35.8, intergovernmental transfers. Tax revenue does not include payments for a special privilege granted or service rendered, employee or employer assessments and contributions to finance retirement and social insurance trust systems, or special assessments to pay for capital improvements.

Territory means the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or American Samoa.

Title I eligible schools means schools eligible to receive services under section 1113 of Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 6313), including schools served under section 1113(b)(1)(C) of that Act.

Title I project means an activity eligible under section 105(a) of the Housing and Community Development Act of 1974 (42 U.S.C. 5305(a)).

Tribal enterprise means a business concern:

(1) That is wholly owned by one or more Tribal governments, or by a corporation that is wholly owned by one or more Tribal governments; or

(2) That is owned in part by one or more Tribal governments, or by a corporation that is wholly owned by one or more Tribal governments, if all other owners are either United States citizens or small business concerns, as these terms are used and consistent with the definitions in 15 U.S.C. 657a(b)(2)(D).

Tribal government means the recognized governing body of any Indian or Alaska Native Tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published on January 29, 2021, pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).

Unemployment rate means the U–3 unemployment rate provided by the Bureau of Labor Statistics as part of the Local Area Unemployment Statistics program, measured as total unemployment as a percentage of the civilian labor force.

Unemployment trust fund means an unemployment trust fund established under section 904 of the Social Security Act (42 U.S.C. 1104).

Unit of general local government has the meaning given to that term in section 102(a)(1) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(1)).

§ 35.4 Reservation of authority, reporting.

(a) *Reservation of authority.* Nothing in this part shall limit the authority of the Secretary to take action to enforce conditions or violations of law, including actions necessary to prevent evasions of this subpart.

(b) *Extensions or accelerations of timing.* The Secretary may extend or accelerate any deadline or compliance date of this part, including reporting requirements that implement this subpart, if the Secretary determines that such extension or acceleration is appropriate. In determining whether an extension or acceleration is appropriate, the Secretary will consider the period of time that would be extended or accelerated and how the modified timeline would facilitate compliance with this subpart.

(c) *Reporting and requests for other information.* During the period of performance, recipients shall provide to the Secretary or her delegate, as applicable, periodic reports providing detailed accounting of the uses of funds, modifications to a State or Territory's tax revenue sources, and such other information as the Secretary or her delegate, as applicable, may require for the administration of this section. In addition to regular reporting requirements, the Secretary may request other additional information as may be necessary or appropriate, including as may be necessary to prevent evasions of the requirements of this subpart. False statements or claims made to the Secretary may result in criminal, civil, or administrative sanctions, including fines, imprisonment, civil damages and penalties, debarment from participating in Federal awards or contracts, and/or any other remedy available by law.

§ 35.5 Use of funds.

(a) *In general.* A recipient may only use funds for the purposes enumerated in § 35.6 (b) through (f) to cover costs incurred during the period beginning March 3, 2021, and ending December 31, 2024, subject to the restrictions set forth in sections 602(c)(2) and 603(c)(2) of the Social Security Act, as applicable. A recipient may only use funds for the purposes enumerated in § 35.6 (g) through (h) to cover costs incurred during the period beginning December 29, 2022, and ending December 31, 2024, subject to the restrictions set forth in sections 602(c)(2), 602(c)(5)(C), 603(c)(2), and 603(c)(6)(B) of the Social Security Act, as applicable.

(b) *Costs incurred.* A cost shall be considered to have been incurred for purposes of paragraph (a) of this section if the recipient has incurred an obligation with respect to such cost by December 31, 2024.

(c) *Return of funds.* A recipient must return any funds not obligated by December 31, 2024. A recipient must return funds obligated for a use identified in § 35.6 (b) through (g) by December 31, 2024, but not expended by December 31, 2026. A recipient must return funds obligated for a use identified in § 35.6 (h) by December 31, 2024, but not expended by September 30, 2026.

§ 35.6 Eligible uses.

(a) *In general.* Subject to §§ 35.7 and 35.8, a recipient may use funds for one or more of the purposes described in paragraphs (b) through (h) of this section.

(b) *Responding to the public health emergency or its negative economic impacts.* A recipient may use funds to respond to the public health emergency or its negative economic impacts if the use meets the criteria provided in paragraph (b)(1) of this section or is enumerated in paragraph (b)(3) of this section; provided that, in the case of a use of funds for a capital expenditure under paragraph (b)(1) or (b)(3) of this section, the use of funds must also meet the criteria provided in paragraph (b)(4) of this section. Treasury may also articulate additional eligible programs, services, or capital expenditures from time to time that satisfy the eligibility criteria of this paragraph (b), which

shall be eligible under this paragraph (b).

(1) *Identifying eligible responses to the public health emergency or its negative economic impacts.*

(i) A program, service, or capital expenditure is eligible under this paragraph (b)(1) if a recipient identifies a harm or impact to a beneficiary or class of beneficiaries caused or exacerbated by the public health emergency or its negative economic impacts and the program, service, or capital expenditure responds to such harm.

(ii) A program, service, or capital expenditure responds to a harm or impact experienced by an identified beneficiary or class of beneficiaries if it is reasonably designed to benefit the beneficiary or class of beneficiaries that experienced the harm or impact and is related and reasonably proportional to the extent and type of harm or impact experienced.

(2) *Identified harms: presumptions of impacted and disproportionately impacted beneficiaries.* A recipient may rely on the following presumptions to identify beneficiaries presumptively impacted or disproportionately impacted by the public health emergency or its negative economic impacts for the purpose of providing a response under paragraph (b)(1) or (b)(3) of this section:

(i) Households or populations that experienced unemployment; experienced increased food or housing insecurity; qualify for the Children's Health Insurance Program (42 U.S.C. 1397aa *et seq.*), Childcare Subsidies through the Child Care and Development Fund Program (42 U.S.C. 9857 *et seq.* and 42 U.S.C. 618), or Medicaid (42 U.S.C. 1396 *et seq.*); if funds are to be used for affordable housing programs, qualify for the National Housing Trust Fund (12 U.S.C. 4568) or the Home Investment Partnerships Program (42 U.S.C. 12721 *et seq.*); if funds are to be used to address impacts of lost instructional time for students in kindergarten through twelfth grade, any student who did not have access to in-person instruction for a significant period of time; and low- and moderate-income households and populations are presumed to be impacted by the public health emergency or its negative economic impacts;

(ii) The general public is presumed to be impacted by the public health emergency for the purposes of providing the uses set forth in paragraphs (b)(3)(i)(A) and (b)(3)(i)(C) of this section; and

(iii) The following households, communities, small businesses, and nonprofit organizations are presumed to be disproportionately impacted by the public health emergency or its negative economic impacts:

(A) Households and populations residing in a qualified census tract; households and populations receiving services provided by Tribal governments; households and populations residing in the territories; households and populations receiving services provided by territorial governments; low-income households and populations; households that qualify for Temporary Assistance for Needy Families (42 U.S.C. 601 *et seq.*), the Supplemental Nutrition Assistance Program (7 U.S.C. 2011 *et seq.*), Free and Reduced Price School Lunch and/or Breakfast programs (42 U.S.C. 1751 *et seq.* and 42 U.S.C. 1773), Medicare Part D Low-income Subsidies (42 U.S.C. 1395w-114), Supplemental Security Income (42 U.S.C. 1381 *et seq.*), Head Start (42 U.S.C. 9831 *et seq.*), Early Head Start (42 U.S.C. 9831 *et seq.*), the Special Supplemental Nutrition Program for Women, Infants, and Children (42 U.S.C. 1786), Section 8 Vouchers (42 U.S.C. 1437f), the Low-Income Home Energy Assistance Program (42 U.S.C. 8621 *et seq.*), Pell Grants (20 U.S.C. 1070a), and, if SLFRF funds are to be used for services to address educational disparities, Title I eligible schools;

(B) Small businesses operating in a qualified census tract, operated by Tribal governments or on Tribal lands, or operating in the territories; and

(C) Nonprofit organizations operating in a qualified census tract, operated by Tribal governments or on Tribal lands, or operating in the territories.

(3) *Enumerated eligible uses: responses presumed reasonably proportional.* A recipient may use funds to respond to the public health emergency or its negative economic impacts on a beneficiary or class of beneficiaries for one or more of the following purposes unless such use is grossly disproportionate to the harm caused or exacerbated by the public health emergency or its negative economic impacts:

(i) Responding to the public health impacts of the public health emergency for purposes including:

(A) COVID–19 mitigation and prevention in a manner that is consistent with recommendations and guidance from the Centers for Disease Control and Prevention, including vaccination programs and incentives; testing programs; contact tracing; isolation and quarantine; mitigation and prevention practices in congregate settings; acquisition and distribution of medical equipment for prevention and treatment of COVID–19, including personal protective equipment; COVID–19 prevention and treatment expenses for public hospitals or health care facilities, including temporary medical facilities; establishing or enhancing public health data systems; installation and improvement of ventilation systems in congregate settings, health facilities, or other public facilities; and assistance to small businesses, nonprofits, or impacted industries to implement mitigation measures;

(B) Medical expenses related to testing and treating COVID–19 that are provided in a manner consistent with recommendations and guidance from the Centers for Disease Control and Prevention, including emergency medical response expenses, treatment of long-term symptoms or effects of COVID–19, and costs to medical providers or to individuals for testing or treating COVID–19;

(C) Behavioral health care, including prevention, treatment, emergency or first-responder programs, harm reduction, supports for long-term recovery, and behavioral health facilities and equipment; and

(D) Preventing and responding to increased violence resulting from the public health emergency, including community violence intervention programs, or responding to increased gun violence resulting from the public health emergency, including payroll and covered benefits associated with community policing strategies; enforcement efforts to reduce gun violence; and investing in technology and equipment;

(ii) Responding to the negative economic impacts of the public health emergency for purposes including:

(A) Assistance to households and individuals, including:

(1) Assistance for food; emergency housing needs; burials, home repairs, or weatherization; internet access or digital literacy; cash assistance; and assistance accessing public benefits;

(2) Paid sick, medical, or family leave programs, or assistance to expand access to health insurance;

(3) Childcare, early learning services, home visiting, or assistance for child welfare-involved families or foster youth;

(4) Programs to address the impacts of lost instructional time for students in kindergarten through twelfth grade;

(5) Development, repair, and operation of affordable housing and services or programs to increase long-term housing security;

(6) Financial services that facilitate the delivery of Federal, State, or local benefits for unbanked and underbanked individuals;

(7) Benefits for the surviving family members of individuals who have died from COVID–19, including cash assistance to surviving spouses or dependents of individuals who died of COVID–19;

(8) Assistance for individuals who want and are available for work, including those who are unemployed, have looked for work sometime in the past 12 months, who are employed part time but who want and are available for full-time work, or who are employed but seeking a position with greater opportunities for economic advancement;

(9) Facilities and equipment related to the provision of services to households provided in paragraphs (b)(3)(ii)(A)(*1*) through(*8*) of this section;

(10) The following expenses related to Unemployment Trust Funds:

(i) Contributions to a recipient Unemployment Trust Fund and repayment of principal amounts due on advances received under Title XII of the Social Security Act (42 U.S.C. 1321) up to an amount equal to (a) the difference between the balance in the recipient's Unemployment Trust Fund as of January 27, 2020, and the balance of such account as of May 17, 2021, plus (b) the principal amount outstanding as of May 17, 2021, on any advances received under Title XII of the Social Security Act between January 27, 2020, and May 17, 2021; provided that if a recipient repays principal on Title XII advances or makes a contribution to an Unemployment Trust Fund after April 1, 2022, such recipient shall not reduce average weekly benefit amounts or maximum benefit entitlements prior to December 31, 2024; and

(ii) Any interest due on such advances received under Title XII of the Social Security Act (42 U.S.C. 1321); and

(11) A program, service, capital expenditure, or other assistance that is provided to a disproportionately impacted household, population, or community, including:

(i) Services to address health disparities of the disproportionately impacted household, population, or community;

(ii) Housing vouchers and relocation assistance;

(iii) Investments in communities to promote improved health outcomes and public safety such as parks, recreation facilities, and programs that increase access to healthy foods;

(iv) Capital expenditures and other services to address vacant or abandoned properties;

(v) Services to address educational disparities; and

(vi) Facilities and equipment related to the provision of these services to the disproportionately impacted household, population, or community.

(B) Assistance to small businesses, including:

(*1*) Programs, services, or capital expenditures that respond to the negative economic impacts of the COVID–19 public health emergency, including loans or grants to mitigate financial hardship such as declines in revenues or impacts of periods of business closure, or providing technical assistance; and

(*2*) A program, service, capital expenditure, or other assistance that responds to disproportionately impacted small businesses, including rehabilitation of commercial properties; storefront and façade improvements; technical assistance, business incubators, and grants for start-ups or expansion costs for small businesses; and programs or services to support micro-businesses;

(C) Assistance to nonprofit organizations including programs, services, or capital expenditures, including loans or grants to mitigate financial hardship such as declines in revenues or increased costs, or technical assistance;

(D) Assistance to tourism, travel, hospitality, and other impacted industries for programs, services, or capital expenditures, including support for payroll costs and covered benefits for employees, compensating returning employees, support for operations and maintenance of existing equipment and facilities, and technical assistance; and

(E) Expenses to support public sector capacity and workforce, including:

(1) Payroll and covered benefit expenses for public safety, public health, health care, human services, and similar employees to the extent that the employee's time is spent mitigating or responding to the COVID–19 public health emergency;

(2) Payroll, covered benefit, and other costs associated with programs or services to support the public sector workforce and with the recipient:

(i) Hiring or rehiring staff to fill budgeted full-time equivalent positions that existed on January 27, 2020, but that were unfilled or eliminated as of March 3, 2021; or

(ii) Increasing the number of its budgeted full-time equivalent employees by up to the difference between the number of its budgeted full-time equivalent employees on January 27, 2020, multiplied by 1.075, and the number of its budgeted full-time equivalent employees on March 3, 2021, provided that funds shall only be used for additional budgeted full-time equivalent employees above the recipient's number of budgeted full-time equivalent employees as of March 3, 2021;

(3) Costs to improve the design and execution of programs responding to the COVID–19 pandemic and to administer or improve the efficacy of programs addressing the public health emergency or its negative economic impacts; and

(4) Costs associated with addressing administrative needs of recipient governments that were caused or exacerbated by the pandemic.

(4) *Capital expenditures.* A recipient, other than a Tribal government, must prepare a written justification for certain capital expenditures according to Table 1 of paragraph (b) of this section. Such written justification must include the following elements:

(i) Describe the harm or need to be addressed;

(ii) Explain why a capital expenditure is appropriate; and

(iii) Compare the proposed capital expenditure to at least two alternative capital expenditures and demonstrate why the proposed capital expenditure is superior.

TABLE 1 TO PARAGRAPH (b)

If a project has total expected capital expenditures of	and the use is enumerated in (b)(3), then	and the use is not enumerated in (b)(3), then
Less than $1 million	No Written Justification required	No Written Justification required.
Greater than or equal to $1 million, but less than $10 million.	Written Justification required but recipients are not required to submit as part of regular reporting to Treasury.	Written Justification required and recipients must submit as part of regular reporting to Treasury.

TABLE 1 TO PARAGRAPH (b)—Continued

If a project has total expected capital expenditures of	and the use is enumerated in (b)(3), then	and the use is not enumerated in (b)(3), then
$10 million or more	Written Justification required and recipients must submit as part of regular reporting to Treasury.	

(c) *Providing premium pay to eligible workers.* A recipient may use funds to provide premium pay to eligible workers of the recipient who perform essential work or to provide grants to eligible employers that have eligible workers who perform essential work, provided that any premium pay or grants provided under this paragraph (c) must respond to eligible workers performing essential work during the COVID–19 public health emergency. A recipient uses premium pay or grants provided under this paragraph (c) to respond to eligible workers performing essential work during the COVID–19 public health emergency if:

(1) The eligible worker's total wages and remuneration, including the premium pay, is less than or equal to 150 percent of the greater of such eligible worker's residing State's or county's average annual wage for all occupations as defined by the Bureau of Labor Statistics' Occupational Employment and Wage Statistics;

(2) The eligible worker is not exempt from the Fair Labor Standards Act overtime provisions (29 U.S.C. 207); or

(3) The recipient has submitted to the Secretary a written justification that explains how providing premium pay to the eligible worker is responsive to the eligible worker performing essential work during the COVID–19 public health emergency (such as a description of the eligible workers' duties, health, or financial risks faced due to COVID–19, and why the recipient determined that the premium pay was responsive despite the worker's higher income).

(d) *Providing government services.* A recipient may use funds for the provision of government services up to an amount equal to the greater of:

(1) $10,000,000; or

(2) the amount of the reduction in the recipient's general revenue due to the COVID–19 public health emergency, which equals the sum of the reduction in revenue, calculated as of each date identified in paragraph (d)(2)(i) of this section and according to the formula in paragraph (d)(2)(ii) of this section:

(i) A recipient must make a one-time election to calculate the reduction in its general revenue using information as of either:

(A) December 31, 2020, December 31, 2021, December 31, 2022, and December 31, 2023; or

(B) The last day of each of the recipient's fiscal years ending in 2020, 2021, 2022, and 2023.

(ii) A reduction in a recipient's general revenue for each date identified in paragraph (d)(2)(i) equals:

$$Max\ \{[Base\ Year\ Revenue^{*}\ (1 + Growth\ Adjustment)\hat{}(n_t/12)] - Actual\ General\ Revenue;\ 0\}$$

Where:

(A) Base Year Revenue is the recipient's general revenue for the most recent full fiscal year prior to the COVID–19 public health emergency;

(B) Growth Adjustment is equal to the greater of 5.2 percent (or 0.052) and the recipient's average annual revenue growth over the three full fiscal years prior to the COVID–19 public health emergency;

(C) n equals the number of months elapsed from the end of the base year to the calculation date;

(D) Subscript t denotes the specific calculation date; and

(E) Actual General Revenue is a recipient's actual general revenue collected during the 12-month period ending on each calculation date identified in paragraph (d)(2)(i) of this section, except:

(*1*) For purposes of all calculation dates on or after April 1, 2022, in the case of any change made after January 6, 2022, to any law, regulation, or administrative interpretation that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase and that the recipient assesses has had the effect of decreasing the amount of tax revenue collected during the 12-month period ending on the calculation date relative to the amount of tax revenue that would have been collected in the absence of such change, the recipient must add to actual general revenue the amount of such decrease in tax revenue;

(*2*) For purposes of any calculation date on or after April 1, 2022, in the case of any change made after January 6, 2022, to any law, regulation, or administrative interpretation that increases any tax (by providing for an increase in a rate, the reduction of a rebate, a deduction, or a credit, or otherwise) or accelerates the imposition of any tax or tax increase and that the recipient assesses has had the effect of increasing the amount of tax revenue collected during the 12-month period ending on the calculation date relative to the amount of tax revenue that would have been collected in the absence of such change, the recipient must subtract from actual general revenue the amount of such increase in tax revenue; and

(*3*) If the recipient makes a one-time election to adjust general revenue to reflect tax changes made during the period beginning on January 27, 2020 and ending on January 6, 2022, for purposes of each calculation date identified in paragraph (d)(2)(i) of this section:

(*i*) In the case of any change made during such prior period to any law, regulation, or administrative interpretation that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase and that the recipient assesses has had the effect of decreasing the amount of tax revenue collected during the 12-month period ending on the calculation date relative to the amount of tax revenue that would have been collected in the absence of such change, the recipient must add to actual general revenue the amount of such decrease in tax revenue; and

(*ii*) In the case of any change made during such prior period to any law, regulation, or administrative interpretation that increases any tax (by providing for an increase in a rate, the reduction of a rebate, a deduction, or a credit, or otherwise) or accelerates the imposition of any tax or tax increase and that the recipient assesses has had the effect of increasing the amount of tax revenue collected during the 12-month period ending on the calculation date relative to the amount of tax revenue that would have been collected in the absence of such change, the recipient must subtract from actual general revenue the amount of such increase in tax revenue; and

(*4*) With respect to any calculation date during the period beginning on January 6, 2022, and ending on March 31, 2022, if the recipient makes the

election in paragraph (d)(3) of this section, the recipient must also make the adjustments referenced in paragraph (d)(3) of this section with respect to any such changes in law, regulation, or administrative interpretation during the period beginning on January 6, 2022, and ending on such calculation date.

(e) *Making necessary investments in water, sewer, and broadband infrastructure.* A recipient may use funds to make the following investments in water, sewer, and broadband infrastructure.

(1) *Water and sewer investments*—(i) *Clean Water State Revolving Fund projects.* Projects or activities of the type that meet the eligibility requirements of section 603(c) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c));

(ii) *Additional stormwater projects.* Projects to manage, reduce, treat, or recapture stormwater or subsurface drainage water regardless of whether such projects would improve water quality if such projects would otherwise meet the eligibility requirements of section 603(c)(5) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c)(5));

(iii) *Drinking Water State Revolving Fund projects.* Projects or activities of the type that meet the eligibility requirements of section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j–12) as implemented by the regulations adopted by the Environmental Protection Agency (EPA) under 40 CFR 35.3520, provided that:

(A) The recipient is not required to comply with the limitation under 40 CFR 35.3520(c)(2) to acquisitions of land from willing sellers or the prohibition under 40 CFR 35.3520(e)(6) on uses of funds for certain Tribal projects; and

(B) In the case of lead service line replacement projects, the recipient must replace the full length of the service line and may not replace only a partial portion of the service line.

(iv) *Additional lead remediation and household water quality testing.* Projects or activities to address lead in drinking water or provide household water quality testing that are within the scope of the programs the EPA is authorized to establish under sections 1459A(b)(2), 1459B(b)(1), 1464(d)(2), and 1465 of the Safe Drinking Water Act (42 U.S.C. 300j–19a(b)(2), 300j–19b(b)(1), 300j–24(d)(2), and 300j–25), provided that:

(A) In the case of lead service line replacement projects, the recipient must replace the full length of the service line and may not replace only a partial portion of the service line; and

(B) In the case of projects within the scope of the program the EPA is authorized to establish under section 1459B(b)(1) of the Safe Drinking Water Act, the recipient may determine the income eligibility of homeowners served by lead service line replacement projects in its discretion.

(v) *Drinking water projects to support increased population.* Projects of the type that meet the eligibility requirements of 40 CFR 35.3520 other than the requirement of 40 CFR 35.3520(b)(1) to address present or prevent future violations of health-based drinking water standards, if the following conditions are met:

(A) The project is needed to support increased population, with need assessed as of the time the project is undertaken;

(B) The project is designed to support no more than a reasonable level of projected increased need, whether due to population growth or otherwise;

(C) The project is a cost-effective means for achieving the desired level of service; and

(D) The project is projected to continue to provide an adequate level of drinking water over its estimated useful life.

(vi) *Dams and reservoirs.* Rehabilitation of dams and reservoirs if the following conditions are met:

(A) The project meets the requirements of 40 CFR 35.3520 other than the following requirements:

(1) The prohibition on the rehabilitation of dams and reservoirs in paragraphs (e)(1) and (e)(3) of 40 CFR 35.3520; and

(2) The requirement in paragraph (b)(1) of 40 CFR 35.3520 that the project is needed to address present or prevent future violations of health-based drinking water standards, provided that if the dam or reservoir project does not meet this requirement, the project must be needed to support increased population, with need assessed as of the time the project is undertaken, and the project must be projected to continue to provide an adequate level of drinking water over its estimated useful life;

(B) The primary purpose of the dam or reservoir is for drinking water supply;

(C) The project is needed for the provision of drinking water supply, with need assessed as of the time the project is initiated;

(D) The project is designed to support no more than a reasonable level of projected increased need, whether due to population growth or otherwise; and

(E) The project is a cost-effective means for achieving the desired level of service.

(vii) *Private wells.* Rehabilitation of private wells, testing initiatives to identify contaminants in private wells, and treatment activities and remediation projects that address contamination in private wells, if the project meets the requirements of 40 CFR 35.3520 other than the limitation to certain eligible systems under paragraph (a) of 40 CFR 35.3520.

(2) *Broadband investments*—(i) *General.* Broadband infrastructure if the following conditions are met:

(A) The broadband infrastructure is designed to provide service to households and businesses with an identified need, as determined by the recipient, for such infrastructure;

(B) The broadband infrastructure is designed to, upon completion:

(*1*) Reliably meet or exceed symmetrical 100 Mbps download speed and upload speeds; or

(*2*) In cases where it is not practicable, because of the excessive cost of the project or geography or topography of the area to be served by the project, to provide service reliably meeting or exceeding symmetrical 100 Mbps download speed and upload speeds:

(i) Reliably meet or exceed 100 Mbps download speed and between at least 20 Mbps and 100 Mbps upload speed; and

(ii) Be scalable to a minimum of 100 Mbps download speed and 100 Mbps upload speed; and

(C) The service provider for a completed broadband infrastructure investment project that provides service to households is required, for as long as the SLFRF-funded broadband infrastructure is in use, by the recipient to:

(*1*) Participate in the Federal Communications Commission's Affordable Connectivity Program (ACP) through the lifetime of the ACP; or (*2*) Otherwise provide access to a broad-based affordability program to low-income consumers in the proposed service area of the broadband infrastructure that provides benefits to households commensurate with those provided under the ACP through the lifetime of the ACP.

(ii) *Cybersecurity infrastructure investments.* Cybersecurity infrastructure investments that are designed to improve the reliability and resiliency of new and existing broadband infrastructure. Such investments may include the addition or modernization of network security hardware and software tools designed to strengthen cybersecurity for the end-users of these networks.

(f) *Meeting the non-Federal matching requirements for Bureau of Reclamation projects.* A recipient may use funds to

meet the non-Federal matching requirements of any authorized Bureau of Reclamation project.

(g) *Natural Disaster Emergency Relief.* Subject to paragraph (g)(3) of this section, a recipient may use funds to provide emergency relief from the physical impacts or negative economic impacts of a natural disaster, including the forms of emergency relief identified in paragraph (g)(2) of this section, if the use meets the criteria provided in paragraph (g)(1) of this section.

(1) *Identifying emergency relief from the physical or negative economic impacts of a natural disaster.* A recipient provides emergency relief from the physical impacts or negative economic impacts of a natural disaster when the recipient:

(i) Identifies either:

(A) a natural disaster that has occurred or is expected to occur imminently and that has been the subject of an emergency declaration or designation applicable to the recipient's geography and jurisdiction in the form of:

(1) an emergency declaration pursuant to the Stafford Act;

(2) an emergency declaration by the Governor of a state pursuant to state law;

(3) an emergency declaration made by a Tribal government; or

(4) a designation as a natural disaster by the chief executive (or equivalent) of the recipient, provided that the chief executive (or equivalent) documents that the event meets the definition of natural disaster; or

(B) a natural disaster that is threatened to occur in the future, provided that the recipient documents evidence of historical patterns or predictions of natural disasters that would reasonably demonstrate the likelihood of the future occurrence of a natural disaster in the recipient's jurisdiction; and

(ii) Provides emergency relief that responds to and is related and reasonably proportional to:

(A) the physical or negative economic impacts of the natural disaster identified in paragraph (g)(1)(i)(A) of this section, or

(B) the potential physical or negative economic impacts of the natural disaster identified in paragraph (g)(1)(i)(B) of this section.

(2) *Enumerated eligible uses.* A recipient may use funds to provide emergency relief from

(i) the physical or negative economic impacts of natural disasters identified under paragraph (g)(1)(i)(A) of this section by engaging in one of the following activities, provided that the emergency relief is related and reasonably proportional to the physical or negative economic impacts of the natural disaster identified:

(A) Temporary emergency housing, food assistance, and financial assistance for lost wages;

(B) Emergency protective measures, including assistance for emergency access, medical care and transport, emergency operations center related costs, and other activities traditionally undertaken as part of emergency response;

(C) Debris removal activities, including the clearance, removal, and disposal of vegetative debris, construction and demolition debris, sand, mud, silt, gravel, rocks, boulders, white goods, and vehicle and vessel wreckage;

(D) Restoration of public infrastructure damaged by a natural disaster, including roads, bridges, and utilities;

(E) Increased operational costs, including payroll costs and costs for government facilities and government services;

(F) Cash assistance for uninsured or underinsured expenses, and cash assistance serving low-income households; or

(G) Home repairs for uninhabitable primary residences; or

(ii) the potential physical or negative economic impacts of natural disasters identified under paragraph (g)(1)(i)(B) of this section by using funds for mitigation activities, provided that the emergency relief is related and reasonably proportional to the potential physical or negative economic impacts of the natural disaster identified, and provided further that if funds are used for capital expenditures under this paragraph, a recipient, other than a Tribal government, must prepare a written justification for activities under this paragraph (g)(2)(ii) with total capital expenditures of $1 million or greater. Such written justification must include the following elements:

(A) Describe the emergency relief provided by the mitigation activity and why it is needed to lessen or avert the potential impacts of the natural disaster that is threatened to occur in the future;

(B) Explain why the capital expenditure is appropriate to address the need for emergency relief; and

(C) Compare the proposed capital expenditure to at least two alternative capital expenditures and demonstrate why the proposed capital expenditure is superior.

(3) *Duplication of benefits.* (A) A recipient may not provide financial assistance under this paragraph (g) to a person, business concern, or other entity with respect to disaster losses for which such beneficiary will receive financial assistance under any other program or from insurance or any other source.

(B) A recipient may provide assistance with respect to disaster losses to a person, business concern, or other entity that is or may be entitled to receive assistance for those losses from another source, if such person, business concern, or other entity has not received the other benefits by the time of application for assistance and the person, business concern, or other entity agrees to repay any duplicative assistance to the recipient. A recipient providing assistance with respect to disaster losses shall coordinate with the relevant Regional Administrator of the Federal Emergency Management Agency and state disaster-assistance administrator. Recipients shall notify subrecipients and contractors that, when providing assistance with respect to disaster losses, those entities are responsible for ensuring that beneficiaries disclose any other assistance received for the same disaster losses prior to receiving assistance under this paragraph (g).

(C) Funds shall be used last in the delivery sequence unless the recipient, in consultation with the appropriate Regional Administrator of the Federal Emergency Management Agency or state disaster-assistance administrator, determines that another sequence is appropriate.

(h) *Certain infrastructure projects.* A recipient may use funds for Surface Transportation projects as set forth in paragraph (h)(1) of this section and for Title I projects as set forth in paragraph (h)(2) of this section, subject to the requirements set forth in paragraph (h)(3) of this section.

(1) *Surface Transportation projects.* A recipient may use funds for Surface Transportation projects in the manner set forth in paragraph (h)(1)(i) of this section, subject to the requirements and limitations set forth in paragraph (h)(1)(ii) of this section.

(i)(A) A recipient may use funds to expand the scope of, to cover additional costs associated with, or to otherwise supplement funding for a project receiving funding from the Department of Transportation at the time that the funds are obligated and expended for the project.

(B) A recipient may use funds for a Surface Transportation project that is not funded by the Department of Transportation at the time the funds are obligated and expended.

(C) A recipient may use funds to satisfy non-Federal share requirements

for a project eligible under the provisions identified in paragraphs (1), (18), (21), and (27) of the definition of ''Surface Transportation project'' in § 35.3 or to repay a loan provided under the Transportation Infrastructure Finance and Innovation Act program under 23 U.S.C. chapter 6.

(ii) The following limitations and requirements apply to funds used for Surface Transportation projects under paragraphs (h)(1)(i)(A) and (h)(1)(i)(B) of this section.

(A) Funds used for Surface Transportation projects eligible under the provisions set forth in paragraphs (20) through (24) of the definition of ''Surface Transportation projects'' in § 35.3 shall not be used for operating expenses of such a project.

(B) Except as otherwise determined by the Secretary or the head of the Federal agency to which the Secretary has delegated authority, the requirements of titles 23, 40, and 49 of the U.S. Code, and the associated implementing regulations, apply to Surface Transportation projects, including but not limited to the following:

(*1*) Project eligibility requirements;

(*2*) Project approval requirements, provided that such requirements shall not apply to Surface Transportation projects undertaken pursuant to paragraph (h)(1)(i)(B) of this section that meet the following criteria:

(*i*) The project qualifies as an ''eligible project'' under the program described in paragraph (17) of the definition of Surface Transportation project set forth in § 35.3;

(*ii*) The recipient does not use more than $10 million in funds for the project; and

(*iii*) The entire project scope, including for avoidance of doubt any portion of the project funded through other sources, is limited to the actions or activities listed under 23 CFR 771.116(c)(1) through(22), 23 CFR 771.117(c)(1) through(30), and 23 CFR 771.118(c)(1) through(16), provided that the actions or activities do not involve unusual circumstances, as described in 23 CFR 771.116(b), 23 CFR 771.117(b), and 23 CFR 771.118(b).

(*3*) Wage and employee protection requirements, including the requirements set forth at 23 U.S.C. 113 and 49 U.S.C. 5333(a) and (b);

(*4*) Domestic preference procurement requirements, including the requirements set forth at 23 U.S.C. 313, 49 U.S.C. 5323(j), 49 CFR part 661, and 23 CFR 635.410, provided that such requirements shall not apply to Surface Transportation projects undertaken pursuant to paragraph (h)(1)(i)(B) of this section that meet the criteria set forth in paragraph (h)(1)(ii)(B)(*2*)(*i*) through (*iii*) of this section;

(*5*) Project design, planning, construction, operation, maintenance, vehicle weight limit, and toll requirements, provided that the requirement to include Surface Transportation projects in a state transportation improvement program or transportation improvement program shall not apply to Surface Transportation projects undertaken pursuant to paragraph (h)(1)(i)(B) of this section except in circumstances when the project is regionally significant and requires action by an office of the Department of Transportation pursuant to 23 CFR 450.218.

(C) Except as otherwise determined by the Secretary or the head of the Federal agency to which the Secretary has delegated authority, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), and the associated implementing regulations, apply to Surface Transportation projects.

(D) When a State uses funds for a Surface Transportation project eligible under title 23 of the U.S. Code or that otherwise would be subject to the requirements of title 23, the project must either:

(1) Demonstrate progress in achieving a state of good repair as required by the State's asset management plan under 23 U.S.C. 119(e), or

(2) Support the achievement of one or more performance targets of the State established under 23 U.S.C. 150.

(2) *Title I projects.* A recipient may use funds for Title I projects, subject to the following limitations and requirements:

(i) Except as otherwise determined by the Secretary or the head of the Federal agency to which the Secretary has delegated authority, the requirements of Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*), and the associated implementing regulations, apply to Title I projects, including:

(A) At least 70 percent of funds used for such projects, in the aggregate, must be used for projects that principally benefit low- and moderate-income persons, in accordance with the definitions and requirements set forth at 24 CFR 570.3, 24 CFR 570.200(a)(3), and 24 CFR 570.208(a) for recipients that are not Tribal governments, and at 24 CFR 1003.4 and 1003.208 for Tribal government recipients; provided, however, that Tribal governments may demonstrate that beneficiaries of Title I assistance are ''low and moderate income beneficiaries,'' as defined at 24 CFR 1003.4, based on an attestation by the Tribal government that these beneficiaries are receiving or are eligible to receive services administered by the Tribal government on the basis of an individual's income.

(B) In the case of recipients that are not Tribal governments, funds used for projects must satisfy at least one of the national objectives as set forth in 24 CFR 570.208.

(C) Not more than 15 percent of funds used for such projects, in the aggregate, may be used for public services activities and projects eligible under 42 U.S.C. 5305(a)(8).

(D) Not more than 20 percent of funds used for such projects, in the aggregate, may be used for planning and administrative costs, as described at 24 CFR 570.200(g), 570.205, and 570.206 with respect to recipients that are not Tribal governments, and as described at 24 CFR 1003.205 and 1003.206 with respect to recipients that are Tribal governments.

(E) In the case of recipients that are not Tribal governments, funds used for such projects must satisfy the requirements set forth at 42 U.S.C. 5310 and 24 CFR 570.603.

(F) Prior to commencing a Title I project, a recipient must comply with the environmental protection measures set forth at 42 U.S.C. 5304(g) and the implementing regulations set forth at 24 CFR 570.604, 24 CFR 1003.605, and 24 CFR part 58, provided that the certification contemplated by 42 U.S.C. 5304(g) shall be submitted to the Secretary and not the Secretary of the Department of Housing and Urban Development.

(ii) To the extent a Title I project relates to broadband infrastructure, the requirements of section 60102 of the Infrastructure Investment and Jobs Act shall apply.

(3) *Requirements applicable to Surface Transportation projects and Title I projects.* (i) The total amount of funds that a recipient may use for costs incurred for projects set forth in paragraphs (h)(1) and (h)(2) of this section, taken together, shall not exceed the greater of $10,000,000 and 30 percent of the recipient's total award received pursuant to payment or transfer of funds made under section 602 or 603 of the Social Security Act.

(ii) Funds used for the projects set forth in paragraph (h) of this section must supplement, and not supplant, other Federal, State, territorial, Tribal, and local government funds (as applicable) that

(A) in the case of non-Federal funds, have been obligated for activities or projects that are eligible as part of any

Surface Transportation project or Title I project, as applicable, or

(B) in the case of Federal funds, a Federal agency has committed to a particular project pursuant to an award agreement or otherwise.

§ 35.7 Pensions.

A recipient (other than a Tribal government) may not use funds for deposit into any pension fund.

§ 35.8 Tax.

(a) *Restriction.* A State or Territory shall not use funds to either directly or indirectly offset a reduction in the net tax revenue of the State or Territory resulting from a covered change during the covered period.

(b) *Violation.* Treasury will consider a State or Territory to have used funds to offset a reduction in net tax revenue if, during a reporting year:

(1) *Covered change.* The State or Territory has made a covered change that, either based on a reasonable statistical methodology to isolate the impact of the covered change in actual revenue or based on projections that use reasonable assumptions and do not incorporate the effects of macroeconomic growth to reduce or increase the projected impact of the covered change, the State or Territory assesses has had or predicts to have the effect of reducing tax revenue relative to current law;

(2) *Exceeds the de minimis threshold.* The aggregate amount of the measured or predicted reductions in tax revenue caused by covered changes identified under paragraph (b)(1) of this section, in the aggregate, exceeds 1 percent of the State's or Territory's baseline;

(3) *Reduction in net tax revenue.* The State or Territory reports a reduction in net tax revenue, measured as the difference between actual tax revenue and the State's or Territory's baseline, each measured as of the end of the reporting year; and

(4) *Consideration of other changes.* The aggregate amount of measured or predicted reductions in tax revenue caused by covered changes is greater than the sum of the following, in each case, as calculated for the reporting year:

(i) The aggregate amount of the expected increases in tax revenue caused by one or more covered changes that, either based on a reasonable statistical methodology to isolate the impact of the covered change in actual revenue or based on projections that use reasonable assumptions and do not incorporate the effects of macroeconomic growth to reduce or increase the projected impact of the covered change, the State or Territory assesses has had or predicts to have the effect of increasing tax revenue; and

(ii) Reductions in spending, up to the amount of the State's or Territory's net reduction in total spending, that are in:

(A) Departments, agencies, or authorities in which the State or Territory is not using funds; and

(B) Departments, agencies, or authorities in which the State or Territory is using funds, in an amount equal to the value of the spending cuts in those departments, agencies, or authorities, minus funds used.

(c) *Amount and revenue reduction cap.* If a State or Territory is considered to be in violation pursuant to paragraph (b) of this section, the amount used in violation of paragraph (a) of this section is equal to the lesser of:

(1) The reduction in net tax revenue of the State or Territory for the reporting year, measured as the difference between the State's or Territory's baseline and its actual tax revenue, each measured as of the end of the reporting year; and,

(2) The aggregate amount of the reductions in tax revenues caused by covered changes identified in paragraph (b)(1) of this section, minus the sum of the amounts in identified in paragraphs (b)(4)(i) and (ii) of this section.

§ 35.9 Compliance with applicable laws.

A recipient must comply with all other applicable Federal statutes, regulations, and executive orders, and a recipient shall provide for compliance with the American Rescue Plan Act, this subpart, and any interpretive guidance by other parties in any agreements it enters into with other parties relating to these funds.

§ 35.10 Recoupment.

(a) *Identification of violations*—(1) *In general.* Any amount used in violation of §§ 35.5, 35.6, or 35.7 may be identified at any time prior to December 31, 2026.

(2) *Annual reporting of amounts of violations.* On an annual basis, a recipient that is a State or territory must calculate and report any amounts used in violation of § 35.8.

(b) *Calculation of amounts subject to recoupment*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, the Secretary will calculate any amounts subject to recoupment resulting from a violation of §§ 35.5, 35.6 or 35.7 as the amounts used in violation of such restrictions.

(2) *Violations of § 35.8.* The Secretary will calculate any amounts subject to recoupment resulting from a violation of § 35.8, equal to the lesser of:

(i) The amount set forth in § 35.8(c); and,

(ii) The amount of funds received by such recipient.

(c) *Initial notice.* If the Secretary calculates an amount subject to recoupment under paragraph (b) of this section, Treasury will provide the recipient an initial written notice of the amount subject to recoupment along with an explanation of such amounts.

(d) *Request for reconsideration.* Unless the Secretary extends or accelerates the time period, within 60 calendar days of receipt of an initial notice of recoupment provided under paragraph (c) of this section, a recipient may submit a written request to the Secretary requesting reconsideration of any amounts subject to recoupment under paragraph (b) of this section. To request reconsideration of any amounts subject to recoupment, a recipient must submit to the Secretary a written request that includes:

(1) An explanation of why the recipient believes all or some of the amount should not be subject to recoupment; and

(2) A discussion of supporting reasons, along with any additional information.

(e) *Final amount subject to recoupment.* Unless the Secretary extends or accelerates the time period, within 60 calendar days of receipt of the recipient's request for reconsideration provided pursuant to paragraph (d) of this section or the expiration of the period for requesting reconsideration provided under paragraph (d) of this section, the recipient will be notified of the Secretary's decision to affirm, withdraw, or modify the notice of recoupment. Such notification will include an explanation of the decision, including responses to the recipient's supporting reasons and consideration of additional information provided. A recipient must invoke and exhaust the procedures available under this subpart prior to seeking judicial review of a decision under § 35.10.

(f) *Repayment of funds.* Unless the Secretary extends or accelerates the time period, a recipient shall repay to the Secretary any amounts subject to recoupment in accordance with instructions provided by the Secretary:

(1) Within 120 calendar days of receipt of the notice of recoupment provided under paragraph (c) of this section, in the case of a recipient that does not submit a request for reconsideration in accordance with the requirements of paragraph (d) of this section; or

(2) Within 120 calendar days of receipt of the Secretary's decision under

paragraph (e) of this section, in the case of a recipient that submits a request for reconsideration in accordance with the requirements of paragraph (d) of this section.

(g) *Other remedial actions.* Prior to seeking recoupment or taking other appropriate action pursuant to paragraphs (c), (d), (e), or (f) of this section, the Secretary may notify the recipient of potential violations and provide the recipient an opportunity for informal consultation and remediation.

§ 35.11 Payments to States.

(a) *In general.* With respect to any State or Territory that has an unemployment rate as of the date that it submits an initial certification for payment of funds pursuant to section 602(d)(1) of the Social Security Act that is less than two percentage points above its unemployment rate in February 2020, the Secretary will withhold 50 percent of the amount of funds allocated under section 602(b) of the Social Security Act to such State or territory until at least May 10, 2022 and not more than twelve months from the date such initial certification is provided to the Secretary.

(b) *Payment of withheld amount.* In order to receive the amount withheld under paragraph (a) of this section, the State or Territory must submit to the Secretary the following information:

(1) A certification, in the form provided by the Secretary, that such State or Territory requires the payment to carry out the activities specified in section 602(c) of the Social Security Act and will use the payment in compliance with section 602(c) of the Social Security Act; and

(2) Any reports required to be filed by that date pursuant to this part that have not yet been filed.

§ 35.12 Distributions to nonentitlement units of local government and units of general local government.

(a) *Nonentitlement units of local government.* Each State or Territory that receives a payment from the Secretary pursuant to section 603(b)(2)(B) of the Social Security Act shall distribute the amount of the payment to nonentitlement units of local government in such State or Territory in accordance with the requirements set forth in section 603(b)(2)(C) of the Social Security Act and without offsetting any debt owed by such nonentitlement units of local governments against such payments.

(b) *Budget cap.* A State or Territory may not make a payment to a nonentitlement unit of local government pursuant to section 603(b)(2)(C) of the Social Security Act and paragraph (a) of this section in excess of the amount equal to 75 percent of the most recent budget for the nonentitlement unit of local government as of January 27, 2020. For purposes of this section 35.12, a nonentitlement unit of local government's most recent budget shall mean the nonentitlement unit of local government's total annual budget, including both operating and capital expenditure budgets, in effect as of January 27, 2020. A State or Territory shall permit a nonentitlement unit of local government without a formal budget as of January 27, 2020, to provide a certification from an authorized officer of the nonentitlement unit of local government of its most recent annual expenditures as of January 27, 2020, and a State or Territory may rely on such certification for purposes of complying with this section 35.12.

(c) *Units of general local government.* Each State or Territory that receives a payment from the Secretary pursuant to section 603(b)(3)(B)(ii) of the Social Security Act, in the case of an amount to be paid to a county that is not a unit of general local government, shall distribute the amount of the payment to units of general local government within such county in accordance with the requirements set forth in section 603(b)(3)(B)(ii) of the Social Security Act and without offsetting any debt owed by such units of general local government against such payments.

(d) *Additional conditions.* A State or Territory may not place additional conditions or requirements on distributions to nonentitlement units of local government or units of general local government beyond those required by section 603 of the Social Security Act or this subpart A.

Kayla Arslanian,

Executive Secretary.

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Part III

Department of Homeland Security

8 CFR Parts 214 and 274a
Modernizing H–2 Program Requirements, Oversight, and Worker Protections; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

[CIS No. 2740–23; DHS Docket No. USCIS–2023–0012]

RIN 1615–AC76

Modernizing H–2 Program Requirements, Oversight, and Worker Protections

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security (DHS) proposes to amend its regulations affecting temporary agricultural (H–2A) and temporary nonagricultural (H–2B) nonimmigrant workers (H–2 programs) and their employers. This notice of proposed rulemaking is intended to better ensure the integrity of the H–2 programs and enhance protections for workers.

DATES: Written comments must be submitted on or before November 20, 2023. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

ADDRESSES: You may submit comments on the entirety of this proposed rulemaking package, identified by DHS Docket No. USCIS–2023–0012 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using *http://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, MD, Camp Springs, 20746; telephone (240) 721–3000. (This is not a toll-free number.) Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

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Table of Abbreviations

BLS—Bureau of Labor Statistics
CBP—U.S. Customs and Border Protection
CFR—Code of Federal Regulations
CPI–U—Consumer Price Index for All Urban Consumers
DHS—Department of Homeland Security
DOJ—Department of Justice
DOL—Department of Labor
DOS—Department of State
DOT—Department of Transportation
ETA—Employment and Training Administration
FDNS—Fraud Detection and National Security Directorate
FY—Fiscal year
GAO—Government Accountability Office
GDOL—Guam Department of Labor
H–2A—Temporary Agricultural Workers Nonimmigrant Classification
H–2B—Temporary Nonagricultural Workers Nonimmigrant Classification
ICE—U.S. Immigration and Customs Enforcement
INA—Immigration and Nationality Act
INS—Immigration and Naturalization Service
LCA—Labor condition application
MOU—Memorandum of understanding
NAICS—North American Industry Classification System
NEPA—National Environmental Policy Act
NOID—Notice of intent to deny
NPRM—Notice of proposed rulemaking
OFLC—Office of Foreign Labor Certification
OIRA—Office of Information and Regulatory Affairs
OMB—Office of Management and Budget
OSHA—Occupational Safety and Health Administration
PRA—Paperwork Reduction Act
RFA—Regulatory Flexibility Act of 1980
RFE—Request for evidence
SBA—Small Business Administration
SSA—Social Security Administration
TFR—Temporary final rule
TLC—Temporary labor certification
UMRA—Unfunded Mandates Reform Act of 1995
USCIS—U.S. Citizenship and Immigration Services
USAID—U.S. Agency for International Development
WHD—Wage and Hour Division

I. Public Participation

DHS invites all interested parties to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to USCIS in implementing these changes 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. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS.

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2023–0012 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment 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 and Security Notice available at *http://www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received, go to *http://www.regulations.gov,* referencing DHS Docket No. USCIS–2023–0012. You may also sign up for email alerts on the online docket to be notified when comments are posted, or a final rule is published.

II. Executive Summary

A. Purpose of the Regulatory Action

The purpose of this rulemaking is to modernize and improve the DHS regulations relating to the H–2A temporary agricultural worker program and the H–2B temporary nonagricultural worker program (H–2 programs). Through this proposed rule, DHS seeks to strengthen worker protections and the integrity of the H–2 programs, provide greater flexibility for H–2A and H–2B workers, and improve program efficiency.

B. Summary of Major Provisions of the Regulatory Action

DHS proposes to include the following major changes:

- Program Integrity and Worker Protections

To improve the integrity of the H–2 programs, DHS is proposing significant revisions to the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H–2A and H–2B workers, including new bars to approval for some H–2 petitions. Further, as a significant new program integrity measure and a deterrent to petitioners that have been found to have committed labor law violations or abused the H–2 programs, DHS is proposing to institute certain mandatory and discretionary bars to approval of an H–2A or H–2B petition. In addition, to protect workers who report their employers for program violations, DHS is proposing to provide H–2A and H–2B workers with ''whistleblower protection'' comparable to the protection that is currently offered to H–1B workers. Additionally, DHS proposes to clarify requirements for petitioners and employers to consent to, and fully comply with, USCIS compliance reviews and inspections. DHS also proposes to clarify USCIS's authority to deny or revoke a petition if USCIS is unable to verify information related to the petition, including but not limited to where such inability is due to lack of cooperation from a petitioner or an employer during a site visit or other compliance review.

- Worker Flexibilities

DHS is also proposing changes meant to provide greater flexibility to H–2A and H–2B workers. These changes include adjustments to the existing admission periods before and after the validity dates of an approved petition (grace periods) so that H–2 workers would receive up to 10 days prior to the petition's validity period and up to 30 days following the expiration of the petition, as well as an extension of the existing 30-day grace period following revocation of an approved petition during which an H–2 worker may seek new qualifying employment or prepare for departure from the United States without violating their nonimmigrant status or accruing unlawful presence for up to 60 days. In addition, to account for other situations in which a worker may unexpectedly need to stop working or wish to seek new employment, DHS is proposing to provide a new grace period for up to 60 days during which an H–2 worker can cease working for their petitioner while maintaining H–2 status. Further, in a change meant to work in conjunction with the new grace period provisions, DHS proposes to permanently provide portability—the ability to begin new employment upon the proper filing of an extension of stay petition rather than only upon its approval—to H–2A and H–2B workers. Additionally, in the case of petition revocations, DHS proposes to clarify that H–2A employers have the same responsibility that H–2B employers currently have for reasonable costs of return transportation for the beneficiary. DHS also proposes to clarify that H–2 workers will not be considered to have failed to maintain their H–2 status solely on the basis of taking certain steps toward becoming lawful permanent residents of the United States. Finally, DHS proposes to remove the phrase ''abscondment,'' ''abscond,'' and its other variations to emphasize that the mere fact of leaving employment, standing alone, does not constitute a basis for assuming wrongdoing by the worker.

- Improving H–2 Program Efficiencies and Reducing Barriers to Legal Migration

DHS proposes two changes to improve the efficiency of the H–2 programs and to reduce barriers to use of those two programs. First, DHS proposes to remove the requirement that USCIS may generally only approve petitions for H–2 nonimmigrant status for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated as eligible to participate in the H–2 programs. Second, DHS proposes to simplify the regulatory provisions regarding the effect of a departure from the United States on the 3-year maximum period of stay by providing a uniform standard for resetting the 3-year clock following such a departure.

C. Summary of Costs and Benefits

This proposed rule would directly impose costs on petitioners in the form of increased opportunity costs of time to complete and file H–2 petitions and time spent to familiarize themselves with the rule. Other difficult to quantify costs may also be experienced by certain petitioners if selected for a compliance review, petitioners that face stricter consequences regarding prohibited fees, or for those that opt to transport and house H–2A beneficiaries earlier than they would have otherwise based on the proposed extension of the pre-employment grace period from 7 to 10 days. The Federal Government may also face some increased opportunity costs of time for adjudicators to review information regarding debarment and other past violation determinations more closely, issue requests for evidence (RFE) or notices of intent to deny (NOID), and additional costs for related computer system updates.

The benefits of this proposed rule would be diverse, though most are difficult to quantify. The proposed rule would extend portability to H–2 workers lawfully present in the United States regardless of a porting petitioner's E-Verify standing, affording these workers agency of choice at an earlier moment in time, which is consistent with other portability regulations and more similar to other workers in the labor force. Employers and beneficiaries would also benefit from the extended grace periods and eliminating the interrupted stay provisions and instead reducing the period of absence out of the country to reset their 3-year maximum period of stay. The Federal Government would also realize benefits, mainly through bolstering existing program integrity activities, possible increased compliance with program requirements, and providing a greater ability for USCIS to deny or revoke petitions for issues related to program compliance.

Table 1 provides a more detailed summary of the proposed provisions and their impacts. The impact of the

costs and benefits described herein are quantified (and monetized) wherever possible given all available information. Where there are insufficient data to quantify a given impact, we provide a qualitative description of the impact.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)	DHS is proposing to add stronger language requiring petitioners or employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS's authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.	Cost: • Cooperation during a site visit or compliance review may result in opportunity costs of time for petitioners to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.7 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. • Employers that do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses. Benefit: • USCIS would have clearer authority to deny or revoke a petition if unable to verify information related to the petition. The effectiveness of existing USCIS program integrity activities would be improved through increased cooperation from employers.
8 CFR 214.2(h)(20)	DHS is proposing to provide H–2A and H–2B workers with ''whistleblower protection'' comparable to the protection currently offered to H–1B workers.	Cost: • Employers may face increased RFEs, denials, or other actions on their H–2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H–2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers. Benefit: • Such protections may afford workers the ability to expose issues that harm workers or are not in line with the intent of the H–2 programs while also offering protection to such workers (therefore potentially improving overall working conditions), but the extent to which this would occur is unknown.
8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C), 8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), and 8 CFR 214.2(h)(6)(i)(D).	DHS is proposing significant revisions to the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H–2A and H–2B workers, including new bars on approval for some H–2 petitions.	Cost: • Enhanced consequences for petitioners who charge prohibited fees could lead to increased financial losses and extended ineligibility from participating in H–2 programs. Benefit: • Possibly increase compliance with provisions regarding prohibited fees and thus reduce the occurrence and burden of prohibited fees on H–2 beneficiaries.
8 CFR 214.2(h)(10)(iii)	DHS is proposing to institute certain mandatory and discretionary bars to approval of an H–2A or H–2B petition.	Costs: • USCIS adjudicators may require additional time associated with reviewing information regarding debarment and other past violation determinations more closely, issuing RFEs or NOIDs, and conducting the discretionary analysis for relevant petitions. • The expansion of violation determinations that could be considered during adjudication, as well as the way debarments and other violation determinations would be tracked, would require some computer system updates resulting in costs to USCIS. Benefit: • Possibly increase compliance with H–2 program requirements, thereby increasing protection of H–2 workers.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E).	Eliminate the lists of countries eligible to participate in the H–2 programs.	Costs: • None expected. Benefit: • Employers and the Federal Government will benefit from the simplification of Form I–129 adjudications by eliminating the ''national interest'' portion of the adjudication that USCIS is currently required to conduct for beneficiaries from countries that are not on the lists. • Remove petitioner burden to provide evidence for beneficiaries from countries not on the lists. • Petitioners may have increased access to workers potentially available to the H–2 programs. • Free up agency resources devoted to developing and publishing the eligible country lists in the **Federal Register** every year.
8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A) 8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C)	Change grace periods such that they will be the same for both H–2A and H–2B Programs. Create a 60-day grace period following any H–2A or H–2B revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.	Costs: [1] • H–2A employers may face additional costs such as for housing, but employers likely would weigh those costs against the benefit of providing employees with additional time to prepare for the start of work. Benefit: • Provides employees (and their employers) with extra time to prepare for the start of work. Provides clarity for adjudicators and makes timeframes consistent for beneficiaries and petitioners. • Provides workers additional time to seek other employment or depart from the United States if their employer faces a revocation or if they cease employment.
8 CFR 214.2(h)(11)(iv)	Clarifies responsibility of H–2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.	Costs: • None expected since H–2A petitioning employers are already generally liable for the return transportation costs of H–2A workers. Benefit: • Beneficiaries would benefit in the event that clarified employer responsibility decreased the incidence of workers having to pay their own return travel costs in the event of a petition revocation.
8 CFR 214.2(h)(16)(i)	Clarifies that H–2 workers may take steps toward becoming a lawful permanent resident of the United States while still maintaining lawful nonimmigrant status.	Costs: • None expected. Benefit: • DHS expects this could enable some H–2 workers who have otherwise been dissuaded to pursue lawful permanent residence with the ability to do so without concern over becoming ineligible for H–2 status.
8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), and 8 CFR 214.2(h)(13)(i)(B).	Eliminates the ''interrupted stay'' calculation and instead reduces the period of absence to reset an individual's 3-year period of stay.	Costs: • Workers in active H–2 status who would consider making trips abroad for periods of less than 60 days but more than 45 days, may be disincentivized to make such trip. Benefit: • Simplifies and reduces the burden to calculate beneficiary absences for petitioners, beneficiaries, and adjudicators. • May reduce the number of RFEs related to 3-year periods of stay. Transfers: • As a result of a small number of H–2 workers at the 3-year maximum stay responding to the proposed shorter absence requirement by working 30 additional days, DHS estimates upper bound annual transfer payment of $2,918,958 in additional earnings from consumers to H–2 workers and $337,122 in tax transfers from these workers and their employers to tax programs (Medicare and Social Security).

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), and 8 CFR 274a.12(b)(21).	Make portability permanent for H–2B workers and remove the requirement that H–2A workers can only port to an E-Verify employer.	Costs: • The total estimated annual opportunity cost of time to file Form I–129 by human resource specialists is approximately $40,418. The total estimated annual opportunity cost of time to file Form I–129 and Form G–28 will range from approximately $90,554 if filed by in-house lawyers to approximately $156,132 if filed by outsourced lawyers. • The total estimated annual costs associated with filing Form I–907 if it is filed with Form I–129 is $4,728 if filed by human resource specialists. The total estimated annual costs associated with filing Form I–907 would range from approximately $9,006 if filed by an in-house lawyer to approximately $15,527 if filed by an outsourced lawyer. • The total estimated annual costs associated with the portability provision ranges from $133,684 to $198,851, depending on the filer. • DHS may incur some additional adjudication costs as more petitioners will likely file Form I–129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form. Benefit: • Enabling H–2 workers present in the United States to port to a new petitioning employer affords these workers agency of choice at an earlier moment in time consistent with other portability regulations and more similar to other workers in the labor force. • Replacing the E-Verify requirement for employers wishing to hire porting H–2A workers with strengthened site visit authority and other provisions that maintain program integrity would aid porting beneficiaries in finding petitioners without first needing to confirm if that employer is in good standing in E-Verify. Although this change impacts an unknown portion of new petitions for porting H–2A beneficiaries, no reductions in E-Verify enrollment are anticipated. • An H–2 worker with an employer that is not complying with H–2 program requirements would have additional flexibility in porting to another employer's certified position. Transfers: • Annual undiscounted transfers of $636,760 from filing fees for Form I–129 combined with Form I–907 from petitioners to USCIS.
8 CFR 214.2(h)(2)(i)(I)(*3*)	DHS proposes to clarify that a beneficiary of an H–2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H–2 program requirements.	Benefits: • Provides H–2 workers with requisite protections and benefits as codified in the rule in the event that a porting provision is withdrawn or denied. Costs: • None expected.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
Cumulative Impacts of Proposed Regulatory Changes		
DHS proposes to make changes to the Form I–129, to effectuate the proposed regulatory changes.		Costs: • The time burden to complete and file Form I–129, H Classification Supplement, would increase by 0.3 hours as a result of the proposed changes. The estimated opportunity cost of time for each petition by type of filer would be $15.28 for an HR specialist, $34.25 for an in-house lawyer, and $59.06 for an outsourced lawyer. The estimated total annual opportunity costs of time for petitioners or their representatives to file H–2 petitions under this proposed rule ranges from $745,330 to $985,540.
Petitioners or their representatives would familiarize themselves with the rule		Costs: • Petitioners or their representatives would need to read and understand the rule at an estimated opportunity cost of time that ranges from $9,739,715 to $12,877,651, incurred during the first year of the analysis.

Source: USCIS analysis.

III. Background

A. Legal Authority

The Immigration and Nationality Act (INA or the Act) section 101(a)(15)(H)(ii)(a) and (b), 8 U.S.C. 1101(a)(15)(H)(ii)(a) and (b), establishes the H–2A and H–2B nonimmigrant visa classifications for noncitizens [2] who are coming to the United States temporarily to perform agricultural labor or services or to perform nonagricultural services or labor, respectively.

The Secretary's authority for this proposed rule can be found in various provisions of the immigration laws. INA sec. 103(a), as amended, 8 U.S.C. 1103(a), provides the Secretary general authority to administer and enforce the immigration laws and to issue regulations necessary to carry out that authority. Section 402 of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 202, charges the Secretary with ''[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States'' and ''[e]stablishing national immigration enforcement policies and priorities.'' *See also* HSA sec. 428, 6 U.S.C. 236. The HSA also provides that a primary mission of DHS is to ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.'' HSA sec. 101(b)(1)(F), 6 U.S.C. 111(b)(1)(F).

With respect to nonimmigrants in particular, the INA provides that ''[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.'' [3] INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1). *See* INA secs. 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizens who are not authorized for employment). And the HSA transferred to USCIS the authority to adjudicate petitions for H–2 nonimmigrant status, establish policies for performing that function, and set national immigration services policies and priorities. *See* HSA secs. 451(a)(3), (b); 6 U.S.C. 271(a)(3), (b). In addition, under INA sec. 214(b), 8 U.S.C. 1184(b), every noncitizen, with the exception of noncitizens seeking L, V, or H–1B nonimmigrant status, is presumed to be an immigrant unless the noncitizen establishes the noncitizen's entitlement to a nonimmigrant status.[4] INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1), establishes the nonimmigrant petition process as a prerequisite for obtaining (H), (L), (O), or (P)(i) nonimmigrant status (except for those in the H–1B1 classification). This statutory provision provides the Secretary of Homeland Security with exclusive authority to approve or deny H–2 nonimmigrant visa petitions after consultation with the appropriate agencies of the Government. It also authorizes the Secretary to prescribe the form and identify information necessary for the petition. With respect to the H–2A classification, this section defines the term ''appropriate agencies of [the] Government'' to include the Departments of Labor and Agriculture, and cross-references INA sec. 218, 8 U.S.C. 1188, with respect to the H–2A classification.

INA sec. 214(c)(5)(A), 8 U.S.C. 1184(c)(5)(A), requires the employer to provide or pay for the reasonable cost of return transportation if an H–2B worker was dismissed early from employment, *i.e.,* before the end of the authorized period of admission.

[1] USCIS does not expect any additional costs to H–2B employers as, generally, they do not have to provide housing for workers. Employers are required to provide housing at no cost to H–2A workers. *See* INA sec. 218(c)(4), 8 U.S.C. 1188(c)(4). There is no similar statutory requirement for employers to provide housing to H–2B workers, although there is a regulatory requirement for an H–2B employer to provide housing when it is primarily for the benefit or convenience of the employer. *See* 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015).

[2] For purposes of this discussion, DHS uses the term ''noncitizen'' as synonymous with the term ''alien'' as it is used in the INA and regulations. *See* INA sec. 101(a)(3), 8 U.S.C. 1101(a)(3).

[3] Although several provisions of the INA discussed in this NPRM refer exclusively to the ''Attorney General,'' such provisions are now to be read as referring to the Secretary of Homeland Security by operation of the HSA. *See* 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1), (g), 1551 note; *Nielsen* v. *Preap,* 139 S. Ct. 954, 959 n.2 (2019).

[4] This section also precludes officers or employees of any foreign governments or of any international organizations entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act [22 U.S.C. 288 *et seq.*], or noncitizens who are attendants, servants, employees, or member of the immediate family of such noncitizens from applying for or receiving nonimmigrant visas or entering the United States as immigrants unless they execute a written waiver in the same form and substance as is prescribed by section 1257(b) of this title. This portion of the provision, however, is not relevant to this NPRM.

INA sec. 214(c)(14), 8 U.S.C. 1184(c)(14), provides the Secretary of Homeland Security with the authority to impose administrative remedies (including civil monetary penalties), and deny petitions for a period of at least 1 but not more than 5 years, if, after notice and an opportunity for a hearing, the Secretary finds that an employer substantially failed to meet any of the conditions of the H–2B petition or engaged in willful misrepresentation of a material fact in the H–2B petition. *See* INA sec. 214(c)(14)(A)(i) and (ii), 8 U.S.C. 1184(c)(14)(A)(i) and (ii). It also authorizes the Secretary to delegate to the Secretary of Labor the authority to determine violations and impose administrative remedies, including civil monetary penalties. *See* INA sec. 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B).[5] The Secretary of Homeland Security may designate officers or employees to take and consider evidence concerning any matter that is material or relevant to the enforcement of the INA. *See* INA secs. 235(d)(3), 287(a)(1), (b); 8 U.S.C. 1225(d)(3), 1357(a)(1), (b).

B. Description of the H–2 Nonimmigrant Classifications

1. H–2A Temporary Agricultural Workers

The INA establishes the H–2A nonimmigrant classification for temporary agricultural workers, described as a noncitizen ''having a residence in a foreign country which he [sic] has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services.'' INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a). As noted in the statute, not only must the noncitizen be coming ''temporarily'' to the United States, but the agricultural labor or services that the noncitizen is performing must also be ''of a temporary or seasonal nature.'' INA sec. 101(a)(15)(H)(ii)(a).

Current DHS regulations further define an employer's temporary need as employment that is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year. *See* 8 CFR 214.2(h)(5)(iv)(A). An employer's seasonal need is defined as employment that is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels above those necessary for ongoing operations. *Id.* There is no annual limit or ''cap'' on the number of noncitizens who may be issued H–2A visas or otherwise provided H–2A status (such as through a change from another nonimmigrant status, *see* INA sec. 248, 8 U.S.C. 1258).

2. H–2B Temporary Nonagricultural Workers

Similarly, the INA establishes the H–2B nonimmigrant classification for temporary nonagricultural workers, described as a noncitizen ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary [nonagricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.'' INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Current DHS regulations define an employer's temporary need as employment that is of a temporary nature where the employer's need to fill the position with a temporary worker generally will last no longer than 1 year, unless the employer's need is a one-time event, in which case the need could last up to 3 years. *See* 8 CFR 214.2(h)(1)(ii)(D), (h)(6)(ii), and (h)(6)(vi)(D).

Unlike the H–2A classification, there is a statutory annual limit or ''cap'' on the number of noncitizens who may be issued H–2B visas or otherwise provided H–2B status. Specifically, the INA sets the annual number of noncitizens who may be issued H–2B visas or otherwise provided H–2B status at 66,000, to be distributed semi-annually beginning in October and April. *See* INA sec. 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). With certain exceptions,[6] up to 33,000 noncitizens may be issued H–2B visas or provided H–2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H–2B visas from the first half of a fiscal year, will be available for employers seeking to hire H–2B workers during the second half of the fiscal year.[7] If insufficient petitions are approved to use all available H–2B numbers in a given fiscal year, the unused numbers cannot be carried over for petition approvals for employment start dates beginning on or after the start of the next fiscal year.

3. Temporary Labor Certification (TLC) Process

H–2 workers may not displace qualified, available U.S. workers who are capable of performing such services or labor. *See* INA secs. 101(a)(15)(H)(ii)(a)–(b), 8 U.S.C. 1101 (a)(15)(H)(ii)(a)–(b), and 218(a)(1), 8 U.S.C. 1188(a)(1); 8 CFR 214.2(h)(5)(ii)[8] and (h)(6)(i). In addition, H–2 employment may not adversely affect the wages and working conditions of workers in the United States. *See* INA sec. 218(a)(1)(B), 8 U.S.C. 1188(a)(1)(B) (H–2A); INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b) (H–2B); 8 CFR 214.2(h)(5)(ii) and (h)(6)(i). DHS regulations provide that an H–2A or H–2B petition for temporary employment in the United States must be accompanied by an approved TLC from DOL, issued pursuant to regulations established at 20 CFR part 655, or from the Guam Department of Labor (GDOL) for H–2B workers who will be employed on Guam. *See, e.g.,* 8 CFR 214.2(h)(5)(i)(A), (h)(6)(iii)(A), (C)–(E), (h)(6)(iv)(A), (v)(A). *See generally* INA secs. 103(a)(6), 214(c)(1), 8 U.S.C. 1103(a)(6), 1184(c)(1). The TLC serves as DHS's consultation with DOL or GDOL with respect to whether a qualified U.S. worker is available to fill the petitioning

[5] In 2009, the Secretary delegated to the Secretary of Labor certain authorities under INA sec. 214(c)(14)(A)(i). *See* ''Delegation of Authority to the Department of Labor under Section 214(c)(14)(A) of the Immigration and Nationality Act'' (Jan. 16, 2009).

[6] Generally, workers in the United States in H–2B status who extend their stay, change employers, or change the terms and conditions of employment will not be subject to the cap. *See* 8 CFR 214.2(h)(8)(ii). Similarly, H–2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names them on the petition and indicates that they have already been counted. *See* 8 CFR 214.2(h)(8)(ii). The spouse and children of H–2B workers, classified as H–4 nonimmigrants, also do not count against the cap.

Additionally, petitions for the following types of workers are exempt from the H–2B cap: Fish roe processors, fish roe technicians, or supervisors of fish roe processing; and workers performing labor or services in the Commonwealth of Northern Mariana Islands or Guam until Dec. 31, 2029. *See* Section 14006 of Public Law 108–287, 118 Stat. 951, 1014 (Aug. 5, 2004), and Section 3 of the Northern Mariana Islands U.S. Workforce Act of 2018, Pub. L. 115–218, 132 Stat. 1547, 1547 (July 24, 2018).). Once the H–2B cap is reached, USCIS may only accept petitions for H–2B workers who are exempt or not subject to the H–2B cap.

[7] The Federal Government's fiscal year runs from October 1 of the prior calendar year through September 30 of the year being described. For example, fiscal year 2023 runs from October 1, 2022, through September 30, 2023.

[8] INA sec. 218 governs the temporary agricultural labor certifications issued by the Department of Labor (DOL). That section is implemented through regulations at 20 CFR part 655, subpart B and 29 CFR part 501. By issuing a temporary agricultural labor certification referenced in 8 CFR 214.2(h)(5)(ii), DOL binds the employer to comply with a variety of program obligations, including the prohibition against the layoff of U.S. workers, and several provisions related to the recruitment and hiring of U.S. workers. *See* 20 CFR 655.135(g); *see also* 20 CFR 655.135(a), (b), (c), (d), and (h).

H–2A or H–2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages and working conditions of similarly employed workers in the United States. *See* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(ii), (h)(6)(iii)(A), and (h)(6)(v).

4. Current H–2 Petition Procedures

Employers must petition DHS for classification of prospective temporary workers as H–2A or H–2B nonimmigrants. *See* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1). After receiving an approved TLC, the employer listed on the TLC or the employer's U.S. agent (''H–2 petitioner'') must file the H–2 petition with the appropriate USCIS office. *See* 8 CFR 214.2(h)(2)(i), (h)(5)(i)(A), (h)(6)(iii)(E), and (h)(6)(vi). The H–2 petitioner must be a U.S. employer, a U.S. agent meeting the requirements of 8 CFR 214.2(h)(2)(i)(F), or a foreign employer filing through a U.S. agent. *See* 8 CFR 214.2(h)(2)(i)(A), (5)(i)(A) and (h)(6)(iii)(B). The H–2 petitioner may request one or more named or unnamed H–2 workers, but the total number of workers may not exceed the number of positions listed on the TLC. *See* 8 CFR 214.2(h)(2)(ii) and (iii), (h)(5)(i)(B), and (h)(6)(viii). H–2 petitioners must identify by name the H–2 worker if the worker is in the United States or, under current DHS regulations, if the H–2 worker is a national of a country that is not designated as an H–2 participating country. *See* 8 CFR 214.2(h)(2)(iii). Generally, USCIS must approve this petition before the beneficiary can be considered eligible for an H–2A or H–2B visa or for H–2A or H–2B nonimmigrant status.

Once the petition is approved, under the INA and current DHS regulations, H–2 workers are limited to employment with the employer listed on the H–2 petition. *See* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(1)(i); 8 CFR 274a.12(b)(9). An H–2 petitioner generally may submit a new H–2 petition, with a new, approved TLC, to USCIS to request an extension of H–2 nonimmigrant status for the validity of the TLC or for a period of up to 1 year. *See* 8 CFR 214.2(h)(15)(ii)(C). The H–2 petitioner must name the worker on the new H–2 petition because the H–2 worker is in the United States and requesting an extension of stay. For H–2A petitioners only, in the event of an emergent circumstance, the petitioner may request an extension to continue employment with the same employer not to exceed 2 weeks without first having to obtain an additional approved TLC from DOL if certain criteria are met, by submitting the new H–2A petition. *See* 8 CFR 214.2(h)(5)(x).

5. Admission and Limitations of Stay

Upon USCIS approval of the H–2 petition and the H–2 worker's admission to the United States or grant of status under the respective H–2 classification, the employer or U.S. agent may begin to employ the H–2 worker(s). USCIS has authority to approve the worker's H–2A or H–2B classification for up to the period authorized on the approved TLC. *See* 8 CFR 214.2(h)(9)(iii)(B). H–2 workers who are outside of the United States may apply for a visa with the Department of State (DOS) at a U.S. Embassy or Consulate abroad, if required, and seek admission to the United States as an H–2 nonimmigrant with U.S. Customs and Border Protection (CBP) at a U.S. port of entry. The spouse and children of an H–2 nonimmigrant, if they are accompanying or following to join an H–2 nonimmigrant, may be admitted into the United States, if they are otherwise admissible, as H–4 dependents for the same period of admission (including any extension periods) as the principal spouse or parent. *See* 8 CFR 214.2(h)(9)(iv). Thus, H–4 dependents of H–2 workers are subject to the same limitations on stay, including permission to remain in the country during the pendency of the new employer's petition, as the H–2 beneficiary, but generally may not engage in employment. *See* 8 CFR 214.2(h)(9)(iv).

In general, a noncitizen's H–2 status is limited by the validity dates on the approved H–2 petition, typically for a period of up to 1 year. *See* 8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(iv)(B), 8 CFR 214.2(h)(6)(v)(B), 8 CFR 214.2(h)(9)(iii)(B), and 8 CFR 214.2(h)(15)(ii)(C). H–2A workers may be admitted to the United States for a period of up to 1 week prior to the beginning validity date listed on the approved H–2A petition so that they may travel to their worksites, but H–2A workers may not begin work until the beginning validity date. H–2A workers may also remain in the United States 30 days beyond the expiration date of the approved H–2A petition to prepare for departure or to seek an extension of stay or change of nonimmigrant status but cannot work during this period. *See* 8 CFR 214.2(h)(5)(viii)(B).

H–2B workers may be admitted to the United States for a period of up to 10 days prior to the beginning validity date listed on the approved H–2B petition so that they may travel to their worksites, but H–2B workers may not begin work until the beginning validity date. Under current DHS regulations, H–2B workers also may remain in the United States up to 10 days beyond the expiration date of the approved H–2B petition to prepare for departure or to seek an extension of stay or change of nonimmigrant status and also cannot work during this period. *See* 8 CFR 214.2(h)(13)(i)(A). Unless otherwise authorized under 8 CFR 274a.12, H–2A and H–2B workers do not have employment authorization outside of the validity period listed on the approved petition. *See* 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(13)(i)(A).

The maximum period of stay for a noncitizen in H–2 classification is 3 years (or 45 days in the U.S. Virgin Islands).[9] *See* 8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(13)(iv), and 8 CFR 214.2(h)(15)(C). Generally, once a noncitizen has held H–2 nonimmigrant status for a total of 3 years, they must depart and remain outside of the United States for an uninterrupted period of 3 months before seeking readmission as an H–2 nonimmigrant.[10] *See* 8 CFR 214.2(h)(5)(viii)(C) and (h)(13)(iv).

C. H–2 2008 Final Rules

In December 2008, DHS published two final rules providing that H–2 petitioners must meet certain requirements for an H–2 petition to be approved. *See Final Rule Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,* 73 FR 78104 (Dec. 19, 2008); *Final Rule Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 76891 (Dec. 18, 2008) (collectively ''H–2 2008 Final Rules''). Those rules addressed a number of issues in the H–2 programs

[9] Any time an H–2 worker spends in the United States under section 101(a)(15)(H) or (L) of the Act, 8 U.S.C. 1101(a)(15)(H), (L), will count towards the 3-year limitation. *See* 8 CFR 214.2(h)(13)(iv). Time spent in H–4 or L–2 status will not count towards the 3-year limitation. *See* USCIS, *Additional Guidance on Determining Periods of Admission for Foreign Nationals Previously Admitted as H–4 Nonimmigrants who are Seeking H–2 or H–3 Status (PM–602–0092), https://www.uscis.gov/sites/default/files/document/memos/2013-1111_H-4_Seeking_H-2_or_H-3_Status_PM_Effective_2.pdf.*

[10] If the H–2 worker's accumulated stay is 18 months or less, an absence of at least 45 days will interrupt the 3-year limitation on admission. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months. *See* 8 CFR 214.2(h)(5)(viii)(C) and (13)(iv); *see also* 8 CFR 214.2(h)(13)(v) (also excepting from the limitations under 8 CFR 214.2(h)(13)(iii) and (iv), with respect to H–2B beneficiaries, workers who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year, as well as workers who reside abroad and regularly commute to the United States to engage in part-time employment).

such as requiring that H–2 petitions be filed with a valid TLC approved by either the DOL or GDOL, as appropriate, prohibiting the imposition of certain fees on H–2 workers, modifying requirements to allow for unnamed H–2 beneficiaries in the petition, and amending the definition of ''temporary services or labor,'' among other changes.

DHS, through this proposed rulemaking, seeks to modify several requirements implemented by the H–2 2008 Final Rules. The following subsections describe those provisions as they were finalized in the 2008 rules.

1. Prohibited Fees in the H–2 Nonimmigrant Classifications

Under current regulations, USCIS may deny or revoke a petition when the beneficiary pays, directly or indirectly, certain fees that are conditions of H–2A employment or, for H–2B workers, as a condition of an offer of employment. *See* 8 CFR 214.2(h)(5)(xi) and 8 CFR 214.2(h)(6)(i). The current regulation at 8 CFR 214.2(h)(5)(xi) prohibits the collection of job placement fees or other compensation (directly or indirectly) from the beneficiary at any time as a condition of H–2A employment, including before or after the filing or approval of the petition. The prohibition applies to the petitioner, agent, facilitator, recruiter, or a similar employment service. However, the current regulation permits the collection of the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees so long as the payment of such fees is not prohibited by statute or DOL regulations, unless the employer agent, facilitator, recruiter, or similar employment service has agreed with the noncitizen to pay such costs and fees. The current regulation at 8 CFR 214.2(h)(6)(i)(B) contains largely identical language applicable to H–2B petitions, but omits mention of the ''Department of Labor.'' [11]

Under current DHS regulations, where such prohibited fees have been collected or the petitioner has entered into an agreement to collect such prohibited fees, including through a deduction or withholding from a worker's wages, an H–2 petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, it has reimbursed the beneficiary in full or, where such fee or compensation has not yet been paid by the beneficiary, that the agreement has been terminated. *See* 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*). Generally, the H–2 petition will be denied or revoked if the petitioner knew or should have known that the beneficiary has paid or agreed to pay the prohibited fee as a condition of employment (or, in the H–2B context, as a condition of an offer of employment). *See* 8 CFR 214.2(h)(5)(xi)(*2*)–(*4*) and 8 CFR 214.2(h)(6)(i)(B)(*2*)–(*4*).

2. H–2 Eligible Countries Lists

USCIS may generally only approve H–2 petitions for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated through a notice published in the **Federal Register** as countries eligible to participate in the respective H–2A and H–2B programs. *See* 8 CFR 214.2(h)(5)(i)(F)(*1*)(*i*) and 8 CFR 214.2(h)(6)(i)(E)(*1*). This **Federal Register** notice is effective for 1 year after publication. *See* 8 CFR 214.2(h)(5)(i)(F)(*2*) and 8 CFR 214.2 (h)(6)(i)(E)(*3*). In designating countries whose nationals can participate in the H–2 programs, DHS takes into account several factors including, but not limited to: (1) the country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(*1*)(*i*) and 8 CFR 214.2(h)(6)(i)(E)(*1*).

Petitioners who seek H–2 workers from countries that are not designated as eligible to participate in the applicable H–2 program must meet additional criteria showing that it is in the U.S. interest to employ such workers. *See* 8 CFR 214.2(h)(5)(i)(F)(*1*)(*ii*) and 8 CFR 214.2(h)(6)(i)(E)(*2*). In determining what is in the U.S. interest for purposes of these provisions, the Secretary of Homeland Security has sole and unreviewable discretion to take into account factors including, but not limited to: (1) evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the lists described in 8 CFR 214.2(h)(5)(i)(F)(*1*)(*i*) and 8 CFR 214.2(h)(6)(i)(*E*)(*1*); (2) evidence that the beneficiary has been admitted to the United States previously in H–2 status; (3) the potential for abuse, fraud, or other harm to the integrity of the applicable H–2 visa program through the potential admission of a beneficiary from a country not currently designated as eligible; and (4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(*1*)(*ii*) and 8 CFR 214.2(h)(6)(i)(E)(*2*). Petitions for workers from designated countries and undesignated countries should be filed separately. *See* 8 CFR 214.2(h)(2)(ii). H–2 petitioners must name the H–2 worker if the H–2 worker is a national of a country that is not designated as an H–2 participating country. *See* 8 CFR 214.2(h)(2)(iii). USCIS reviews each petition naming a national from a country not on the lists and all supporting documentation and makes a determination on a case-by-case basis.

Subsequent to the publication of the H–2 2008 Final Rules, DHS has published annual notices in the **Federal Register** that designate certain countries as participants in the H–2 programs. In December 2008, DHS first published in the **Federal Register** two notices: *Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H–2A Visa Program,* and *Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H–2B Visa Program,* which designated 28 countries whose nationals were eligible to participate in the H–2A and H–2B programs. *See* 73 FR 77043 (Dec. 18, 2008); 73 FR 77729 (Dec. 19, 2008). The notices ceased to have effect on January 17, 2010, and January 18, 2010, respectively. DHS has published a notice each year from 2010 through the present, in which various countries have been added or removed from the lists of countries eligible for participation in the H–2 programs. DHS published its most recent notice on November 10, 2022, and announced that the Secretary of Homeland Security, in consultation with the Secretary of State, identified 86 countries whose nationals are eligible to participate in the H–2A program and 87 countries whose nationals are eligible to participate in the H–2B program for 1 year ending November 9, 2023. *See Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs,* 87 FR 67930 (Nov. 10, 2022).

The notices provide examples of specific factors serving the U.S. interest that are taken into account when considering whether to designate or terminate the designation of a country, which include, but are not limited to:

[11] The regulations at 20 CFR 655.20(o) (H–2B); 20 CFR 655.135(j) (H–2A); and 29 CFR 503.16(o) (H–2B) contain similar prohibited fee provisions for H–2 employers. In addition, the regulations at 20 CFR 655.20(j) and 29 CFR 655.16(j) (H–2B) and 20 CFR 655.122(h) (H–2A) prohibit, with certain limitations, the collection of transportation and visa fees.

fraud (such as fraud in the H–2 petition or visa application process by nationals of the country, the country's level of cooperation with the U.S. Government in addressing H–2-associated visa fraud, and the country's level of information sharing to combat immigration-related fraud); nonimmigrant visa overstay rates for nationals of the country (including but not limited to H–2A and H–2B nonimmigrant visa overstay rates); and non-compliance with the terms and conditions of the H–2 visa programs by nationals of the country.

3. H–2A Employers Who are Participants in Good Standing in E-Verify

The 2008 H–2A final rule (but not the H–2B final rule) included a provision allowing H–2A workers who are lawfully present in the United States to begin work with a new petitioning employer upon the filing of a new H–2A petition naming the worker, before petition approval, provided that the new employer is a participant in good standing in E-Verify.[12] *See* 8 CFR 214.2(h)(2)(i)(D) and 8 CFR 274a.12(b)(21). In such a case, the H–2A worker's employment authorization continues for a period not to exceed 120 days beginning on the ''Received Date'' on Form I–797, Notice of Action, which acknowledges the receipt of the new H–2A extension petition. Except for the new employer and worksite, the employment authorization extension remains subject to the same conditions and limitations indicated on the initial H–2A petition. The employment authorization extension will terminate automatically if the new employer fails to remain a participant in good standing in E-Verify, as determined by USCIS in its discretion, or after 15 days if USCIS denies the extension request prior to the expiration of the 120-day period.

D. Importance of the H–2 Programs and the Need for Reforms

DHS recognizes that the H–2A and H–2B programs play a critical role in the U.S. economy, allowing foreign workers to fill temporary jobs for which U.S. workers are not available and qualified. Reflective of their importance, the H–2A and H–2B programs have experienced significant growth since DHS published the H–2 2008 Final Rules. For instance, DOS data indicate that the number of H–2A visas issued has increased by over 365 percent over the last decade, reaching 257,898 visas issued in fiscal year (FY) 2021, compared to 55,384 visas issued in fiscal year 2011.[13] With regard to the H–2B program, because Congress has capped the number of H–2B visas available, the number of H–2B visas issued has not increased at the same rate as H–2A visas. Yet, DOS data indicate that issuance of H–2B visas nearly doubled between fiscal year 2011 (50,826 visas) and fiscal year 2021 (95,053 visas).[14] Because the recent demand for H–2B visas has regularly far-exceeded the statutory cap, Congress has repeatedly provided limited authority to DHS, in consultation with DOL and based on the needs of American businesses, to increase the number of H–2B visas available to U.S. employers over the last several years.[15]

In addition, in recent years the administration has sought to expand interest in the H–2 programs as part of its overall strategy to manage safe, orderly, and humane migration to this country.[16] For instance, the U.S. Agency for International Development (USAID) conducted significant outreach focused on building government capacity to facilitate access to temporary worker visas under the H–2 programs.[17] These efforts have successfully encouraged increased use of the H–2 programs when there are not sufficient qualified and available U.S. workers.[18]

At the same time, the administration has consistently recognized the need to balance the expanded use of the H–2 programs with greater protections for workers. The National Security Council noted in its *Collaborative Migration Management Strategy* that expansion of access to nonimmigrant work visas ''must also address the vulnerability of workers to abusive labor practices.'' [19] In guidance promoting implementation of best practices by employers and by governments seeking to increase participation in the H–2 visa programs,

[12] *See Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 76891, 76905 (Dec. 8, 2008).

[13] *See* DOS, *Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2007–2011, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI(B).pdf;* DOS, *Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2017–2021, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_%20TableXVB.pdf.*

[14] *See* DOS, *Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2007–2011, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI(B).pdf;* DOS, *Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2017–2021, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_%20TableXVB.pdf.*

[15] *See* Consolidated Appropriations Act, 2017, Public Law 115–31, div. F, sec. 543; Consolidated Appropriations Act, 2018, Public Law 115–141, div. M, sec. 205; Consolidated Appropriations Act, 2019, Public Law 116–6, div. H, sec. 105; Further Consolidated Appropriations Act, 2020, Public Law 116–94, div. I, sec. 105; Consolidated Appropriations Act, 2021, Public Law 116–260, div. O, sec. 105; sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, Public Law 117–43, div. A, secs. 101, 106(3); section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022, Public Law 117–70, div. A, sec. 101; Consolidated Appropriations Act, 2022, Public Law 117–103, div. O, sec. 204; section 101(6) of Division A of Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117–180, div. A, sec. 101(6); Consolidated Appropriations Act, 2023, Public Law 117–328, div. O, sec. 303.

[16] *See* Executive Order 14010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border* (Feb. 2, 2021), *https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf;* National Security Council, *Collaborative Migration Management Strategy* (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf.*

[17] In addition to other efforts, when exercising the delegated authority Congress granted it under separate legislation noted above to increase the number of H–2B visas available in a given fiscal year, DHS and DOL used that authority to create specific H–2B visa allocations in furtherance of its efforts to address irregular migration. *See Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 86 FR 28198 (May 25, 2021); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 4722 (Jan. 28, 2022); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 6017 (Feb. 3, 2022) (correction); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 30334 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022); and *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers; Correction,* 87 FR 77979 (Dec. 21, 2022) (correction).

[18] *See* USAID, *Administrator Samantha Power at the Summit of the Americas Fair Recruitment and H–2 Visa Side Event, https://www.usaid.gov/news-information/speeches/jun-9-2022-administrator-samantha-power-summit-americas-fair-recruitment-and-h-2-visa* (June 9, 2022) (''Our combined efforts [with the labor ministries in Honduras and Guatemala, and the Foreign Ministry in El Salvador] . . . resulted in a record number of H–2 visas issued in 2021, including a nearly forty percent increase over the pre-pandemic levels in H–2B visas issued across all three countries.'').

[19] *See* National Security Council, *Collaborative Migration Management Strategy, https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf* (July 2021).

DOS, USAID, and DOL emphasized that ''[e]xpanding access to [the H–2 programs] and protecting migrant workers' rights are two aspects of the same agenda.'' [20]

Similarly, in proposing this rule, DHS recognizes that stronger protections are needed for the nonimmigrant workers who participate in the H–2 programs.[21] Numerous reports from Federal Government entities, migrant worker advocates, media, and other stakeholders have noted frequent violations of H–2 workers' rights, both in the United States and prior to admission.[22] For example, a Federal Government report found that workers may experience abuses before and after entering the United States, and during the course of their H–2 employment in the United States.[23] Reports from advocacy groups found that many H–2 workers suffer at least one serious violation of their rights (such as paying prohibited recruitment fees or significant wage violations) or a form of coercion (such as threats, verbal abuse, and withholding of documents) during their employment in the United States.[24] These reports detail a wide range of violations, from coercion to paying illegal fees; wage theft; receiving false job information; [25] discrimination and harassment; [26] and being housed in crowded, unsanitary, and degrading conditions with limited food and water. Other serious violations include forced labor; being held captive without personal documents; threats of arrest, deportation, and violence toward the workers or their families abroad; kidnapping; sexual abuse; rape; and even death.[27] Recent court cases serve to underscore the range and severity of abuses and exploitation faced by H–2 workers in the United States.[28]

A U.S. Government study found that the structure of the H–2A and H–2B programs may create systematic disincentives for workers to report or leave abusive working conditions.[29] One disincentive is that workers are authorized to work only for the petitioning H–2A or H–2B employer; consequently, the workers cannot freely leave to work for another employer, nor do they feel free to report mistreatment by their employer for fear of retaliation or blacklisting (that is, exclusion from future employment opportunities through the same employer or recruiter) [30] despite existing DOL prohibitions on such retaliation.[31] Losing their jobs means losing their legal status and authorization to remain in the United States, and potentially their ability to work in the United States in the future.[32] According to the GAO, workers also fear reporting violations to law enforcement or government entities due generally to their immigration status and lack of knowledge about their rights.[33] Another significant disincentive identified by the GAO is the workers' incurrence of prohibited fees or subjection to other recruitment abuses, as workers or their family members may face retaliation from recruiters or other actors in their home countries if they do not repay these debts.[34]

In a study conducted by migrant worker advocates, a majority of H–2

[20] *See* DOS, USAID, and DOL, *Guidance on Fair Recruitment Practices for Temporary Migrant Workers* (June 2022), *https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/06/ILAB20220565.pdf; see also* U.S. Dep't of Agric., *U.S. Department of Agriculture to Invest up to $65 Million in Pilot Program to Strengthen Food Supply Chain, Reduce Irregular Migration, and Improve Working Conditions for Farmworkers* (June 10, 2022) (''Strong working conditions are critical to the resiliency of the food and agricultural supply chain. Through this pilot program, [U.S. Department of Agriculture] will support efforts to improve working conditions for both U.S. and H–2A workers and ensure that H–2A workers are not subjected to unfair recruitment practices.''), *https://www.usda.gov/media/press-releases/2022/06/10/us-department-agriculture-invest-65-million-pilot-program.*

[21] *See, e.g.,* DHS, *DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations* (Jan. 13, 2023), *https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations.*

[22] *See, e.g.,* GAO, *Closed Civil and Criminal Cases Illustrate Instances of H–2B Workers Being Targets of Fraud and Abuse* (GAO–10–1053*)* (2010), *https://www.gao.gov/assets/gao-10-1053.pdf;* GAO, *Increased Protections Needed for Foreign Workers* (GAO–15–154*)* (2015), *https://www.gao.gov/assets/gao-15-154.pdf;* Centro de los Derechos del Migrante, Inc. (CDM), *Ripe for Reform: Abuses of Agricultural Workers in the H–2A Visa Program* (2020) (noting prevalence of ''systemic violations of [H–2A] workers' legal rights''), *https://cdmigrante.org/ripe-for-reform/;* Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2013), *https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf* (''The current H–2 program. . ..is rife with labor and human rights violations committed by employers who prey on a highly vulnerable workforce.''); Daniel Costa, *Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID–19,* Economic Policy Institute (Feb. 3, 2021), *https://files.epi.org/pdf/217871.pdf.*

[23] *See* GAO–15–154 (2015), *https://www.gao.gov/assets/gao-15-154.pdf.*

[24] *See* Polaris, *Labor Exploitation and Trafficking of Agricultural Workers During the Pandemic* 6 (2021) (reporting that available data on likely victims of labor trafficking show that 99 percent experienced some type of coercion), *https://polarisproject.org/wp-content/uploads/2021/06/Polaris_Labor_Exploitation_and_Trafficking_of_Agricultural_Workers_During_the_Pandemic.pdf,;* CDM, *Ripe for Reform* 4 (2020) (reporting data showing that every worker interviewed, even those most satisfied with their experience, suffered at least one serious legal violation of their rights), *https://cdmigrante.org/ripe-for-reform/;* Polaris, *Labor Trafficking on Specific Temporary Work Visas* (2022) (reporting that over 68 percent of H–2B workers identified as likely victims of labor trafficking reported experiencing coercion), *https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf.*

[25] *See* GAO–15–154 (2015), *https://www.gao.gov/assets/gao-15-154.pdf;* CDM, *Fake Jobs for Sale: Analyzing Fraud and Advancing Transparency in U.S. Labor Recruitment* 4 (2019), *https://cdmigrante.org/wp-content/uploads/2019/04/Fake-Jobs-for-Sale-Report.pdf.*

[26] *See* CDM, *Ripe for Reform* (2020), *https://cdmigrante.org/ripe-for-reform/.* For a report illustrating how women, in particular, disproportionately face discrimination in the H–2B program, see CDM, *Breaking the Shell: How Maryland's Migrant Crab Pickers Continue to be ''Picked Apart''* (2020), *https://cdmigrante.org/wp-content/uploads/2020/09/Breaking-The-Shell.pdf.*

[27] *See, e.g.,* Polaris, *Labor Trafficking on Specific Temporary Work Visas* (2022), *https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf;* CDM, *Ripe for Reform* (2020), *https://cdmigrante.org/ripe-for-reform/;* Polaris, *Labor Exploitation and Trafficking of Agricultural Workers During the Pandemic* 6 (2021), *https://polarisproject.org/wp-content/uploads/2021/06/Polaris_Labor_Exploitation_and_Trafficking_of_Agricultural_Workers_During_the_Pandemic.pdf.*

[28] *See, e.g.,* Department of Justice (DOJ), U.S. Attorney's Office, Southern District of Georgia, *Three men sentenced to federal prison on charges related to human trafficking: Each admitted to role in forced farm labor in Operation Blooming Onion* (Mar. 31, 2022) (involving forced labor, keeping workers in substandard conditions, kidnapping, and rape, among other abuses), *https://www.justice.gov/usao-sdga/pr/three-men-sentenced-federal-prison-charges-related-human-trafficking; DOJ, Three Defendants Sentenced in Multi-State Racketeering Conspiracy Involving the Forced Labor of Mexican Agricultural H–2A Workers* (Oct. 27, 2022) (involving forced labor, imposing debts on workers, and subjecting workers to crowded, unsanitary, and degrading living conditions), *https://www.justice.gov/opa/pr/three-defendants-sentenced-multi-state-racketeering-conspiracy-involving-forced-labor-mexican;* DOL, *Order Finding Civil Contempt and Imposing Stop Work Order,* No. 1:19-cv-00007 (D. N. Mar. I. Jan. 21, 2021) (involving extensive wage violations, substandard living conditions, and threats to withhold food if workers stopped working, among other abuses), *https://www.dol.gov/sites/dolgov/files/SOL/files/IPI%20-%20Stop%20Work%20Order.pdf.*

[29] *See* GAO–15–154, at 37–38 (2015), *https://www.gao.gov/assets/gao-15-154.pdf.*

[30] *See* GAO–15–154, at 37–38 (2015), *https://www.gao.gov/assets/gao-15-154.pdf;* CDM, *Ripe for Reform* 4 (2020), *https://cdmigrante.org/ripe-for-reform/.*

[31] *See* 20 CFR 655.20(n); 655.135(h); and 29 CFR 503.16(n).

[32] *See* CDM, *Ripe for Reform* 4 (2020), *https://cdmigrante.org/ripe-for-reform/;* CDM, *Recruitment Revealed: Fundamental Flaws in the H–2 Temporary Worker Program and Recommendations for Change* 22–24 (2018), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.*

[33] *See* GAO–15–154, at 51 (2015), *https://www.gao.gov/assets/gao-15-154.pdf.*

[34] *See* GAO–15–154, at 37–38 (2015), *https://www.gao.gov/assets/gao-15-154.pdf;* CDM, *Recruitment Revealed* 22–24 (2018), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf;* CDM, *Fake Jobs for Sale, https://cdmigrante.org/wp-content/uploads/2019/04/Fake-Jobs-for-Sale-Report.pdf.*

workers reported paying recruitment fees, even though charging recruitment fees to such workers violates current U.S. immigration and labor regulations.[35] These types of fees perpetuate the cycle of exploitation. Reports indicate that many H–2 workers incur substantial debts before they even get to the United States.[36] Some recruiters target individuals already living in impoverished conditions abroad, often from rural or indigenous communities, further heightening the workers' vulnerability to exploitation.[37] Because they incur substantial debts in connection with (or related to) their seeking to come to this country as H–2 workers, these workers face economic hardship, and in many instances, debt bondage when arriving in the United States.[38] As a result, these workers are less able or willing to report or leave poor working conditions or abusive situations.[39]

While current regulations already contain provisions on prohibited fees intended to protect H–2 workers, DHS recognizes that stronger protections are needed to address many of the reported widespread abuses and make DHS's authority to address these issues explicit. Through this proposed rulemaking, DHS seeks to clarify and strengthen existing provisions on prohibited fees, and furthermore, implement significant new provisions to increase DHS's ability to deter and hold accountable certain employers that have been found to have committed labor law violations and other violations relevant to the H–2 programs, while providing safeguards for workers reporting that they have been subject to payment of prohibited fees.

Aside from prohibited fees, there are other harmful employer, recruiter, or agent behaviors that DHS's current regulations do not address but that are relevant to eligibility and, in some instances, should warrant exclusion from the H–2 programs. Multiple sources have revealed flaws or gaps in the H–2 framework that allow H–2 employers that have committed serious labor law violations to continue using the H–2 programs even after the violations.[40] For instance, a report from an advocacy group highlighted how an H–2 employer that was the subject of over 80 complaints of unpaid wages and violations of employment terms during a single summer season continued using H–2 program to employ H–2 workers.[41] A news article detailed how a company with a history of worker protection violations and vehicle safety violations (including for improper vehicle maintenance and unsafe driving) continued to receive approved TLCs to employ H–2 workers, including within 3 months after it was found responsible for a vehicle crash that killed some of the H–2 workers it employed.[42] A labor union report listed numerous case studies of H–2 employers that continued to receive approved TLCs despite multitudes of labor violations, some of which were deemed ''egregious'' and ''serious.''[43] While these studies focused on available data related to employers' receipt of approved TLCs from DOL, it is apparent to DHS that these and other types of violations can be directly relevant to whether an employer has the ability and intent to comply with DHS's H–2 program requirements. These types of violations should therefore be considered by USCIS in its adjudication of H–2A and H–2B petitions, regardless of whether DOL has taken action on the underlying TLCs. The proposed provisions in this rule, including new bars to approval for prohibited fees as well as for certain findings of labor law and other violations, and holding employers responsible for the actions of their recruiters and others in the recruitment chain, underscore DHS's commitment to addressing aspects of the H–2 programs that may result in the exploitation of persons seeking to come to the United States as H–2 workers.[44]

In addition to providing greater protection for a vulnerable population of workers, the reforms proposed in this rulemaking offer a number of benefits to employers. DHS recognizes the immense importance of the H–2A and H–2B programs to U.S. employers that are unable to fill temporary jobs with qualified and available U.S. workers. The proposed portability provision, in addition to offering flexibility to workers, would assist petitioners facing worker shortages by allowing them to more quickly hire H–2A and H–2B workers who are already in the United States without waiting for approval of a new petition. In addition, as discussed in greater detail below, both the proposed elimination of the eligible countries lists and the proposed revision of the calculation of the maximum period of stay for H–2 workers stand to reduce petitioner

[35] *See* CDM, *Recruitment Revealed* 4, 16 (2018), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.* This study focused on recruitment in Mexico because Mexico is home to the largest number of H–2 workers. The H–2 workers surveyed in this study worked in the U.S. during or after 2006. *See also* 8 CFR 214.2(h)(5)(xi); 8 CFR 214.2(h)(6)(i); 20 CFR 655.20(o) and (p); and 20 CFR 655.135(j) and (k).

[36] *See, e.g.,* CDM, *Ripe for Reform* 19 (2020), *https://cdmigrante.org/ripe-for-reform/;* CDM, *Recruitment Revealed* 4, 16 (2018), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf;* GAO–15–154, at 28–29 (2015), *https://www.gao.gov/assets/gao-15-154.pdf.*

[37] *See* CDM, *Ripe for Reform* 16 (2020), *https://cdmigrante.org/ripe-for-reform/.* This report highlighted how indigenous workers face significant challenges primarily due to their language and cultural differences.

[38] *See, e.g., Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 8230, 8233 (Feb. 13, 2008) (''USCIS has found that certain job recruiters and U.S. employers are charging potential H–2A workers job placement fees in order to obtain H–2A employment. . . . USCIS has learned that payment by these workers of job placement-related fees not only results in further economic hardship for them, but also, in some instances, has resulted in their effective indenture.''); GAO–15–154, at 30 (2015), *https://www.gao.gov/assets/gao-15-154.pdf;* CDM, *Recruitment Revealed* 4 (2018), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf* (many H–2 workers arrive in the United States in debt, which may lead to situations of debt servitude or other abuse); Daniel Costa, *Temporary work visa programs and the need for reform* 20 (2021), *https://files.epi.org/pdf/217871.pdf* (''Many [workers] are required to pay exorbitant fees to labor recruiters to secure U.S. employment opportunities, even though such fees are usually illegal. Those fees leave them indebted to recruiters or third-party lenders, which can result in a form of debt bondage.'').

''Debt bondage'' is defined in 22 U.S.C. 7102(7) as ''the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or those of a person under his or her control as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.''

[39] *See* GAO–15–154 (2015), *https://www.gao.gov/assets/gao-15-154.pdf.*

[40] *See, e.g.,* AFL–CIO, Comprehensive H–2B Recommendations. See the docket for this rulemaking for a copy of this letter; Farmworker Justice, *No Way to Treat a Guest: Why the H–2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2012), *https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf;* LIUNA, *H–2B Guest Worker Program: Lack of Accountability Leads to Exploitation of Workers, https://d3ciwvs59ifrt8.cloudfront.net/b156551f-4cfc-4f0e-ab0f-1c05b2955a44/4d0e38cb-1c2b-4b12-924c-279c4e15ce31.pdf.*

[41] *See* Farmworker Justice, *No Way to Treat a Guest* (2012), *https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf.*

[42] *See* Ken Bensinger, Jessica Garrison, Jeremy Singer-Vine, *The Pushovers: Employers Abuse Foreign Workers, U.S. Says, By All Means, Hire More,* BuzzFeed News (May 12, 2016), *https://www.buzzfeednews.com/article/kenbensinger/the-pushovers.*

[43] *See* LIUNA, *H–2B Abuse by Construction and Landscaping Companies, https://d3ciwvs59ifrt8.cloudfront.net/5ad8299b-5dba-47b2-9544-bd96627e284d/067fa0a5-659f-4113-8b25-ac60c2060510.pdf.*

[44] *See, e.g.,* DHS, Response to Senator Ossoff letter (May 3, 2022), *https://www.ossoff.senate.gov/wp-content/uploads/2022/05/DHS-Response-Blooming-Onion.pdf;* DHS, *For First Time, DHS to Supplement H–2B Cap with Additional Visas in First Half of Fiscal Year* (Dec. 20, 2021), *https://www.uscis.gov/newsroom/news-releases/for-first-time-dhs-to-supplement-h-2b-cap-with-additional-visas-in-first-half-of-fiscal-year.*

burdens such as those associated with information collected at the time of filing and through subsequent RFEs, increase access to workers, and improve program efficiency. Further, with respect to the H–2B program, the proposed regulations are intended to ensure that only those employers who comply with the requirements of the H–2B program will be able to compete for the limited number of available cap-subject visas, by precluding those employers who fail to demonstrate an intent to do so from participating in the H–2B program.

IV. Discussion of Proposed Rule

A. Program Integrity and Worker Protections

1. Payment of Fees, Penalties, or Other Compensation by H–2 Beneficiaries

As discussed above, despite 2008 regulatory changes providing that USCIS will deny or revoke a petition when a beneficiary pays a fee as a condition of H–2 employment, reports from various sources indicate that the collection of prohibited fees remains a pervasive problem in the H–2A and H–2B programs.[45] Through this rulemaking, DHS is proposing various amendments to strengthen and clarify the existing regulatory prohibitions, to close potential loopholes, and to modify the consequences for charging prohibited fees to H–2 workers.

a. Fees, Penalties, or Other Compensation ''Related To'' H–2 Employment

The intent of the prohibited fee provisions in the 2008 H–2 rules was, in part, to establish measures to help avoid economic hardship for H–2 workers and combat effective indenture and similar abuses against H–2 workers.[46] This proposed rule is intended, among other things, to foreclose claims that because a worker agreed (or appears to have agreed) to pay a prohibited fee, such agreement cannot be considered to be a condition of employment.

To strengthen the prohibited fee provisions and establish substantial uniformity with DOL's prohibited fee provisions, DHS proposes to modify its provisions to state that fees paid by H–2 workers to an employer, joint employer, petitioner (including to its employee), agent, attorney, facilitator, recruiter, similar employment service, *related to* such workers' H–2 employment, are prohibited. Although DHS used the phrase ''as a condition of'' in its 2008 final H–2A and H–2B rules, DOL, in promulgating its 2008 H–2A final rule, used instead the phrase ''related to'' when addressing which costs and fees associated with recruitment and employment are prohibited.[47] As DOL noted in 2008 and reiterated at the time it updated its 2008 H–2A rule in 2010, the intent of the prohibited fees provisions was to ''requir[e] employers to bear the full cost of their decision to import foreign workers [as] a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers.'' [48] DOL affirmed these principles when it updated the H–2A regulations in 2022.[49] Similarly, DOL used the term ''related to'' rather than ''as a condition of'' in its 2008 H–2B final rule.[50] By proposing to replace the term ''as a condition of'' with ''related to,'' with respect to the scope of the bar on payment of ''prohibited fees,'' DHS is proposing to modify the language of its H–2A and H–2B prohibited fees rules to substantially conform with DOL prohibited fee regulations. Fees that are ''related to'' H–2 employment would include, but not be limited to, the employer's agent or attorney fees, visa application and petition fees, visa application and petition preparation fees, and recruitment costs [51]; however, such fees would not include those that are ''the responsibility and primarily for the benefit of the worker, such as government-required passport fees.'' *See* proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B).[52]

DHS also seeks to clarify that the term ''prohibited fee'' would include any ''fee, penalty, or compensation'' related to the H–2A or H–2B employment. *See* proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). A prohibited fee would include those collected either directly (such as, for instance, through a direct payment from the beneficiary to the petitioner or the petitioner's agent), or indirectly (such as, for instance, through a withholding or deduction from the worker's wages for a service provided earlier by a third party).

To further strengthen the prohibited fee provisions and establish substantial uniformity with DOL's prohibited fee provisions, proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) would have new

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[45] *See, e.g.,* CDM, *Recruitment Revealed* 16 (2018), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf;* CDM, *Ripe for Reform* 20 (2020), *https://cdmigrante.org/ripe-for-reform/;* Polaris, *Labor Trafficking on Specific Temporary Work Visas* 14 (2022), *https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf;* Polaris, *On-ramps, intersections, and exit routes: A roadmap for systems and industries to prevent and disrupt human trafficking* 41 (2018), *https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf;* GAO–10–1053, at 4 (2010), *https://www.gao.gov/assets/gao-10-1053.pdf.*

[46] When initially proposing the prohibited fee provisions, DHS explicitly noted these abuses and stated that the provisions were ''an effort to protect [H–2] workers from such abuses.'' *Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 8230, 8233 (Feb. 13, 2008); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,* 73 FR 49109, 49112 (Aug. 20, 2008).

[47] Current 20 CFR 655.135(j) (H–2A) and 20 CFR 655.20(o) (H–2B). Notably, with respect to H–2A nonimmigrants, the Department of Labor has explained that, even in the case of otherwise permissible fees, ''an employee may only pay such fees if they are for services that are voluntarily requested by the . . . employee. If an employee lacks a meaningful opportunity and an independent choice to refuse or decline the service which requires the payment of the fee,'' such fee is prohibited. *See* U.S. Department of Labor, *Wage and Hour Field Assistance Bulletin 2011–2,* available at *https://www.dol.gov/agencies/whd/field-assistance-bulletins/2011-2* (addressing H–2A fees). Further, DOL has explained that ''[t]he signing of a document by a prospective worker stating that he/she has agreed to pay the fee does not, in and of itself, establish that the fee is voluntary.'' *Id.* This proposed rule recognizes that the concerns addressed by DOL with respect to the H–2A program apply equally to the H–2B program, and, as in the case of the H–2A program, this rule would intend to foreclose claims that simply because a worker agreed (or appears to have agreed) to a fee, it cannot be considered to be prohibited.

[48] *Temporary Agricultural Employment of H–2A Aliens in the United States,* 75 FR 6884, 6925 (Feb. 12, 2010); *Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement,* 73 FR 77110, 77158 (Dec. 18, 2008).

[49] *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States,* 87 FR 61660, 61744 (Oct. 12, 2022) (revisions to 20 CFR 655.135(k) intended to ''mak[e] it clear that foreign labor contractors or recruiters and their agents are not to receive remuneration from prospective employees recruited in exchange for access to a job opportunity or any activity related to obtaining H–2A labor certification'').

[50] *See* former 20 CFR 655.22(j) available at *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes,* 73 FR 78020, 78060 (Dec. 19, 2008); *see also* current 20 CFR 655.20(o) and 29 CFR 503.16(o) (both using the term ''related to'' and clarifying that prohibited fees would broadly include ''payment of the employer's attorney or agent fees, application and H–2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved Application for Temporary Employment Certification''). For readability purposes, this rule refers to all of the H–2B-related provisions of 20 and 29 CFR as ''DOL regulations'' notwithstanding DHS's joint issuance of some rules affecting these provisions.

[51] *See* DOL, *Fact Sheet #78D: Deductions and Prohibited Fees under the H–2B Program, https://www.dol.gov/agencies/whd/fact-sheets/78d-h2b-deductions.*

[52] DHS notes, however, that while certain fees are not prohibited under this proposed rule, it is not DHS's intent to render a worker subject to any unlawful treatment or harassment resulting from the worker's incurring debt from a petitioner (including a petitioner's employee), agent, attorney, facilitator, recruiter, or similar employment service, or employer or joint employer, to cover such nonprohibited fees.

references to a petitioner's employee or attorney as part of the list of individuals who may not collect prohibited fees from a beneficiary.[53] As before, it is not the intention of DHS to bar the payment of fees to any agent, attorney, facilitator, recruiter, or similar employment service by the petitioner or employer, provided such fees do not come directly or indirectly from H–2 workers themselves. DHS recognizes the role of recruiters and similar employment services in assisting employers in finding H–2 workers. An employer may hire a recruiter and pay the recruiter out of its own funds, as long as it does not pass this cost directly or indirectly on to the worker(s).

b. Clarification of Acceptable Reimbursement Fees

Further, it is not the intention of DHS to pass to petitioners, employers, agents, attorneys, facilitators, recruiters, or similar employment services, the costs of services or items that are truly personal and voluntary in nature for the worker. Despite the phrase *related to,* not all payments made by prospective or current H–2 workers would be considered prohibited fees or payments related to H–2 employment under the proposed rule. Payments made primarily for the benefit of the worker, such as a passport fee, would not be prohibited fees or payments related to the H–2 employment under the rule and would, therefore, permissibly be considered the responsibility of the worker.

The current regulations state that prohibited fees do not include ''the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees, to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or DOL regulations, unless the employer agent, facilitator, recruiter, or employment service has agreed with the [noncitizen] to pay such costs and fees.'' 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). To simplify the language related to acceptable reimbursement fees and clarify that the exception only applies to costs that are truly for the worker's benefit, DHS proposes to replace the existing regulatory language on this topic with text stating that the provision would not prevent relevant parties ''from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.'' Proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). This proposed language is derived from, and is consistent with, DOL regulations on prohibited fees for H–2B and H–2A workers at 20 CFR 655.20(o), 29 CFR 503.16(o), and 20 CFR 655.135(j). The proposed provision would clarify the existing prohibition on a beneficiary's payment of costs required by statute or regulation to be paid or otherwise incurred by the petitioner (such as certain transportation costs or, in the H–2A context, certain housing costs).[54] Specifically, the proposed language would make clear that the passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, would constitute a collection of a prohibited fee by the petitioner. Proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). DHS has proposed the phrase ''applicable regulations'' to recognize that, in the H–2A context, ''applicable regulations'' would include DHS and DOL regulations, and in the H–2B context, ''applicable regulations'' would include DHS, DOL, and GDOL regulations.

c. Prohibiting Breach of Contract Fees and Penalties

DHS also proposes to clarify that prohibited fees include any fees or penalties charged to workers who do not complete their contracts. Advocacy groups have reported instances of recruiters forcing, or threatening to force, H–2 workers to pay large ''breach'' fees of up to thousands of dollars for leaving employment before the scheduled conclusion of work.[55] DHS proposes to explicitly include a ''fee or penalty for breach of contract'' in the revised prohibited fee provision in order to provide greater clarity for stakeholders, and to emphasize the prohibited nature of such fees. Proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B).

d. Strengthening the Prohibited Fees Provisions

DHS is proposing to amend regulatory language that currently allows petitioners to avoid liability in certain instances despite a USCIS determination that the petitioner collected or planned to collect prohibited fees. Under the current regulations, a petitioner who was found to have collected or entered into an agreement to collect a prohibited fee is not subject to denial or revocation on notice if the petitioner demonstrates that it reimbursed the worker prior to the filing of the petition or, if the fee has not yet been paid by the worker, that the agreement has been terminated. 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*). Similarly, if USCIS determines that the petitioner knew or should have known at the time of filing that its agent, facilitator, recruiter, or similar employment service collected or entered into an agreement to collect prohibited fees, the current regulations include exceptions to the requirement that USCIS deny or revoke on notice if the petitioner demonstrates that such fees were reimbursed, the agreement to collect fees was terminated prior to collection, or, in cases where such payment or agreement was made after the filing of the petition, that the petitioner notified DHS of the prohibited fees or agreement within 2 days of learning of them. 8 CFR 214.2(h)(5)(xi)(A)(*2*) and (*4*) and 8 CFR 214.2(h)(6)(i)(B)(*2*) and (*4*).

DHS is proposing to eliminate the above-noted exceptions to prohibited fee-related denials or revocations that are based solely on a petitioner's reimbursement, pre-payment cancellation of a prohibited fee agreement, or notification to DHS. Proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*) and (*2*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) and (*2*). Whereas reimbursement, pre-payment cancellation, or notification to DHS, by itself, currently allows a petitioner to avoid a denial or revocation, DHS is proposing to require the petitioner to take additional, significant steps to prevent the unlawful collection of fees and thus avoid a future denial or revocation and the additional consequences that follow. This change is appropriate because, in such cases, petitioners (including their employees) or their third-party associates (including agents, attorneys, facilitators, recruiters, or similar employment services) have already engaged in wrongdoing by taking actions that violate longstanding

[53] *See* 20 CFR 655.20(o), which applies to prohibited fees by ''[t]he employer and its attorney, agents, or employees.''

[54] *See* 8 CFR 214.2(h)(5)(xi)(A) (acceptable fees exclude fees ''to the extent that the passing of such costs to the beneficiary is not prohibited by statute'') and 8 CFR 214.2(h)(6)(i)(B) (acceptable fees exclude fees ''to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or Department of Labor regulations''). *See also* INA sec. 218(c)(4) (''Employers shall furnish housing in accordance with regulations.'') and 20 CFR 655.122(d)(1) (''*[t]he employer must provide housing at no cost to H–2A workers . . .*'' (italics added).

[55] These concerns were raised by representatives from Centro de los Derechos del Migrante, Inc. and Farmworker Justice during a listening session held by DHS on May 16, 2022, and were also raised by Migration that Works in a letter to DHS dated May 17, 2022. See the docket for this rulemaking for access to a transcript of the listening session and a copy of the letter.

requirements of the H–2 programs, namely, collecting or taking steps toward collecting prohibited fees. In addition, the collection or agreement to collect a prohibited fee has the potential to harm an H–2 worker even if the fee is later reimbursed or the agreement is cancelled prior to collection, such as by causing the worker to go into debt related to the payment, or anticipated payment, of the fee.[56] DHS emphasizes the importance of petitioners reimbursing a worker who has paid a prohibited fee because it mitigates the harm done to the worker. DHS is therefore proposing to incorporate language in the proposed rule regarding the impact reimbursement could have with respect to the consequences for a determination of prohibited fees, as discussed below.

For situations in which a petitioner itself is found to have collected or entered an agreement to collect prohibited fees, such as when an employee of the petitioner engages in such activity, DHS proposes to hold the petitioner or its successor accountable by denying or revoking its approved petition and thereby making it subject to additional consequences described below, except in rare cases involving extraordinary circumstances beyond the petitioner's control. Proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*). Specifically, a petition filed by a petitioner found to have collected or entered into an agreement to collect prohibited fees would be subject to denial or revocation on notice and the resulting additional consequence of a 1-year to 4-year bar to approval of subsequent petitions. Proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*), 8 CFR 214.2(h)(5)(xi)(B), 8 CFR 214.2(h)(6)(i)(B)(*1*), and 8 CFR 214.2(h)(6)(i)(C). That petitioner may only avoid such consequences if it demonstrates, through clear and convincing evidence in response to a USCIS notice of intent to deny or revoke, both that extraordinary circumstances beyond its control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees and that it has fully reimbursed all affected beneficiaries and designees. Proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*). The determination as to whether a petitioner has met this very high standard would be made on a case-by-case basis. As a baseline, a petitioner would need to first demonstrate that the extraordinary circumstances were rare and unforeseeable, and that it had made significant efforts to prevent prohibited fees prior to the collection of or agreement to collect such fees. As the proposed standard would require evidence of the petitioner's significant efforts to prevent prohibited fees, a petitioner would need to demonstrate that it took affirmative steps to prevent its employees from collecting or agreeing to collect such fees. The petitioner's mere lack of awareness of its employee's collection or agreement to collect such fees would not be sufficient.

In addition to the above, a petitioner would further need to establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee. Moreover, a petitioner would need to demonstrate that it has fully reimbursed all affected beneficiaries or their designees. The petitioner would need to establish all of the above elements in order to avoid denial or revocation of its petition. While USCIS may determine that denial or revocation is not appropriate in such an extraordinary case, petitioners would still be accountable for reimbursing workers in full irrespective of the circumstances surrounding their own prohibited fee collections or agreements.

To further ensure against a petitioner avoiding liability for prohibited fees, DHS proposes to change the standards under which a petitioner may be held accountable for the prohibited fee-related violations of its agents, attorneys, facilitators, recruiters, or similar employment services. Under current regulations, in order to hold a petitioner liable for such actions, USCIS must make a determination that the petitioner ''knew or should have known'' about any such prohibited collection or agreement that was made prior to filing the petition, or that any post-filing collection or agreement was made ''with the knowledge of the petitioner.'' 8 CFR 214.2(h)(5)(xi)(A)(*2*) and (*4*) and 8 CFR 214.2(h)(6)(i)(B)(*2*) and (*4*). This requirement can make it difficult for USCIS to deny a petition, even if there is evidence that prohibited fees were collected. In practice, a petitioner may be able to avoid a denial or revocation based on its lack of knowledge (whether or not as a result of its failure to exercise due diligence) or claimed lack of knowledge of the practices of the third parties with whom it has done business, such as by submitting evidence that the petitioner's contract with a recruitment service includes a clause forbidding the collection of prohibited fees.[57]

In proposing changes to the above-noted provisions, DHS seeks to clarify and emphasize that it is a petitioner's responsibility to conduct due diligence to ensure that any third-party agent, attorney, facilitator, recruiter, or similar employment service with whom it conducts business will comply with H–2 program requirements, including the prohibition on collection of fees related to H–2 employment. This due diligence obligation applies irrespective of whether the employer is in contractual privity with such third party or whether such third party is located or operating in the United States. Accordingly, DHS is proposing to hold petitioners accountable for any prohibited fee-related violation by these third parties, with only an extremely limited exception.

Specifically, under DHS's proposed provisions, any determination that an H–2 worker has paid or agreed to pay a prohibited fee to the petitioner's agent, facilitator, recruiter, or similar employment service would result in denial of the petition or revocation on notice, ''unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement and that all affected beneficiaries have been fully reimbursed.'' Proposed 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*). DHS is also proposing to state that, by itself, a written contract between the petitioner and the third party stating that such fees are prohibited will not be sufficient to meet this standard of proof.[58] While the language of such a contract may be considered, additional documentation must be provided. Relevant documentation could include evidence

[56] A study conducted by the advocacy group Centro de los Derechos del Migrante, Inc. noted that some H–2 workers who go into debt to cover pre-employment expenses are vulnerable to predatory lending practices such as high interest rates and exploitative collateral requirements. *See* CDM, *Recruitment Revealed* 18 (2018), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.*

[57] *See, e.g.,* International Labor Recruitment Working Group, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse* 34 (2013) (noting employers' evasion of H–2A and H–2B prohibited fee laws by claiming they are unaware their workers were charged recruitment fees), *https://migrationthatworks.org/reports/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse/.*

[58] DOL already requires employers to contractually forbid third parties whom they engage for the recruitment of workers from seeking or receiving payments or other compensation from prospective employees. *See* 20 CFR 655.9(a), 20 CFR 655.20(p), and 20 CFR 655.135(k). Accordingly, USCIS's acceptance of such a contract alone as meeting the proposed standard would mean that nearly all petitioners could avoid liability.

of communications showing the petitioner inquired about the third party's past practices and payment structure to ensure that it obtains its revenue from sources other than the workers and/or any documentation that was provided to the petitioner by the third party about its payment structure and revenue sources. DHS seeks input from the public regarding other types of evidence that may be relevant and available to meet the proposed standard.

Finally, DHS is proposing to add that, in addition to petitioners, agents, facilitators, recruiters, and similar employment services, the prohibited fee provision would apply to any joint employers in the H–2A context, including a petitioner's member employers if the petitioner is an association of U.S. agricultural producers, and any employers (if different from the petitioner) in the H–2B context. Proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). The regulations allow an H–2A petition to be filed by either the employer listed on the TLC, the employer's agent, or the association of U.S. agricultural producers named as a joint employer on the TLC. 8 CFR 214.2(h)(5)(i)(A). Similar to a petitioner's responsibility with the listed third parties discussed above, DHS seeks to clarify and emphasize that an association of U.S. agricultural producers named as a joint employer on a TLC and other joint employers bear responsibility to conduct due diligence to self-police and ensure that its member or joint employers will comply with H–2A program requirements. Likewise, in a job contracting scenario in which a petitioner brings in H–2B workers to work for one or more employer-clients,[59] DHS seeks to clarify and emphasize that the petitioner is responsible for ensuring that such employers will comply with H–2B program requirements. Therefore, petitioners would be held accountable for any collection or agreement to collect prohibited fees by any such employers and (for H–2A) joint employers, ''unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement.'' Proposed 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*).

e. Consequences of a Denial or Revocation Based on Prohibited Fees

Under the current regulations, during the 1-year period following an H–2A or H–2B denial or revocation for prohibited fees, USCIS may only approve a petition filed by the same petitioner for the same classification if the petitioner demonstrates either that each affected beneficiary has been reimbursed in full or that it made reasonable efforts but has failed to locate such beneficiary(ies). 8 CFR 214.2(h)(5)(xi)(C)(*1*) and 8 CFR 214.2(h)(6)(i)(D). The current regulations specify that reasonable efforts include contacting the beneficiary's known addresses. 8 CFR 214.2(h)(5)(xi)(C)(*1*) (with respect to H–2A workers, reasonable efforts include ''contacting any of the beneficiary's known addresses''); 8 CFR 214.2(h)(6)(i)(D)(*1*) (with respect to H–2B workers, reasonable efforts include ''contacting all of each such beneficiary's known addresses''). DHS is proposing several changes to these provisions to increase the consequences and provide a stronger deterrent against prohibited fee violations, to incentivize reimbursement when such violations occur, and to better ensure that petitioners do not avoid the consequences of a denial or revocation for such violations.

First, DHS is proposing to create a 1-year bar on H–2 petition approvals following an H–2A or H–2B denial or revocation based in whole or in part on prohibited fees, or following the petitioner's withdrawal of an H–2A or H–2B petition if the withdrawal occurs after USCIS issues a request for evidence or notice of intent to deny or revoke the petition on such a basis. Proposed 8 CFR 214.2(h)(5)(xi)(B) and 8 CFR 214.2(h)(6)(i)(C).

During this 1-year period, the petitioner would be barred from approval of any H–2A or H–2B petition, regardless of whether beneficiaries are reimbursed for payment of prohibited fees. Proposed 8 CFR 214.2(h)(5)(xi)(B) and 8 CFR 214.2(h)(6)(i)(C).[60] This proposed provision is meant to reflect the serious nature of prohibited fee violations, which are not only illegal but also harmful to H–2 workers. As advocacy groups have consistently noted, recruitment fees put workers at risk for exploitation because workers who incur debt to cover such fees are vulnerable to predatory lenders and are at increased risk of debt bondage, human trafficking, and other abuses.[61]

In addition, for the 3 years following the 1-year bar, DHS proposes to allow petition approval only if each affected beneficiary (or the beneficiary's designee(s), if applicable) has been reimbursed in full, with no exceptions. *See* proposed 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D). Given the serious nature of prohibited fee violations and the significant harm to beneficiaries who are charged such fees, as discussed above, it would not be appropriate to allow a violator to avoid consequences merely by contacting any known addresses of affected beneficiaries or claiming inability to locate affected beneficiaries. Instead, DHS intends the expanded 3-year time period during which reimbursement would be a condition to petition approval, as well as the removal of the exception for failure to locate the beneficiary(ies), to provide a significantly stronger incentive to ensure that beneficiaries or their designees are in fact reimbursed.

The proposed provision would clarify that a petitioner may only provide reimbursement of prohibited fees to a beneficiary's designee if a beneficiary cannot be located or is deceased. Proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*). As this provision is not meant to create a loophole for a petitioner to avoid reimbursement of prohibited fees by not attempting to locate a beneficiary, the petitioner would need to demonstrate

[59] H–2B job contractors and employer-clients must meet the requirements of the definition of an H–2 ''employer'' under 20 CFR 655.5 and 655.19.

[60] USCIS would deny any such petition filed during this period and would not refund the filing fee. *See* 8 CFR 103.2(a)(1).

[61] *See, e.g.,* CDM, *Recruitment Revealed* 18 (2018) (''High interest rates on loans put workers at risk of becoming trapped in debt, and exploitative collateral requirements can cause workers to lose essential property, such as their vehicles or even their homes. Moreover, when workers with abusive loans arrive in the U.S. to work, they are faced with an additional pressure to earn back the money they borrowed in their country of origin.''), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf;* CDM, *Ripe for Reform* 21 (2020) (''Our surveys revealed that 26% of workers interviewed were forced to pay recruitment fees as high as $4,500. This practice makes workers vulnerable to abuse. Charging workers for the right to work is illegal and is a serious risk factor for human trafficking. Workers are less free to leave an abusive environment when they start the job indebted.''), *https://cdmigrante.org/ripe-for-reform/;* Polaris, *On-Ramps, Intersections, and Exit Routes* 43 (2018) (''The financial burdens of recruitment fees can be devastating in and of themselves but they are also—ironically—a necessary backdrop for trafficking to occur.''), *https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf;* Polaris, *Labor Trafficking on Specific Temporary Work Visas* 16 (2022) (''Having paid substantial fees in order to get the job—and often having gone into debt to do so—leaves workers with little choice but to try to recoup their losses regardless of the conditions in which they are working.''), *https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf.*

that it made all possible efforts to locate the beneficiary, and then after exhausting such efforts to locate the beneficiary, that it reimbursed the appropriate designee. The proposed provision would clarify that a beneficiary's designee(s) must be an individual(s) or entity(ies) for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement on the beneficiary's behalf, as long as the petitioner or its successor, its agent, any employer (if different from the petitioner) or any joint employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement. Proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*). The requirement for ''prior written authorization'' would better ensure USCIS's ability to determine whether the petitioner in fact reimbursed the appropriate designee. The prohibition against the petitioner or its agent, employer (if different from the petitioner) or any joint employer, attorney, facilitator, recruiter, or similar employment service from acting as the designee or deriving any financial benefit, either directly or indirectly, from the reimbursement would foreclose the possibility that any of these parties could serve as a designee or would use the designee provision as a way to benefit from not reimbursing the beneficiary.

If this provision is finalized, petitioners would be expected, as a matter of best practice, to obtain in writing the beneficiary's full contact information (including any contact information abroad), early on during the recruitment process, and to maintain and update such information as needed, to better ensure the petitioner's ability to fully reimburse the beneficiary, or the beneficiary's designee(s), for any sums the petitioner may be liable to pay the beneficiary. Petitioners would also be expected to inform the beneficiary, in a language the beneficiary understands, of the beneficiary's ability to name a designee, and obtain full designee information, early on during the recruitment process, and to maintain and update such information as needed to ensure that the petitioner has in fact complied with the reimbursement requirement.

Following a denial or revocation (or withdrawal) for prohibited fees under the proposed provisions, the maximum total period that a petitioner's H–2 petitions would be denied if the petitioner failed to fully reimburse its workers or their designees would be 4 years. DHS believes that this period is sufficient to incentivize compliance with the reimbursement requirement. DHS invites comments as to the proposed maximum 4-year bar to the approval of an H–2A or H–2B petition that would apply if the petitioner cannot demonstrate that it has in fact reimbursed the worker(s) or their designee(s) in full for any prohibited fees paid.

DHS is proposing to apply the above consequences for prohibited fees not only to the violating petitioner, but also to its successor in interest in order to prevent a petitioning entity from avoiding liability by changing hands, reincorporating, or holding itself out as a new entity. Proposed 8 CFR 214.2(h)(5)(xi)(B) and (C) and 8 CFR 214.2(h)(6)(i)(C) and (D). DHS proposes to define a successor in interest as an employer that is controlling and carrying on the business of a previous employer, regardless of whether such successor in interest has inherited all of the rights and liabilities of the predecessor entity. Proposed 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D). DHS proposes to include the term ''regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity'' in order to prevent the new entity from avoiding liability by intentionally assuming only some of the petitioner's rights and liabilities. Proposed 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D) further list factors that USCIS may consider as relevant when determining whether an entity would be considered a successor in interest. As made clear in the proposed regulatory text, no one factor is dispositive, and USCIS would make a determination as to whether the entity is a successor in interest, and is therefore liable for reimbursement, based on the circumstances as a whole.

These proposed factors are similar, but not identical, to the factors listed at 8 CFR 214.2(w)(1)(xiv) for the CW–1 nonimmigrant program. They are also similar, but not identical, to the factors listed in DOL regulations for the H–2A and H–2B programs. *See, e.g.,* 20 CFR 655.103(b); 20 CFR 655.5; 29 CFR 501.3; 29 CFR 503.4. To the extent that the proposed factors differ from the ones currently in place at 8 CFR 214.2(w)(1)(xiv) and DOL regulations, they generally flow from factors that are currently in place. For example, ''Familial or close personal relationships between predecessor and successor owners of the entity'' under proposed factor (ix) flows from the current factors on whether the former management or owner retains a direct or indirect interest in the new enterprise, continuity of the work force, similarity of supervisory personnel, and the ability of predecessor to provide relief. ''Use of the same or related remittance sources for business payments'' under proposed factor (x) flows from current factors on use of the same facilities, substantial continuity of business operations similarities, and similarities in products, services, and production methods. Furthermore, USCIS's adjudicative experience has shown the proposed factors in (ix)–(x) to be relevant when determining the relationship between entities and/or individuals.

Finally, the proposed bars apply across *both* H–2 programs, meaning that an H–2B denial or revocation would trigger the bars to H–2A approval under proposed 8 CFR 214.2(h)(5)(xi)(B) and (C), and an H–2A denial or revocation would trigger the bars to H–2B approval under proposed 8 CFR 214.2(h)(6)(i)(C) and (D). Specifically, proposed 8 CFR 214.2(h)(5)(xi)(B) states that the bar would apply within 1 year after the decision denying or revoking on notice ''an H–2A *or H–2B petition* on the basis of paragraph (h)(5)(xi)(A) *or (h)(6)(i)(B),* respectively, of this section'' (emphasis added). Likewise, proposed 8 CFR 214.2(h)(6)(i)(C) states that the bar would apply within 1 year after the decision denying or revoking on notice ''an H–2B *or H–2A petition* on the basis of paragraph (h)(6)(i)(B) or *(h)(5)(xi)(A),* respectively, of this section'' (emphasis added). The additional 3-year bar at proposed 8 CFR 214.2(h)(5)(xi)(C) and (6)(i)(D) would similarly apply to both classifications whether the underlying petition that was denied or revoked for prohibited fees was an H–2A or H–2B petition. DHS is also proposing to apply the bars across both classifications in cases where a petitioner withdraws the petition after USCIS has issued a notice of intent to deny or revoke based on the H–2A or H–2B prohibited fee provisions.

2. Denial of H–2 Petitions for Certain Violations of Program Requirements

In this proposed rule, DHS, pursuant to its general authority under INA secs. 103(a) and 214(c)(1), as well as its specific authority under INA sec. 214(c)(14)(A)(ii) with respect to the H–2B program, is proposing to enhance worker protections by introducing a provision that allows for the denial of H–2 petitions for employers that have been found to have committed certain labor law violations or otherwise violated the requirements of the H–2 programs. *See* proposed 8 CFR

214.2(h)(10)(iii).[62] This proposed reform is an important addition in DHS's efforts to improve the integrity of the H–2 programs and to protect H–2 workers by allowing evaluation of a petitioner's past compliance with certain H–2 related laws prior to USCIS approving H–2 petitions. As noted in earlier sections, a worker's H–2 status is tied to the petitioning employer only, and worker advocates have noted that the structure of the programs makes H–2 workers vulnerable to exploitation and abuse. It is necessary, therefore, that USCIS have improved tools to properly identify and vet employers that seek to bring in H–2 workers. The consequences of bad actors participating in the H–2 programs can be extremely harmful.[63] This proposed provision reflects DHS's determination that an employer's past conduct in relation to respecting worker rights, as well as in relation to ensuring the safety and working conditions of its past or current employees, is relevant to petition eligibility as it may inform USCIS of that employer's present intent and ability to comply with H–2 laws and requirements. The phrase ''H–2 laws and requirements'' includes the obligations and prohibitions specifically outlined in statutes and DHS and DOL regulations. In addition, employers in the H–2 program are required to comply with ''all applicable Federal, State, and local employment-related laws and regulations, including health and safety laws.'' [64]

The Secretary of Homeland Security's authority to deny H–2 petitions for certain past violations of program requirements is derived from the INA and the HSA. Specifically, INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1), states that ''the question of importing any [noncitizen] as a nonimmigrant under subparagraph (H) . . . of section 101(a)(15) . . . in any specific case or specific cases shall be determined by the [Secretary of Homeland Security], after consultation with appropriate agencies of the Government, upon petition of the importing employer.'' [65] The same provision goes on to state, ''The petition shall be in such form and contain such information as the [Secretary of Homeland Security] shall prescribe.'' In addition, with respect to H–2B petitions in which DHS has found a substantial failure to meet any conditions of the petition or a willful misrepresentation of a material fact, INA sec. 214(c)(14)(A)(ii), 8 U.S.C. 1184(c)(14)(A)(ii), states in part that the Secretary of Homeland Security, ''after notice and an opportunity for a hearing'' [66] . . . ''may deny petitions filed with respect to that employer. . . during a period of at least 1 year but not more than 5 years. . . .''

The proposed provision is an expansion of existing regulatory authority that bars approval of H–2A petitions for 2 years after an employer or joint employer, or a parent, subsidiary, or affiliate is found to have violated INA sec. 274(a), 8 U.S.C. 1324(a) (criminal penalties for unlawfully bringing in and harboring certain noncitizens) or to have employed an H–2A worker in a position other than that described in the nonimmigrant worker petition. *See* 8 CFR 214.2(h)(5)(iii)(B). The existing provision at 8 CFR 214.2(h)(5)(iii)(B) is insufficient to address serious violations that occur in the H–2 programs, as it applies only to the H–2A program and does not include all of the types of violations that can be relevant to H–2 program compliance. DHS proposes to replace this existing provision with a more comprehensive provision, proposed 8 CFR 214.2(h)(10)(iii), that includes both mandatory and discretionary grounds for denial depending on the type or severity of violations, including mandatory denial based on a final determination(s) that the employer violated INA sec. 274(a), and DHS is therefore proposing to remove and reserve 8 CFR 214.2(h)(5)(iii)(B).

Additionally, under existing DHS regulations at 8 CFR 214.1(k), USCIS may deny for a period of 1 to 5 years any petition filed for nonimmigrant status under INA sec. 101(a)(15)(H) upon the petitioner's debarment by DOL.[67] DHS would retain the provision at 8 CFR 214.1(k) and believes the addition of proposed 8 CFR 214.2(h)(10)(iii) would complement that provision, in part by allowing DHS to address instances of past labor violations that may result in the abuse or exploitation of individuals seeking to come to the United States as H–2 workers, but that may not have resulted in debarment from the H–2 programs by DOL.[68] Further, proposed 8 CFR 214.2(h)(10)(iii) would provide greater clarity to 8 CFR 214.1(k) regarding how the bar under 8 CFR 214.1(k) would be applied to H–2A and H–2B petitions, as discussed below.

Under proposed 8 CFR 214.2(h)(10)(iii), USCIS would have authority to deny H–2 petitions for certain past violations. The proposed provision sets out the conditions which would mandate USCIS denial, as well as instances in which USCIS would evaluate relevant factors to determine whether a discretionary denial is warranted. The violation findings set forth in proposed 8 CFR 214.2(h)(10)(iii)(A) are, by nature, so egregious and directly connected to the H–2 programs that they warrant mandatory denial. In contrast, the conditions set forth in 8 CFR 214.2(h)(10)(iii)(B) could potentially be less egregious in nature or less directly related to the H–2 programs, and therefore, would require additional analysis before determining whether a denial is warranted. These proposed provisions are discussed in more detail in the following subsections. Note that under proposed 8 CFR 214.2(h)(10)(iii), USCIS would or could deny an H–2A petition for a violation that occurred in the H–2B program, and vice versa.

a. Mandatory Denial Based on Certain Violations

Proposed 8 CFR 214.2(h)(10)(iii)(A) states that USCIS will deny any H–2A or H–2B petition filed by a petitioner, or the successor in interest of a petitioner as that term is defined in proposed 8 CFR 214.2(h)(5)(xi)(C)(*2*) and proposed

[62] As previously discussed, numerous studies and news articles have recounted instances of employers continuing to access the H–2 programs despite their respective records of labor law and/or safety violations. *See, e.g.,* Farmworker Justice, *No Way to Treat a Guest: Why the H–2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2012), *https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf;* LIUNA, *H–2B Guest Worker Program: Lack of Accountability Leads to Exploitation of Workers, https://d3ciwvs59ifrt8.cloudfront.net/b156551f-4cfc-4f0e-ab0f-1c05b2955a44/4d0e38cb-1c2b-4b12-924c-279c4e15ce31.pdf.*

[63] *See, e.g.,* DOJ, U.S. Attorney's Office, Southern District of Georgia, *Three men sentenced to federal prison on charges related to human trafficking: Each admitted to role in forced farm labor in Operation Blooming Onion* (Mar. 31, 2022), *https://www.justice.gov/usao-sdga/pr/three-men-sentenced-federal-prison-charges-related-human-trafficking.* Also see the examples of abuse and exploitation of H–2 workers highlighted in section III.D, Importance of the H–2 Programs and the Need for Reforms.

[64] *See* 20 CFR 655.20(z), 29 CFR 503.16(z); *see also* 20 CFR 655.135(e).

[65] *See also* INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1).

[66] USCIS does not read the phrase ''notice and opportunity for a hearing'' in INA sec. 214(c)(14) as requiring a formal hearing under 5 U.S.C. 556. USCIS therefore proposes to utilize its existing informal adjudications and appeals processes to satisfy this ''notice and opportunity for a hearing'' requirement. *See* 8 CFR 103.2, 103.3. *See generally* Michael Asimow, Admin. Conference of the U.S., ''Federal Administrative Adjudication Outside the Administrative Procedure Act'' (2019) (discussing informal adjudication), *at https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf.*

[67] Exceptions to the bar under 8 CFR 214.1(k) are made for status under INA secs. 101(a)(15)(H)(i)(b1), (L), (O), and (P)(i).

[68] A USCIS decision to deny a petition under proposed 8 CFR 214.2(h)(10)(iii) would not preclude a debarment action by DOL.

8 CFR 214.2(h)(6)(i)(D)(*2*), that has been the subject of one or more of the three actions discussed below.

First, DHS proposes mandatory denial based on a final administrative determination by the Secretary of Labor under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503, debarring the petitioner from filing or receiving a future labor certification, or a final administrative determination by the GDOL debarring the petitioner from issuance of future labor certifications under applicable Guam regulations and rules, if the petition is filed during the debarment period, or if the debarment occurs during the pendency of the petition. *See* proposed 8 CFR 214.2(h)(10)(iii)(A)(*1*). The proposed provision is consistent with the existing authority under 8 CFR 214.1(k) to deny petitions based on debarment, but provides greater clarity for H–2A and H–2B petitioners. Specifically, while 8 CFR 214.1(k) states that, upon debarment, USCIS *may* deny a petition ''for a period of at least 1 year but not more than 5 years,'' proposed 8 CFR 214.2(h)(10)(iii)(A)(*1*) would clarify that USCIS *must* deny H–2 petitions filed during the specific debarment period set forth by DOL or GDOL, assuming a final administrative determination as specified in proposed 8 CFR 214.2(h)(10)(iii)(A). In addition, the proposed provision clarifies that it applies to successors in interest of the debarred petitioner, as well as in instances when a debarment occurs while a petition is pending before USCIS. The current language at 8 CFR 214.1(k) would continue to govern how DOL debarment of an employer from the H–2 program would affect non-H–2 petition adjudications for petitions filed by that employer under INA sec. 101(a)(15)(H) (except for status under INA secs. 101(a)(15)(H)(i)(b1), (L), (O), and (P)(i)).

As the second basis for mandatory denial, DHS proposes to include denial or revocation of a prior H–2A or H–2B petition that includes a finding of fraud or willful misrepresentation of a material fact during the pendency of the petition or within 3 years before the filing of the petition. *See* proposed 8 CFR 214.2(h)(10)(iii)(A)(*2*). In order to trigger a denial under this ground, the USCIS decision on the prior petition must explicitly contain a finding of fraud or willful misrepresentation of a material fact, although fraud or willful misrepresentation of a material fact need not be the only ground(s) for denial or revocation. Furthermore, the USCIS decision must be an administratively final decision, meaning there is no pending administrative appeal or the time for filing a timely administrative appeal has elapsed.[69] Because of the inherently serious and relevant nature of a finding that the petitioner committed fraud or willfully misrepresented information that was material with respect to a prior benefit request in the H–2 programs, it is appropriate to exclude from the program petitioners against whom USCIS has recently made such a finding. As to how recent such a finding must be in order to impact adjudication, DHS is proposing a 3-year timeframe as this period captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to a petitioner's current intention and ability to comply with program requirements. The 3-year period generally would be sufficient to ensure that approval of an H–2 petition would not be detrimental to the rights of H–2 workers or the integrity of the H–2 program.[70] DHS seeks public input on the proposed 3-year timeframe as an appropriate length of time to impose.

Third, DHS proposes mandatory denial based on a final determination of a violation under INA sec. 274(a), 8 U.S.C. 1324(a),[71] during the pendency of the petition or within 3 years before filing the petition. *See* proposed 8 CFR 214.2(h)(10)(iii)(A)(*3*). As noted above, this proposed provision essentially incorporates and replaces the portion of the existing provision at 8 CFR 214.2(h)(5)(iii)(B) that bars approval of H–2A petitions if an employer is found to have violated INA sec. 274(a). It also expands upon 8 CFR 214.2(h)(5)(iii)(B) by making the bar also applicable to H–2B petitions, applying it to successors in interest, and extending the 2-year bar to 3 years to make the length consistent with the length of the other proposed mandatory denial periods. As above, DHS seeks public input on this proposed time period.

In determining whether one of the proposed mandatory grounds for denial listed in proposed 8 CFR 214.2(h)(10)(iii)(A) is applicable to the instant petition, USCIS would not revisit the underlying substantive determination during adjudication of the petition. That is, USCIS is not proposing to re-adjudicate or make an independent finding on the merits of the underlying final administrative determination, criminal conviction, or civil judgment against the petitioner. Rather, following issuance of a request for evidence or notice of intent to deny the petition and providing an opportunity for the petitioner to respond, USCIS would determine whether such final determination, conviction, or judgment was made against the petitioner or its successor in interest within the specified time period. Upon a determination that any of the proposed mandatory grounds for denial listed in proposed 8 CFR 214.2(h)(1)(iii)(A) were triggered, USCIS would provide notice to the petitioner indicating that the ground had been triggered and that the petition being adjudicated as well as any pending or subsequently filed H–2 petitions (by the petitioner or a successor in interest) will be denied on the same basis during the applicable time period. *See* proposed 8 CFR 214.2(h)(10)(iii)(E)(*1*). The denial notice would also inform the petitioner of the right to appeal the denial to USCIS's Administrative Appeals Office (AAO), including the ability to request an oral argument pursuant to 8 CFR 103.3.[72] Providing such notice would inform the petitioner to refrain from filing additional H–2 petitions that would be subject to the mandatory ground for denial, therefore saving the petitioner from paying filing fees.

b. Discretionary Denial Based on Certain Violations

In addition to the mandatory denial provision at proposed 8 CFR 214.2(h)(10)(iii)(A), discussed in the preceding subsection, DHS also proposes a provision at 8 CFR 214.2(h)(10)(iii)(B) that would allow USCIS to consider other past violations and authorize discretionary denial in such cases when USCIS determines that the underlying violation(s) calls into question the petitioner's or successor's intention or ability to comply with H–2 program requirements. This proposed provision states that USCIS may deny any H–2 petition filed by a petitioner, or the successor in interest of a petitioner as defined in proposed 8 CFR 214.2(h)(5)(xi)(C)(*2*) and proposed 8 CFR 214.2(h)(6)(i)(D)(*2*), that has been the subject of one or more of the enumerated actions, after evaluation of

[69] *See generally* 8 CFR 103.3 and 8 CFR 103.4 (setting forth the appeal process for petitioners after a decision is issued).

[70] The 3-year period is consistent with the time period set forth in INA sec. 214(c)(14)(A)(ii) with respect to the H–2B classification. Since similar worker protection and program integrity concerns apply to the H–2A program, it is appropriate to use the same timeframe with respect to the H–2A classification.

[71] INA sec. 274, 8 U.S.C. 1324, is titled ''Bringing in and Harboring Certain Aliens,'' and paragraph (a) covers ''Criminal Penalties'' within that section. INA sec. 274(a) is separate and distinct from INA sec. 274A, 8 U.S.C. 1324a, which is titled ''Unlawful Employment of Aliens.''

[72] The denial notice would also inform the petitioner of the ability to file a motion to reopen or reconsider under 8 CFR 103.5(a). The filing of a motion would not stay the denial decision. 8 CFR 103.5(a)(1)(iv).

relevant factors listed at proposed 8 CFR 214.2(h)(10)(iii)(C). The final administrative actions listed in proposed 8 CFR 214.2(h)(10)(iii)(B) would be limited to those that have occurred during the pendency of the petition or within 3 years before the filing the petition. DHS is proposing this 3-year period as such a period captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to a petitioner's current intention and ability to comply with program requirements. The 3-year period generally would be sufficient to ensure that approval of an H–2 petition would not be detrimental to the rights of H–2 workers or the integrity of the H–2 program.[73] DHS welcomes public input on this proposed timeframe.

First, DHS proposes to allow USCIS to consider a discretionary denial when the petitioner has been the subject of a final administrative determination by the Secretary of Labor or GDOL with respect to a prior H–2A or H–2B TLC that includes: (1) revocation of an approved TLC under 20 CFR part 655, subpart A or B, or applicable Guam regulations and rules; (2) DOL debarment under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503, or applicable Guam regulations and rules, if the debarment period has concluded before filing the petition; or (3) any other administrative sanction or remedy under 29 CFR part 501 or 503, or applicable Guam regulations and rules, including assessment of civil money penalties as described in those parts. *See* proposed 8 CFR 214.2(h)(10)(iii)(B)(*1*). This provision is broader than proposed 8 CFR 214.2(h)(10)(iii)(A)(*1*) in that it encompasses other administrative actions beyond debarment by the Secretary of Labor or GDOL. With respect to debarment, the timing of the debarment period is what differentiates proposed 8 CFR 214.2(h)(10)(iii)(A)(*1*) from proposed 8 CFR 214.2(h)(10)(iii)(B)(*1*)(*ii*). A debarment period that began during the last 3 years but has already concluded before the filing of the H–2 petition would fall under 8 CFR 214.2(h)(10)(iii)(B)(*1*)(*ii*) and trigger a discretionary analysis, while a debarment period that is active when the H–2 petition is filed or while it remains pending *would fall under the mandatory denial provision at* proposed 8 CFR 214.2(h)(10)(iii)(A)(*1*).

As the second basis for discretionary denial consideration, DHS proposes to include a USCIS decision revoking the approval of a prior petition that includes one or more of the following findings: the beneficiary was not employed by the petitioner in the capacity specified in the petition; the statement of facts contained in the petition or on the application for a TLC was not true and correct, or was inaccurate; the petitioner violated terms and conditions of the approved petition; or the petitioner violated requirements of INA sec. 101(a)(15)(H) or 8 CFR 214.2(h). *See* proposed 8 CFR 214.2(h)(10)(iii)(B)(*2*). Unlike USCIS decisions that include a finding of fraud or willful misrepresentation of a material fact, these revocation decisions could, but would not always, be relevant to a petitioner's intent and ability to comply with program requirements. Inclusion of the phrase ''the beneficiary was not employed by the petitioner in the capacity specified in the petition'' essentially incorporates the existing provision at 8 CFR 214.2(h)(5)(iii)(B) that bars approval of H–2A petitions for 2 years if an employer is found ''to have employed an H–2A worker in a position other than that described in the relating petition'' and expands it to include H–2B petitions. However, unlike current 8 CFR 214.2(h)(5)(iii)(B), which imposes a mandatory denial, discretion is warranted when the beneficiary was not employed by the petitioner in the capacity specified in the petition (for instance, the beneficiary was performing different duties or working outside the identified area of employment) because the non-compliance could have occurred for a number of reasons, not all of which would call into question a petitioner's intent and ability to comply with program requirements going forward. In addition, the proposed provision would allow consideration of other bases for revocation as listed above that could potentially relate to a petitioner's intent and ability to comply with program requirements. For instance, a USCIS revocation finding that the statement of facts contained in the petition or on the application for a TLC was not true and correct[74] could be based on a petitioner's confiscation and withholding of its H–2 workers' passports, which is both unlawful and harmful to workers,[75] and therefore would be highly relevant to a petitioner's prospective intent and ability to comply with program requirements.

Third, DHS proposes to allow USCIS to consider discretionary denial based on any final administrative or judicial determination (other than one described in 8 CFR 214.2(h)(10)(iii)(A)) that the petitioner violated any applicable Federal, State, or local employment-related laws or regulations, including, but not limited to, health and safety laws or regulations. *See* proposed 8 CFR 214.2(h)(10)(iii)(B)(*3*). This catch-all provision is consistent with existing DOL regulations requiring compliance with all such laws,[76] and it recognizes that numerous Federal agencies (such as DOL's Occupational Safety and Health Administration (OSHA), the Department of Transportation (DOT), and Federal courts), State agencies (such as State departments of labor, State departments of transportation, and State courts), and local agencies (such as those involved in setting local housing standards) have authority in areas affecting H–2 employers and workers. While DHS recognizes that proposed 8 CFR 214.2(h)(10)(iii)(B)(*3*) could be broad in its reach, the key word ''applicable'' and phrase ''may call into question a petitioner's or successor's intention or ability to comply,'' would limit the scope of final determinations that USCIS may consider relevant. For example, USCIS would likely not consider a single de minimis OSHA violation[77] or a single DOT violation for poor vehicle maintenance that did not result in risk or harm to workers as necessarily relevant to the petitioner's intention or ability to comply with H–2A program requirements. On the other hand, if a petitioner has, for instance, a history of serious OSHA violations for failure to provide workers with personal protective equipment or a history of DOT violations for poor vehicle maintenance and those vehicles were continually used to transport the company's H–2 workers, resulting in the death or injury of (or risk of death or

[73] The 3-year period is consistent with the time period set forth in INA sec. 214(c)(14)(A)(ii) with respect to the H–2B classification. Since similar worker protection and program integrity concerns apply to the H–2A program, it is appropriate to use the same timeframe with respect to the H–2A classification.

[74] *See* 8 CFR 214.2(h)(11)(iii)(A)(*2*).

[75] As part of the TLC application process, petitioners are required to attest that they will comply with relevant laws, including 18 U.S.C. 1592(a), with respect to prohibitions against confiscating workers' passports. *See* 20 CFR 655.20(z), 20 CFR 655.135(e); Form ETA–9142A, H–2A Application for Temporary Employment Certification, Appendix A, and Form ETA 9142B, H–2B Application for Temporary Employment Certification, Appendix B, available at *https://www.dol.gov/agencies/eta/foreign-labor/forms. See also* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110–457; 18 U.S.C. 1592(a).

[76] *See* 20 CFR 655.20(z), 20 CFR 655.135(e).

[77] De minimis OSHA violations ''have no direct or immediate relationship to safety and health.'' DOL, *Employment Law Guide, Safety and Health Standards: Occupational Safety and Health, https://webapps.dol.gov/elaws/elg/osha.htm.*

injury to) H–2 workers,[78] then USCIS would likely consider those violations relevant to the petitioner's intention or ability to comply with H–2A or H–2B program requirements under proposed 8 CFR 214.2(h)(10)(iii)(B)(*3*).

As the denials under proposed 8 CFR 214.2(h)(10)(iii)(B)(*3*) would be discretionary, DHS is proposing that USCIS would determine whether the violations may call into question the petitioner's ability or intent to comply with H–2 program requirements by examining all relevant factors. Proposed 8 CFR 214.2(h)(10)(iii)(C) identifies several factors that could be relevant to the analysis and that USCIS may therefore consider. The listed factors are not exhaustive; additional relevant factors that are not listed in the proposed provision may be considered by USCIS in the totality, but each one, standing alone, would not be outcome determinative. Further, not all factors would be relevant in all cases, and different factors may be weighted differently depending on the circumstances of each case. Any one of the factors, such as the egregiousness and willfulness [79] of the violation(s) under proposed 8 CFR 214.2(h)(10)(iii)(C)(*2*) and (*5*), could be given significant weight in reviewing the totality of the facts presented, even if other listed factors were absent. For example, if the petitioner willfully committed a violation that resulted in the death of several H–2 workers, those two factors alone (*i.e.,* willfulness and egregiousness of the violation leading to the death of the workers) could be sufficient to warrant a discretionary denial under proposed 8 CFR 214.2(h)(10)(iii)(B), notwithstanding the absence of other negative factors such as a prior history of violations or achievement of financial gain.

In applying the proposed discretionary analysis, USCIS officers would use the ''preponderance of the evidence'' standard of proof.[80] Under this standard, the evidence must demonstrate that the petitioner's claim that it is willing and able to comply with the requirements of the H–2 program is ''more likely than not'' true [81] after taking into consideration the prior violations and any relevant factors, both negative and positive. While USCIS officers would evaluate whether the petitioner, more likely than not, will comply with H–2 requirements, USCIS officers would not revisit the merits of the underlying final administrative or judicial determination against the petitioner.

When making a determination that any of the proposed discretionary grounds for denial listed in proposed 8 CFR 214.2(h)(10)(iii)(B) were triggered and that the analysis warrants a discretionary denial, the USCIS denial notice would indicate that the triggering of the discretionary ground for denial may also apply in subsequent adjudications of pending or future H–2 petitions, depending on the facts presented with respect to each such petition. *See* proposed 8 CFR 214.2(h)(10)(iii)(E)(*2*). The notice would also inform the petitioner of the right to appeal the denial to the AAO, and the ability to request oral argument pursuant to 8 CFR 103.3.[82]

Providing such notice would enable the petitioner to consider the impact of the discretionary denial on future H–2 petition adjudications. It is the intention of DHS that the petitioner or the petitioner's successor in interest will take corrective actions to bring itself into, and continue to remain in, compliance with H–2 program requirements. Under this proposal, USCIS would take into consideration any such corrective action in subsequent adjudications of H–2 petitions filed by the petitioner or a petitioner's successor in interest. *See* proposed 8 CFR 214.2(h)(10)(iii)(C)(*8*). During the discretionary denial period, USCIS would consider all of the relevant factors in each separate adjudication when exercising its discretion under proposed 8 CFR 214.2(h)(10)(iii)(B).

c. Convictions and Determinations Against Certain Individuals

For the purposes of the mandatory and discretionary denials discussed above, DHS proposes to state that a criminal conviction or final administrative or judicial determination against certain individuals will be treated as a conviction or final administrative or judicial determination against the petitioner or successor in interest. The proposed regulatory text clarifies that this would include convictions and determinations against a person who is acting on behalf of the petitioning entity, which could include, among others, the petitioner's owner, employee, or contractor. The proposed regulatory text would further clarify that, with respect to discretionary denials under proposed 8 CFR 214.2(h)(10)(iii)(B), this would also include convictions and determinations against any employee of the petitioning entity who a reasonable person in the H–2A or H–2B worker's position would believe is acting on behalf of the petitioning entity. *See* proposed 8 CFR 214.2(h)(10)(iii)(D).

Because an employer can rightfully be expected to exercise due diligence over its employees or contractors acting on its behalf, it would not be appropriate to allow petitioners to avoid liability merely because an individual acting on the entity's behalf, rather than the entity itself, was the subject of the final administrative or judicial action. Indeed, some of the most egregious violations, such as those resulting in criminal convictions, involve actions against individuals in addition to any separate actions against the business entity that may be listed as petitioner on an H–2A or H–2B petition. For instance, a recent high-profile investigation into egregious violations in the H–2A program resulted in criminal convictions of several individuals related, in part, to human trafficking and forced labor committed against H–2 workers.[83] To the extent that convicted individuals acted in their capacity on behalf of petitioning employers and resulted in violations of H–2 program requirements, such misconduct is entirely relevant to the adjudication of future petitions by the petitioning employers or their successors. Whether the denial of future petitions would be mandatory or discretionary under the proposed regulation would depend on the nature of the specific convictions or final administrative or judicial actions. In other words, the mandatory bar would apply if the relevant individual was the subject of one or more actions listed in proposed 8 CFR 214.2(h)(10)(iii)(A), and USCIS would have the ability to deny as

[78] *See* Ken Bensinger, Jessica Garrison, Jeremy Singer-Vine, Buzz Feed News, *The Pushovers: Employers Abuse Foreign Workers, U.S. Says, By All Means, Hire More* (May 12, 2016) (describing an example of such an incident), *https://www.buzzfeednews.com/article/kenbensinger/the-pushovers.*

[79] Note that a finding of willfulness must be explicitly stated in the final agency determination, decision, or conviction. USCIS would not independently make a finding of willfulness under proposed 8 CFR 214.2(h)(10)(iii)(C)(*5*).

[80] *See Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010) (''Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.'').

[81] *See Matter of Chawathe,* 25 I&N Dec. at 376 (AAO 2010).

[82] The denial notice would also inform the petitioner of the ability to file a motion under 8 CFR 103.5(a). The filing of a motion would not stay the denial decision. 8 CFR 103.5(a)(1)(iv).

[83] *See* DOJ, U.S. Attorney's Office, Southern District of Georgia, *Three men sentenced to federal prison on charges related to human trafficking: Each admitted to role in forced farm labor in Operation Blooming Onion, https://www.justice.gov/usao-sdga/pr/three-men-sentenced-federal-prison-charges-related-human-trafficking* (Mar. 31, 2022).

a matter of discretion if the relevant individual was the subject of one or more actions listed in proposed 8 CFR 214.2(h)(10)(iii)(B).

Furthermore, for the purposes of discretionary denials under proposed 8 CFR 214.2(h)(10)(iii)(B), proposed 8 CFR 214.2(h)(10)(iii)(D)(*2*) would include convictions and determinations against ''an employee of the petitioning entity who a reasonable person in the H–2A or H–2B worker's position would believe is acting on behalf of the petitioning entity.'' Because employers can rightfully be expected to exercise due diligence over its employees, it would not be appropriate to allow petitioners to avoid liability merely by claiming that an employee was not acting on the petitioner's behalf. At the same time, to guard against the risk that the petitioner be liable for any and all unauthorized actions of their employees, this liability would apply only if a reasonable person in the worker's position would believe that the employee was acting on behalf of the petitioning entity. In addition, because liability for this population would be limited to the discretionary denial provision, petitioners would have an opportunity to provide information regarding the circumstances of the employee's actions, and USCIS would consider all relevant factors in determining whether the petitioner had established its intention and ability to comply with H–2 program requirements.

3. Investigation and Verification Authority

Pursuant to its authorities under INA secs. 103(a) and 214, 8 U.S.C. 1103(a) and 1184, HSA sec. 451, 6 U.S.C. 271, and 8 CFR part 103, among other provisions of law, USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a beneficiary is eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections, verifications, and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections (site visits). The existing authority to conduct inspections, verifications, and other compliance reviews is vital to the integrity of the immigration system as a whole, and to the H–2A and H–2B programs specifically. In this rule, DHS is proposing to add regulations specific to the H–2A and H–2B programs to codify its existing authority and clarify the scope of inspections and the consequences of a refusal or failure to fully cooperate with these inspections. *See* proposed 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)(*2*). The authority of USCIS to conduct on-site inspections, verifications, or other compliance reviews to verify information does not relieve the petitioner of its burden of proof or responsibility to provide information in the petition (and evidence submitted in support of the petition) that is complete, true, and correct.[84]

The proposed regulations would make clear that inspections may include, but are not limited to, an on-site visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H–2 program. *See* proposed 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)(*2*). The proposed provisions would also make clear that an H–2A or H–2B petitioner and any employer must allow access to all sites where the labor will be performed for the purpose of determining compliance with applicable H–2A and H–2B requirements. The word ''employer'' used in this context would include H–2B job contractors and employer-clients as reported on the temporary labor certification[85] and H–2A contractors[86] and joint employers, including member employers if the petitioner is an association of agricultural employers. The petitioner and any employers must also agree to USCIS officials interviewing H–2A or H–2B workers, and any other similarly situated employees working for the H–2A or H–2B employer or joint employer, if necessary, including in the absence of the employer or the employer's representatives. The interviews may take place on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. The ability to inspect any and all of the various locations where the labor will be performed is critical because the purpose of a site inspection is to confirm information related to the petition, and any one of these locations may have information relevant to a given petition. In addition, DHS proposes to require access to the sites where H–2A workers are housed. H–2A petitioners are required to provide housing to H–2A workers at no cost to the workers. *See* INA sec. 218(c)(4) and 20 CFR 655.1304(d). While USCIS does not, and would not, conduct inspections regarding the standard of housing provided, access to H–2A worker housing is appropriate to ensure USCIS has access to the workers themselves during the course of compliance review activities. In addition, the proposed requirement that USCIS be allowed to interview workers without the employer or its representatives present is based on reports indicating that H–2 workers may currently underreport abuse for fear of reprisal by employers.[87] The presence of employer representatives during such interviews can reasonably be expected to have a chilling effect on the ability of interviewed workers to speak freely, and in turn, impede the Government's ability to ensure compliance with the terms and conditions of the H–2 program.

The proposed regulation also states that if USCIS is unable to verify facts related to the H–2 petition, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then the lack of verification of pertinent facts, including from failure or refusal to cooperate, may result in denial or revocation of any petition for workers performing services at the location or locations that are a subject of inspection or compliance review. *See* proposed 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)(*2*). A determination that a petitioner or employer failed or refused to cooperate would be case-specific but could include situations where one or more USCIS officers arrived at a petitioner's worksite, made contact with the petitioner or employer and properly identified themselves to a petitioner's representative, and the petitioner or employer refused to speak to the officers or were refused entry into the premises or refused permission to review human resources records pertaining to the beneficiary(ies). Failure or refusal to cooperate could also include situations where a petitioner or employer agreed to speak but did not provide the

[84] *See* 8 CFR 103.2(b). In evaluating the evidence, the ''truth is to be determined not by the quantity of evidence alone but by its quality.'' *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010) (quoting *Matter of E–M-,* 20 I&N Dec. 77, 80 (Comm'r 1989)).

[85] H–2B job contractors and employer-clients must meet the requirements of the definition of an H–2 ''employer'' under 20 CFR 655.5 and 655.19.

[86] H–2A labor contractors must meet all of the requirements of the definition of an H–2 ''employer'' under 20 CFR 655.103 and 655.132.

[87] *See* GAO–15–154, at 37 (2015), *https://www.gao.gov/assets/gao-15-154.pdf;* CDM, *Ripe for Reform* 27 (2020), *https://cdmigrante.org/ripe-for-reform/.*

information requested within the time period specified, or did not respond to a written request for information within the time period specified. Before denying or revoking the petition, USCIS would provide the petitioner an opportunity to rebut adverse information and present information on its own behalf in compliance with 8 CFR 103.2(b)(16).

This new provision would put petitioners on notice of the specific consequences for noncompliance, whether by them or the employer, if applicable. As stated above, relevant employers would include H–2A labor contractors and would also include joint employers. It has long been established that it is the petitioner's burden to establish eligibility for the immigration benefit sought. If USCIS conducts a site visit in order to verify facts related to an H–2A or H–2B petition or to verify that the beneficiary is being employed consistently with the terms of the petition approval, and is unable to verify relevant facts and otherwise confirm compliance, then the petition may be properly denied or revoked. This would be true whether the unverified facts relate to a petitioner worksite or another worksite at which a beneficiary has been or will be placed by the petitioner. It would also be true whether the failure or refusal to cooperate is by the petitioner or employer.

4. H–2 Whistleblower Protection

As noted above, DHS is proposing to provide H–2A and H–2B workers with ''whistleblower protection'' comparable to the protection currently offered to H–1B workers. *See* proposed 8 CFR 214.2(h)(20). Under current 8 CFR 214.2(h)(20), a qualifying employer seeking an extension of stay for an H–1B nonimmigrant worker, or a change of status for a worker from H–1B status to another nonimmigrant classification, is able to submit documentary evidence indicating that the beneficiary faced retaliatory action from their employer based on a report regarding a violation of the employer's labor condition application (LCA) obligations. If DHS determines such documentary evidence to be credible, DHS may consider any loss or failure to maintain H–1B status by the beneficiary related to such violation as an ''extraordinary circumstance'' for purposes of 8 CFR 214.1(c)(4) and 8 CFR 248.1(b). Those regulations authorize DHS to grant a discretionary extension of H–1B stay or a change of status to another nonimmigrant classification even when the worker has failed to maintain the previously accorded status or where such status expired before the extension of stay or change of status request was filed.[88]

When it proposed the H–1B whistleblower protection provision, DHS noted that it was required under the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Public Law 101–649, to create a process under which an H–1B nonimmigrant worker who files a complaint with DOL regarding such illegal retaliation, and is otherwise eligible to remain and work in the United States, could seek other employment in the United States.[89] While not similarly required by statute in the H–2A and H–2B contexts, it is appropriate to afford such protections to H–2A and H–2B workers in light of the vulnerability of H–2 workers to exploitation and abuse as described at length above. Given DHS's role in ensuring the integrity of the H–2 programs and consistent with its statutory authorities under, *e.g.,* INA secs. 103(a) and 214, 8 U.S.C. 1103(a) and 1184, it is within DHS's authority and interest to take steps to ensure that program violations come to light.[90] As discussed previously, a GAO report has noted that the incidence of abuses in the H–2A and H–2B programs may currently be underreported, in part due to workers' fear of retaliation by their employer.[91] The proposed whistleblower provision, in conjunction with other proposed changes in this rulemaking, including those related to grace periods and portability, may help mitigate the above-discussed structural disincentives that workers could face with respect to reporting abuses.

In order to qualify under the new provision at proposed 8 CFR 214.2(h)(20)(ii), DHS proposes requiring ''credible documentary evidence . . . indicating that the beneficiary faced retaliatory action from their employer based on a reasonable claim of a violation or potential violation of any applicable program requirements or based on engagement in another protected activity'' to be submitted in support of the relevant petition on the beneficiary's behalf seeking an extension of stay or a change of status to another classification. To allow flexibility in the types of documentation that may be submitted, DHS has not proposed specifying any particular form that a ''claim'' or the ''credible documentary evidence'' must take. In this respect, the proposed provision is similar to the approach taken in the H–1B whistleblower provision. In the NPRM that included the H–1B whistleblower provision, DHS noted that ''[c]redible documentary evidence may include a copy of the complaint filed by the individual, along with corroborative documentation that such a complaint has resulted in retaliatory action against the individual . . . .'' [92] In the final rule, DHS noted that it ''has not limited the scope of credible evidence that may be included to document an employer violation. Rather, DHS generally requests credible documentary evidence indicating that the beneficiary faced retaliatory action from their employer due to a report regarding a violation of the employer's LCA obligations.'' [93] Thus, while a formal written complaint, if available, would be acceptable under the proposed H–2A and H–2B whistleblower provision, DHS does not propose a requirement that the submitted evidence must include a formal written complaint, written evidence that the worker engaged in protected activity, or another type of written report filed by the affected H–2 worker. DHS notes that a report could be made orally.

DHS is proposing some variations from the language used in the existing H–1B whistleblower provision in order to increase H–2 workers' protection from threats that could chill workers from exercising their rights. For instance, the proposed H–2 provision would specify that the claim could relate to a violation ''or potential violation,'' as long as such claim was reasonable, to reflect that even if a worker is mistaken about the existence of a violation, a complaint regarding a potential violation is protected from retaliation. Proposed 214.2(h)(20)(ii). Furthermore, a report (whether made

[88] *See Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 81 FR 82398, 82452 (Nov. 18, 2016) (final rule); *see also* INA sec. 212(n)(2)(C)(v), 8 U.S.C. 1182(n)(2)(c)(V).

[89] *See Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 80 FR 81900, 81920 (Dec. 31, 2015) (proposed rule) (citing ACWIA sec. 413 (INA sec. 212(n)(2)(C), 8 U.S.C. 1182(n)(2)(C))).

[90] *See, e.g., Cheney R.R. Co., Inc.* v. *ICC,* 902 F.2d 66, 69 (D.C. Cir. 1990) (''[T]he contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, *i.e.,* to leave the question to agency discretion.'').

[91] *See* GAO–15–154, at 37 (2015), *https://www.gao.gov/assets/gao-15-154.pdf.*

[92] *See Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 80 FR 81900, at 81920 (Dec. 31, 2015).

[93] *See Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 81 FR 82398, 82454 (Nov. 18, 2016).

orally or in writing) is not required under proposed 8 CFR 214.2(h)(20)(ii) in that the retaliatory action could be either based on ''a reasonable claim'' or ''based on engagement in another protected activity.'' In this sense, the proposed H–2 whistleblower provision would be broader than the current H–1B whistleblower provision. Under proposed 8 CFR 214.2(h)(20)(ii), a report would not be required if the H–2 petitioner demonstrates that the retaliatory action was based on a worker's engagement in a protected activity. Examples of protected activity include making a complaint to a manager, employer, a labor union, or a government agency (including a complaint where the worker reasonably believes there is a violation or potential violation of applicable program requirements or based on engagement in other protected activities but was mistaken about the existence of a violation or an adjudicator determines that the employer did not violate the applicable program, and an employer's mistaken belief that a worker has made a complaint); cooperating with a government investigation; requesting payment of wages; refusing to return back wages to the employer; complaints by a third party on behalf of an employee; consulting with a labor agency; exercising rights or attempting to exercise rights, such as requesting certain types of leave; testifying at trial; and consulting with an employee of a legal assistance program or an attorney on matters related to their employment.[94]

DHS recognizes that employer retaliation is not limited to termination of employment and could include any number of adverse actions, including harassment, intimidation, threats, restraint, coercion, blacklisting, intimidating employees to return back wages found due (''kickbacks''), or discrimination, that could dissuade an employee from raising a concern about a possible violation or engaging in other protected activity.[95] These examples do not identify all potential fact patterns that could constitute retaliatory action. To ensure flexibility, and to conform to the current approach for H–1B petitions at 8 CFR 214.2(h)(20), DHS is not proposing to define ''retaliatory action.'' Finally, DHS notes that the proposed retaliatory action provision under 8 CFR 214.2(h)(20)(i)–(ii) would not preclude other sets of facts from potentially qualifying as ''extraordinary circumstances'' under 8 CFR 214.1(c)(4) and 8 CFR 248.1(b). For example, if an H–2 worker is involved in a labor dispute or terminates employment because of unsafe working conditions, that could still qualify as ''extraordinary circumstances'' under 8 CFR 214.1(c)(4) and 8 CFR 248.1(b) even if the worker did not face retaliatory action from the employer, as required under proposed 8 CFR 214.2(h)(20)(ii).

B. Worker Flexibilities

1. Grace Periods

DHS seeks to expand and harmonize the grace periods afforded to H–2 workers. Expanding the length and types of grace periods afforded to H–2 workers is intended to increase worker flexibility, mobility, and protections. Furthermore, harmonizing grace periods for H–2A and H–2B workers should reduce confusion and better ensure consistency in granting the appropriate grace periods.

First, DHS seeks to provide workers in both H–2 classifications with an initial grace period of up to 10 days prior to the petition's validity period. Currently, an H–2A nonimmigrant will be admitted for an additional period of ''up to one week'' before the beginning of the approved validity period, *see* 8 CFR 214.2(h)(5)(viii)(B), while an H–2B nonimmigrant will be admitted for an additional period of ''up to 10 days'' before the validity period begins, *see* 8 CFR 214.2(h)(13)(i)(A). Under proposed 8 CFR 214.2(h)(5)(viii)(B), DHS seeks to extend the initial grace period for H–2A nonimmigrants to up to 10 days to align it with the initial 10-day grace period already afforded to H–2B nonimmigrants under current 8 CFR 214.2(h)(13)(i)(A). DHS would maintain the initial 10-day grace period currently afforded to H–2Bs at 8 CFR 214.2(h)(13)(i)(A) but proposes to codify it at proposed 8 CFR 214.2(h)(6)(vii)(A).[96]

The initial 10-day grace period allows H–2B nonimmigrant workers to make necessary preparations for their employment in the United States. Because an initial 10-day grace period is a reasonable period of time to allow for preparation for employment in the United States, DHS has previously afforded the 10-day grace period to other nonimmigrant classifications.[97] For this reason, DHS now proposes to extend this initial 10-day grace period to H–2A workers to benefit workers and employers. As with the existing initial grace period for H–2A and H–2B nonimmigrants, the proposed initial grace period would apply to their dependents in H–4 classification by virtue of 8 CFR 214.2(h)(9)(iv) (''The spouse and children of an H nonimmigrant, if they are accompanying or following to join such H nonimmigrant in the United States, may be admitted, if otherwise admissible, as H–4 nonimmigrants for the same period of admission or extension as the principal spouse or parent.'').

DHS further seeks to harmonize the grace periods by providing both H–2A and H–2B nonimmigrants a grace period of up to 30 days following the expiration of the petition, subject to the 3-year limitation on stay. *See* proposed 8 CFR 214.2(h)(5)(viii)(B); proposed 8 CFR 214.2(h)(6)(vii)(A). Having consistent grace periods for H–2A and H–2B workers should reduce confusion and better ensure consistency in granting the appropriate grace periods. Currently, H–2A nonimmigrants have a 30-day grace period following the expiration of their petition under 8 CFR 214.2(h)(5)(viii)(B), while H–2B nonimmigrants have a 10-day grace period following the expiration of their petition under 8 CFR 214.2(h)(13)(i)(A). Under proposed 8 CFR 214.2(h)(6)(vii)(A), both H–2A and H–2B nonimmigrants would have the same initial grace period of up to 10 days before the beginning of the approved validity period and the same grace period of up to 30 days following the expiration of the H–2 petition.

The post-validity 30-day grace period at current 8 CFR 214.2(h)(5)(viii)(B) was provided to H–2A workers so that they would have enough time to prepare for departure or apply for an extension of stay based on a subsequent offer of employment.[98] In establishing this 30-day grace period for H–2A workers, DHS also noted that this period would facilitate the then newly provided benefit of portability to E-Verify employers.[99] As DHS is now proposing to extend portability to H–2B workers, DHS proposes to also extend this 30-day

[94] *See* 20 CFR 655.135(h); 29 CFR 501.4(a); DOL Wage and Hour Division (WHD), *Field Assistance Bulletin No. 2022–02, https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf.*

[95] *See* 81 FR 82408, 82428. *Cf. Burlington N. & Santa Fe Ry. Co.* v. *White,* 548 U.S. 53, 68 (2006) (concluding that an adverse action is one that might dissuade a reasonable worker from asserting his or her rights).

[96] Currently, 8 CFR 214.2(h)(6)(vii) only applies to traded professional H–2B athletes. DHS proposes to move this existing provision into a new paragraph (D) within 8 CFR 214.2(h)(6)(vii) and would move provisions generally relating to H–2B periods of admission and limits on stay under current 8 CFR 214.2(h)(13) to proposed 8 CFR 214.2(h)(6)(vii)(A) through (C).

[97] Nonimmigrants in the E–1, E–2, E–3, H–1B1, L–1, O–1, and TN classifications are also afforded an initial 10-day grace period under 8 CFR 214.1(l)(i).

[98] *See Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 76891, 76903 (Dec. 18, 2008).

[99] *See id.*

grace period to H–2B workers in order to facilitate the use of this benefit. As proposed, USCIS will include such grace period when extending workers' H–2A or H–2B status or changing their status to H–2A or H–2B status, subject to the 3-year maximum limitation of stay.

In this context, ''subject to the 3-year maximum limitation of stay'' means that an H–2 worker who has reached their 3-year limitation of stay would not be afforded a post-validity grace period, or that an H–2 worker approaching their 3-year limitation of stay may be afforded a post-validity grace period of less than 30 days. Because grace periods count towards an H–2 worker's 3-year limitation on stay, proposed 8 CFR 214.2(h)(5)(viii)(B) and proposed 8 CFR 214.2(h)(6)(vii)(A) would both state that, following the expiration of the H–2A or H–2B petition, the H–2 worker will be admitted for an additional period of ''up to 30 days subject to the 3-year limitation.'' This would represent a change from the language at current 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(13)(i)(A) which do not contain the same ''up to'' or ''subject to'' language with respect to the 30-day or 10-day post-validity grace period for H–2A workers or H–2B workers, but would clarify, consistent with USCIS practice, that the general 3-year maximum limit on H–2A or H–2B stay includes their respective grace periods. Current USCIS practice is to shorten the post-validity grace period if the H–2 worker is approaching their 3-year maximum limitation of stay so that the total period of stay does not exceed 3 years. Proposed 8 CFR 214.2(h)(5)(viii)(B) and proposed 8 CFR 214.2(h)(6)(vii)(A) would conform with and clarify current practice.[100]

Third, DHS seeks to provide a new 60-day grace period following a cessation of H–2 employment, for example, if the H–2 worker was terminated, has resigned, or otherwise ceased employment prior to the end date of their authorized validity period. Under proposed 8 CFR 214.2(h)(13)(i)(C), an H–2A or H–2B beneficiary (and their dependents) would not be deemed to have failed to maintain nonimmigrant status, and would not accrue any period of unlawful presence for purposes of section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9), solely on the basis of a cessation of the employment on which the beneficiary's classification was based, for 60 consecutive days or until the end of the authorized period of admission, whichever is shorter. The ''authorized period of admission'' in proposed 8 CFR 214.2(h)(13)(i)(C) refers to the end date listed on a worker's Form I–94, which will normally be a date 30 days after the end of the petition validity period to account for the 30-day grace period at proposed 8 CFR 214.2(h)(5)(viii)(B) or proposed 8 CFR 214.2(h)(6)(vii). Accordingly, an H–2 worker who ceases employment less than 60 days before the end of the period of admission will be afforded a grace period through the remainder of the authorized period of admission.

The 60-day grace period under proposed 8 CFR 214.2(h)(13)(i)(C) would be available only once during each authorized period of admission. In addition, an H–2 worker who already had a 60-day grace period for cessation of employment under proposed 8 CFR 214.2(h)(13)(i)(C) would not receive another 30-day grace period under proposed 8 CFR 214.2(h)(5)(viii)(B) or proposed 8 CFR 214.2(h)(6)(vii) at the end of the 60-day grace period.

Proposed 8 CFR 214.2(h)(13)(i)(C) would offer relief to H–2 workers whose employment ceased before the expiration of their petition validity, regardless of the reason for employment cessation. The proposed 60-day grace period may be used to seek new employment, make preparations for departure from the United States, or seek a change of status to a different nonimmigrant classification. For example, an H–2 worker could use this grace period to seek new employment after leaving an abusive employment situation, stopping work due to unforeseen hazardous conditions, or if their employer had to terminate employment due to contract impossibility.[101] DHS is proposing this 60-day grace period following a cessation of employment to allow H–2 workers sufficient time to respond to sudden or unexpected changes related to their employment. Because a cessation of employment may come as an unexpected and harsh burden on an already financially vulnerable H–2 worker, and the likelihood that a 30-day grace period would not be sufficient to find new employment or make other appropriate arrangements, DHS is proposing a 60-day grace period as opposed to the shorter 30-day grace period following the expiration of the H–2 petition under proposed 8 CFR 214.2(h)(5)(viii)(B) or proposed 8 CFR 214.2(h)(6)(vii).

While the 60-day grace period at proposed 8 CFR 214.2(h)(13)(i)(C) would be similar to the one afforded to nonimmigrants included under 8 CFR 214.1(l)(2), there are notable differences. Unlike the grace period in 8 CFR 214.1(l)(2), the grace period at proposed 8 CFR 214.2(h)(13)(i)(C) would be set at either 60 days or the end date of the authorized period of admission, whichever is shorter.'' [102] DHS's intent in proposing a grace period that would be set at either 60 days, or the end date of the authorized period of admission if shorter than 60 days, is to give more certainty to affected H–2 workers of the time they have in the grace period. Giving more certainty of the length of the grace period could help alleviate some fears held by H–2 workers who are facing abusive employment situations, or otherwise wish to change jobs, but are reluctant to leave such employment due to uncertainty surrounding whether they would benefit from a grace period and how long the grace period would be.

The rulemaking promulgating current 8 CFR 214.1(l)(2) explained that the 60-day grace period is discretionary, and that DHS may determine whether to grant or shorten the grace period based on an individualized assessment that considers the totality of the circumstances surrounding the cessation of employment and the beneficiary's activities after such cessation.[103] While this reasoning remains valid for highly skilled nonimmigrants in the E–1, E–2, E–3, H–1B, H–1B1, L–1, O–1, and TN classifications, DHS believes this reasoning is less persuasive for H–2 nonimmigrants who, as discussed throughout this proposed rule, generally are particularly vulnerable to abusive labor practices. As such, it is our view that H–2 workers would benefit greatly from the increased certainty of this proposed 60-day grace period.

DHS acknowledges that proposed 8 CFR 214.2(h)(13)(i)(C) would not prevent an H–2 worker whose employer had good cause to terminate their employment from receiving the 60-day grace period upon cessation of

[100] DHS believes its previous characterization of the post-validity grace periods as ''absolute'' could be erroneously construed as extending the maximum period of H–2 stay beyond three years. *See Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 8230, 8235 (Feb. 18, 2008) (''This rule proposes to extend the H–2A admission period following the expiration of the H–2A petition from not more than ten days to an absolute thirty-day period. See proposed 8 CFR 214.2(h)(5)(viii)(B).''). The reference to ''an absolute thirty-day'' period should have read ''a maximum thirty-day period, subject to an absolute maximum period of H–2A stay of three years.'' This NPRM proposes to clarify this point.

[101] *See* 20 CFR 655.122(o).

[102] *Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 81 FR 82398, 82438–39 (Nov. 18, 2016).

[103] 81 FR 82439.

employment. The rulemaking promulgating current 8 CFR 214.1(l)(2) explained that the ''up to'' language was specifically intended to allow DHS to shorten or entirely refuse the 60-day grace period for violations of status, unauthorized employment during the grace period, fraud or national security concerns, or criminal convictions, among other reasons.[104] However, DHS believes that situations where it would need to shorten or eliminate the grace period for such reasons would be rare, and that the importance of protecting H–2 workers substantially outweighs the risk that some H–2 workers who might not be deserving would also benefit from this proposed provision. Further, the proposed limitation that this grace period would apply ''*solely on the basis of* a cessation of employment'' (emphasis added) should mitigate the risk that some workers would try to use this grace period to engage in unauthorized employment or other unlawful behavior.

Proposed 8 CFR 214.2(h)(13)(i)(C) would also specify that the H–2 worker ''will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9))'' solely on the basis of a cessation of employment. This language is intended to assure H–2 workers that a cessation of employment, in and of itself, would not automatically start the accrual of unlawful presence. While current 8 CFR 214.1(l)(2) does not explicitly mention unlawful presence, the phrase in current 8 CFR 214.1(l)(2) ''shall not be considered to have failed to maintain nonimmigrant status'' already implies that the nonimmigrants covered by that provision also will not accrue unlawful presence solely on the basis of a cessation of the employment. Therefore, the inclusion of the phrase ''will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9))'' in proposed 8 CFR 214.2(h)(13)(i)(C) would not represent a substantive change from current 8 CFR 214.1(l)(2).

Proposed 8 CFR 214.2(h)(13)(i)(C) would not require H–2 workers to notify DHS or USCIS that they are ceasing employment in order to take advantage of the new grace period. DHS notes that it has not proposed to eliminate the separate requirements that H–2A and H–2B employers notify DHS when a worker does not report for work, is terminated, or the work is completed more than 30 days early under 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F), as this information collection continues to have value. However, as is reinforced in the grace period provision at proposed 8 CFR 214.2(h)(13)(i)(C), such notification by an employer would not be considered an indication that a worker is immediately out of status. DHS notes that in subsequent petitions on the workers' behalf, information or evidence may be requested regarding the date of cessation to demonstrate maintenance of status (for instance, by showing that a new petition requesting extension of stay was filed within 60 days after the beneficiary ceased employment with the prior employer).

Fourth, DHS proposes to provide a new 60-day grace period following the revocation of an approved H–2 petition. Under proposed 8 CFR 214.2(h)(11)(iv), an H–2 beneficiary (and their dependents) would not be deemed to have failed to maintain nonimmigrant status, and would not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of the petition revocation for a 60-day period following the revocation of the petitioner's H–2 petition on their behalf, or until the end of the authorized period of admission, whichever is shorter. DHS is proposing this additional 60-day grace period following revocation of a petition approval to give H–2 workers another layer of protection and stability because a worker cannot always anticipate if and when the H–2 petition on their behalf may be revoked, and moreover, if and when the petitioning employer may provide them with notification of the petition revocation. This proposed 60-day grace period would provide these workers with additional time to make arrangements for departure, to seek an extension based on a subsequent offer of employment, or seek a change of status to a different nonimmigrant classification. However, depending on when a worker reaches their 3-year maximum limitation of stay, the post-revocation grace period under proposed 8 CFR 214.2(h)(11)(iv) may be less than 60 days or may not be available.[105] As the post-revocation grace periods for both H–2A and H–2B workers are covered by proposed 8 CFR 214.2(h)(11)(iv), DHS is also proposing to remove the current provision at 8 CFR 214.2(h)(5)(xii).[106]

None of the proposed grace periods would independently authorize the beneficiary to work. *See* proposed 8 CFR 214.2(h)(5)(viii)(B) (''Unless authorized under 8 CFR 274a.12, the beneficiary may not work except during the validity period of the petition.''); proposed 8 CFR 214.2(h)(6)(vii) (''Unless authorized under 8 CFR 274a.12, the beneficiary may not work except during the validity period of the petition.''); proposed 8 CFR 214.2(h)(11)(iv) (''During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12.''); and proposed 8 CFR 214.2(h)(13)(i)(C) (''During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12.''). In this regard, DHS proposes to stay consistent with the current framework for grace periods afforded to H–2 workers at 8 CFR 214.2(h)(5)(viii)(B) (''Unless authorized under 8 CFR 274a.12 . . ., the beneficiary may not work except during the validity period of the petition.'')[107] and 8 CFR 214.2(h)(13)(i)(A) (''The beneficiary may not work except during the validity period of the petition.''), as well as the grace periods afforded to other nonimmigrant classifications at 8 CFR 214.1(l)(1) (''Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.'') and 8 CFR 214.1(l)(2) (''Unless authorized under 8 CFR 274a.12, the alien may not work except during such a period.''). None of these existing grace period provisions independently authorize employment. It has long been the policy of DHS that grace periods do not authorize employment.[108]

Nevertheless, stakeholders have recommended that DHS provide a grace period with employment authorization.[109] To the extent that work authorization for H–2 workers prior to or subsequent to petition validity and after a petition is revoked is permissible, consistent with INA sec.

[104] 81 FR 82438–39.

[105] As with current practice, all time spent in the United States pursuant to the proposed 10-day, 30-day, and 60-day grace periods described above would be considered time spent in H–2A or H–2B status and would count toward the 3-year limitation of stay.

[106] The existing provision at 8 CFR 214.2(h)(5)(xii) also includes language providing that an employer's H–2A petition is immediately and automatically revoked if DOL revokes the underlying TLC, but that language is not needed as it is covered by the existing provision at 8 CFR 214.2(h)(11)(ii).

[107] The current provision at 8 CFR 214.2(h)(5)(viii)(B) contains a reference to employment authorization under section 214(n) of the Act. However, as that section of the Act relates only to portability for H–1B nonimmigrants, DHS proposes to eliminate that reference from proposed 8 CFR 214.2(h)(5)(viii)(B).

[108] *See, e.g., Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 81 FR 82398, 82439 (Nov. 18, 2016) (''Consistent with longstanding policy, DHS declines to authorize individuals to work during these grace periods.'').

[109] *See, e.g.,* Letter from Migration that Works to DHS dated May 17, 2022; Letter from Centro de los Derechos del Migrante, Inc. to DHS dated June 1, 2022. These letters are included in the docket for this proposed rulemaking.

214(c)(1), DHS does not consider a grace period with employment authorization to be feasible and therefore did not propose such a provision in this NPRM. For example, DHS considered operational challenges and costs associated with issuing appropriate evidence of work authorization within such a short period of time. DHS ultimately determined that creating a process whereby, upon cessation of employment, a worker would file, with fee, a request for work authorization for a limited period of 60 days and receive evidence of that work authorization before the 60-day period had elapsed, likely would not be an attractive option for the filer nor operationally feasible for the agency. DHS additionally considered whether it should allow work authorization without issuing an actual employment authorization document to the worker. DHS ultimately determined this to be an unacceptable potential solution in recognition of the difficulties employers would face in satisfying the employment verification requirements of section 274A of the Act, as well as the potential for abuse or fraud inherent in allowing employment authorization without proper documentation.

DHS did consider different lengths of time for the grace periods under proposed 8 CFR 214.2(h)(11)(iv) and proposed 8 CFR 214.2(h)(13)(i)(C), specifically, 30 or 90 days. However, DHS chose to propose 60 days in order to be consistent with the grace period already provided to other nonimmigrant classifications and because 60 days should allow sufficient time to respond to sudden or unexpected changes related to their employment.[110]

2. Transportation Costs for Revoked H–2 Petitions

In addition to the post-revocation grace period discussed above, proposed 8 CFR 214.2(h)(11)(iv) would state that, upon revocation of an H–2A or H–2B petition, the petitioning employer would be liable for the H–2 beneficiary's reasonable costs of return transportation to their last place of foreign residence abroad, unless the beneficiary obtains an extension of stay based on an approved petition in the same classification filed by a different employer. Such a requirement already exists at 8 CFR 214.2(h)(6)(i)(C) for H–2B revocations, but not for H–2A revocations. As DHS recognized when promulgating 8 CFR 214.2(h)(6)(i)(C) in 2008, this requirement would ''minimize the costs to H–2B workers who are affected by the revocation of a petition.'' [111] This proposed provision is necessary in light of the overall intent of this regulation to provide protections for both H–2A and H–2B workers from bearing fees and costs that are primarily for the benefit of their H–2 employers, ensuring parallel treatment of prohibited fees for both H–2A and H–2B workers, and providing consistency with current DOL regulations governing return transportation fees with respect to H–2A workers.[112] Finally, DHS proposes to codify this requirement within 8 CFR 214.2(h)(11)(iv), which deals generally with petition revocations, rather than having duplicate language in both 8 CFR 214.2(h)(5) and (6).

DHS is not proposing changes related to transportation costs outside of the revocation scenario. Under the existing regulation at 8 CFR 214.2(h)(6)(vi)(E), an employer is responsible for the return transportation costs of an H–2B worker if the worker is dismissed for any reason other than if the worker ''voluntarily terminates his or her employment'' prior to the expiration of the validity period. DHS notes that an H–2B worker who is leaving an abusive employment situation would not be considered to have ''voluntarily'' terminated the employment, so the employer's responsibility for transportation costs would still apply. While there is no parallel provision in the DHS H–2A regulations, DOL H–2A regulations at 20 CFR 655.122(h)(2) and (n) already render an employer responsible to pay for return transportation costs when a worker's employment ends early, unless the worker ''voluntarily abandons employment'' or is terminated for cause and the employer properly notifies DOL and DHS of the separation, and related DOL guidance clarifies that departure due to intolerable working conditions would not constitute voluntary abandonment.[113] With respect to both the H–2A and H–2B classifications, if USCIS were to determine that an employer failed to pay transportation costs that were required under DHS or DOL regulations, thereby passing the costs on to H–2 workers, this failure would constitute an indirect collection of a prohibited fee under the provisions at 8 CFR 214.2(h)(5)(xi)(A) or 8 CFR 214.2(h)(6)(i)(B), respectively, and under the proposed regulations would subject the employer to the resulting consequences described in 8 CFR 214.2(h)(5)(xi)(B) and (C) or 8 CFR 214.2(h)(6)(i)(C) and (D). Alternately, depending on the nature of any related final determinations made by USCIS or DOL, such action could potentially make the employer subject to the consequences described in 8 CFR 214.2(h)(10)(iii)(A) through (D), if applicable.

3. Portability

To provide additional flexibility to H–2 workers as well as to employers by allowing workers in the United States to begin new employment in the same classification more expeditiously, thereby avoiding gaps in employment and potential hardship to workers, as well as provide employers with better access to available and willing workers, DHS proposes to permanently provide portability to H–2 workers. Specifically, DHS proposes that an eligible H–2A or H–2B nonimmigrant would be authorized to start new employment upon the proper filing of a nonfrivolous H–2A or H–2B extension of stay petition filed on behalf of the worker, or as of the requested start date, whichever is later. *See* proposed 8 CFR 214.2(h)(2)(i)(I); proposed 8 CFR 274a.12(b)(21); *see also* proposed 8 CFR 214.2(h)(2)(i)(D).[114] Proposed 8 CFR 214.2(h)(2)(i)(I) would define an ''eligible H–2A or H–2B nonimmigrant'' as an individual: (1) who has been lawfully admitted into the United States in, or otherwise provided, H–2A or H–2B nonimmigrant status; (2) on whose behalf a nonfrivolous H–2A or

[110] As stated in the final rule codifying the 60-day grace period for cessation of employment under 8 CFR 214.1(l)(2) that applies to other nonimmigrant classifications, 60 days allows ''sufficient time to respond to sudden or unexpected changes related to their employment.'' *Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 81 FR 82398, 82438 (Nov. 18, 2016).

[111] *See Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,* 73 FR 49109, 49113 (Aug. 20, 2008).

[112] *See* current 20 CFR 655.122(h)(2). Subsequent to DHS's publication of its current H–2A regulations in 2008, the Department of Labor revised its H–2A regulations regarding return transportation fees. *See* 87 FR 61660 (Oct. 12, 2022); 75 FR 6883 (Feb. 12, 2010); *see also* DOL Wage and Hour Division, *Field Assistance Bulletin, 2009–02,* available at *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FieldAssistanceBulletin2009_2.pdf;* current 8 CFR 214.2(h)(5)(xi)(A) (specifically limiting the payment of costs and fees by H–2A beneficiaries to those not prohibited by DOL regulations).

[113] *See* DOL Wage and Hour Division, *Field Assistance Bulletin No. 2012–1* (Feb. 28, 2012) (''[I]f a worker departs employment because working conditions have become so intolerable that a reasonable person in the worker's position would not stay, the worker's departure may constitute a constructive discharge and not abandonment.''), *https://www.dol.gov/agencies/whd/field-assistance-bulletins/2012-1.*

[114] In addition to adding a reference to the newly added portability provision, DHS's proposed changes to 8 CFR 214.2(h)(2)(i)(D) include replacing the reference to ''Form I–129'' with a more general reference to a petition ''for a nonimmigrant worker.'' Where feasible, DHS prefers to change specific form names to a more general reference in case of future changes to the form name or number.

H–2B petition [115] for new employment has been properly filed, including a petition for new employment with the same employer, with a request to amend or extend the H–2A or H–2B nonimmigrant's stay in the same classification that the nonimmigrant currently holds, before the H–2A or H–2B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires; and (3) who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.[116]

Currently, H–2A nonimmigrants only have portability if they are porting to a new employer that has enrolled in and is a participant in good standing in E-Verify, subject to any conditions and limitations noted on the initial authorization, except as to the employer and place of employment. *See* 8 CFR 274a.12(b)(21). DHS initially limited H–2A portability to E-Verify employers to incentivize the use of E-Verify and to reduce opportunities for unauthorized workers to work in the agricultural sector.[117] However, because DHS is seeking to increase the ability of H–2A workers to change employers, especially in circumstances where a worker is facing dangerous or abusive working conditions, the proposed portability provision for H–2A workers would not be limited to E-Verify employers, thus allowing greater flexibility to workers. *See* proposed 8 CFR 274a.12(b)(21).[118]

While H–2B nonimmigrants can currently port to a new H–2B employer, this portability flexibility is only temporarily in place until the end of January 24, 2024. In contrast, the proposed portability provisions for both H–2A and H–2B workers would be permanent and would apply to new employment in the same classification with *the same or different* employer. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(*1*)(*ii*) (''including a petition for new employment with the same employer''). Further, current H–2A portability is limited to a maximum of 120 days from the receipt date of the new petition, *see* 8 CFR 274a.12(b)(21), while the current temporary H–2B portability is only valid for up to 60 days as of the receipt date of the new petition or the start date on the new petition, whichever is later, *see* 8 CFR 214.2(h)(29); 8 CFR 274a.12(b)(33). The proposed H–2 portability that allows new employment would continue as long as the new H–2 petition remains pending, and would automatically cease upon the adjudication or withdrawal of the H–2 petition. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(*2*) and proposed 8 CFR 274a.12(b)(21).

In addition, the proposed portability provision would not limit employment to the conditions and limitations noted on the initial authorization, but would allow workers to perform entirely different jobs within the same nonimmigrant classification, while still being afforded the protections of this proposed rule. *See* proposed 8 CFR 274a.12(b)(21). Doing so would provide more flexibility to employers and workers, regardless of whether the beneficiary would begin a new job with the same employer or move to a new employer. Specifically, while H–2A and H–2B workers, among others, can currently continue to work for the same employer for a period not to exceed 240 days based on a timely filed extension of stay pursuant to 8 CFR 274a.12(b)(20), that authorization is limited to the conditions and limitations noted on the *initial* authorization, and therefore requires the worker to continue to be employed in the position described in the initially approved petition. In contrast, the proposed portability provision provides more flexibility for both employers and beneficiaries by allowing beneficiaries to start working in the same or different job within the same nonimmigrant classification pursuant to a newly filed nonimmigrant visa petition after that petition is properly filed but before it is approved. *See* proposed 8 CFR 214.2(h)(2)(i)(I).

The proposed provision also addresses circumstances where there may be successive portability petitions. In those cases the ability to port would end when any successive H–2A or H–2B portability petition in the succession is denied, unless the beneficiary's previously approved period of H–2A or H–2B status remains valid. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(*4*)(*ii*). The denial of a successive portability petition would not, however, affect the ability of an H–2A or H–2B beneficiary to continue or resume working in accordance with the previously approved H–2A or H–2B petition, if that petition remains valid and the beneficiary maintained H–2A or H–2B status or a period of authorized stay and has not been employed in the United States without authorization. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(*4*)(*iii*). Note that the portability provisions at proposed 8 CFR 214.2(h)(2)(i)(I) would not allow an H–2A worker to port to an H–2B employer, or vice versa.

DHS is also proposing to clarify that a beneficiary of an H–2 portability petition generally is considered to have been in a period of authorized stay during the pendency of the petition and generally will not be considered to have been employed in the United States without authorization. Specifically, during the pendency of the H–2 portability petition, and notwithstanding any subsequent denial or withdrawal of that petition, a beneficiary will not be considered to have been in a period of unauthorized stay during the pendency of the petition and will not be considered to have been employed in the United States without authorization solely on the basis of employment pursuant to that petition. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(*3*). In addition, by filing a new H–2A or H–2B petition supported by a valid temporary labor certification on behalf of the beneficiary seeking to port, the petitioner and any employer agrees to comply with the applicable H–2A or H–2B program requirements. Therefore, during the employment period when that beneficiary is working while the H–2 portability petition filed on the beneficiary's behalf is pending, the new petitioner and any employer,[119] as well as the beneficiary, are subject to H–2A or H–2B program requirements, as applicable under the relevant program, including worker protections, even if the relevant petition is subsequently withdrawn or denied. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(*3*).

DHS believes that its proposal to extend portability, particularly when combined with the extended grace periods, would benefit H–2 workers and employers. These provisions would work together to provide an H–2 worker

[115] For instance, the filing of a petition unsupported by a temporary labor certification would be considered frivolous.

[116] This definition would be the same definition of who is ''eligible'' for H–1B portability under 8 CFR 214.2(h)(2)(i)(H). More generally, the H–2 portability provisions at proposed 8 CFR 214.2(h)(2)(i)(I) substantively mirror the existing H–1B portability provisions at 8 CFR 214.2(h)(2)(i)(H), except that the H–2 portability provisions would not refer to ''concurrent'' employment because H–2 employment must be full-time, thereby precluding concurrent employment. The H–2 portability provisions would also contain new language at proposed 8 CFR 214.2(h)(2)(i)(I)(*3*).

[117] *See Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 8230, 8235 (Feb. 13, 2008) (NPRM); *Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 76891, 76905 (Dec. 18, 2008) (final rule).

[118] DHS remains committed to promoting the use of E-Verify to ensure a legal workforce; however, DHS no longer believes it is appropriate to restrict the benefit of portability to H–2A workers seeking employment with E-Verify employers particularly given the need to increase these workers' mobility.

[119] We note that in some cases, the petitioner may be different from the employer, such as when the petitioner is an association of agricultural employers filing the petition on behalf of its member-farmers as an agent, and not as a joint employer.

facing dangerous or abusive working conditions, for instance, the ability to leave their employer and still maintain status for 60 days. If during those 60 days the worker finds a new H–2 employer, they could begin working for that new employer immediately upon the filing of a new nonfrivolous H–2 petition on the worker's behalf.[120] The proposed portability provisions together with the proposed grace period provisions would therefore improve H–2 worker flexibilities and protections.

In addition, employers would benefit from these provisions by having more time to recruit H–2 workers during the extended grace periods and being able to employ H–2 workers upon filing of the petition rather than having to wait for petition approval. For petitioners seeking workers under the cap-subject H–2B classification, this would also serve as an alternative for those who have not been able to find U.S. workers and have not been able to obtain H–2B workers subject to the statutory numerical limitations.[121]

4. Effect on an H–2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa

DHS proposes to increase flexibility by clarifying that an H–2 worker may take steps toward becoming a lawful permanent resident while still maintaining lawful nonimmigrant status.[122] Under proposed 8 CFR 214.2(h)(16)(ii), the fact that DOL has approved a permanent labor certification, or that an immigrant visa petition was filed by or on behalf of a beneficiary, or that the beneficiary has applied to adjust to lawful permanent resident status or for an immigrant visa would not, by itself, be a violation of H–2 status or show an intent to abandon a foreign residence. Such fact, standing alone, would not constitute a basis for denying an H–2A or H–2B petition or the beneficiary's admission in H–2A or H–2B status, or a petition to change status or extend status. USCIS would consider such fact, however, together with all other facts presented, in determining whether the beneficiary is maintaining H–2 status and has a residence in a foreign country which he or she has no intention of abandoning. This change would therefore complement DHS's other proposals to establish longer grace periods and provide permanent portability flexibility, all toward the goal of further improving H–2 worker mobility.

Under existing regulations, approval of a permanent labor certification, or the filing of a preference petition for an H–2A or H–2B worker currently employed by or in a training position *with the same petitioner,* is considered sufficient reason, by itself, to deny the worker's extension of stay. 8 CFR 214.2(h)(16)(ii). DHS acknowledges that, when it finalized the current 8 CFR 214.2(h)(16) in 1990,[123] in response to a commenter's assertion that H–2 workers are capable of simultaneously having the same lawful temporary and permanent intent as H–1B workers, the agency stated that it could not extend the concept of temporary/permanent intent to the H–2 classifications because ''[c]ontinuing H–2A and B status requires the employer's need for the services to remain temporary.'' [124] However, upon consideration, DHS now recognizes that this stated rationale conflates the beneficiary's nonimmigrant intent with the nature of the employer's need. Further, while at that time the agency stressed the importance of not allowing petitioners to circumvent the requirement to demonstrate a temporary need by petitioning for permanent status on behalf of the worker even *in a different job,*[125] DHS now believes that such a prohibition is overly broad and that it is important to increase H–2 workers' mobility to the extent possible, particularly given the vulnerability of H–2 workers to potential intimidation and threats made on the basis of their nonimmigrant status.[126] The requirements that an H–2A or H–2B petitioner must establish temporary and/or seasonal need, as applicable, will remain covered by the provisions at 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively.

5. Removing ''Abscondment,'' ''Abscond,'' and Its Other Variations

DHS proposes a technical change that would remove the words ''abscondment,'' ''abscond,'' and its other variations from the H–2 regulations. More specifically, DHS proposes to remove the definition of ''abscondment,'' replace the word ''absconds'' with the phrase ''does not report for work for a period of 5 consecutive workdays without the consent of the employer.'' This replacement language is based on the definition contained in current 8 CFR 214.2(h)(5)(v)(E) and (h)(6)(i)(F), and would replace the phrase ''fails to'' with ''does not,'' among other related changes. *See* proposed 8 CFR 214.2(h)(5)(vi)(B) and (E), 8 CFR 214.2(h)(5)(ix), and 8 CFR 214.2(h)(6)(i)(F). The words and phrases relating to ''abscondment'' inherently convey or imply wrongdoing by the H–2 worker when in fact there could be many legitimate reasons why an H–2 worker does not report for work, including unsafe conditions at the work site. Replacing these negatively charged words with more neutral words and phrases signifies DHS's recognition that each H–2 worker deserves to be treated fairly and their situation should be considered based on all of the relevant circumstances.

Further, while DHS is not proposing to eliminate or substantively change the

[120] When a qualifying H–2 petition is properly filed on the H–2 nonimmigrant worker's behalf requesting a start date during this 60-day grace period, DHS would consider the individual to no longer be in the 60-daygrace period. As stated above, during the time a qualifying H–2 petition remains pending, the porting H–2 beneficiary receives H–2 protections for that period. Further, absent his or her violating the terms of his or her authorized period of stay, the porting beneficiary remains in a period of authorized stay.

[121] In the recent joint TFRs providing supplemental H–2B visas, which have included a similar, but temporary, portability provision, DHS and DOL have noted that portability is ''an additional option for employers that cannot find U.S. workers.'' *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,*86 FR 281980, 28210 (May 25, 2021); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 4722, 4736 (Jan. 28, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 30334, 30349 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022).

[122] Similar flexibility is currently provided by regulation to P nonimmigrants who, like H–2 nonimmigrants, are required to maintain a foreign residence that they have no intention of abandoning. INA sec. 101(a)(15)(P), 8 U.S.C. 1101(a)(15)(P); 8 CFR 214.2(p)(15). *See also Matter of Hosseinpour,* 15 I&N Dec. 191, 192 (BIA 1975) (''[T]he filing of an application for adjustment of status is not necessarily inconsistent with the maintenance of lawful nonimmigrant status.'').

[123] *See Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 55 FR 2606, 2619 (final rule) (Jan. 26, 1990). This rule was issued by the former Immigration and Naturalization Service (INS).

[124] *See Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 55 FR 2606, 2619 (final rule) (Jan. 26, 1990).

[125] *See Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 55 FR 2606, 2619 (final rule) (Jan. 26, 1990).

[126] *See, e.g.,* Polaris, *On-ramps, intersections, and exit routes* 41 (2018), *https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf.*

notification requirements in 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F), DHS reiterates that it does not consider the information provided in an employer notification, alone, to be conclusive evidence regarding the worker's current status or the start date of the worker's 60-day grace period under proposed 8 CFR 214.2(h)(13)(i)(C), if applicable. If and when a subsequent petition requesting extension of stay or change of status is filed for the beneficiary, the new petitioner should provide information or evidence regarding the timing of the beneficiary's cessation of prior employment to demonstrate maintenance of status. In the event that the information in an employer notification calls into question the timing of cessation (for instance, if it calls into question whether the grace period ended prior to the filing of the new petition), the new petitioner would receive an opportunity to rebut that information.

C. Improving H–2 Program Efficiencies and Reducing Barriers to Legal Migration

1. Removal of the H–2 Eligible Countries Lists Provisions

DHS, with the concurrence of the Secretary of State, is proposing to remove the regulations at 8 CFR 214.2(h)(5)(i)(F) and 214.2(h)(6)(E), under which, as explained in more detail above, USCIS generally may only approve petitions for H–2A and H–2B classification for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the **Federal Register**. This yearly notice is often referred to as the ''eligible countries lists.''

Such designations must be published as a notice in the **Federal Register** and expire after one year. In designating countries to include on the lists, the Secretary, with the concurrence of the Secretary of State, takes into account factors including, but not limited to: (1) the country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(*1*)(*i*) and 8 CFR 214.2(h)(6)(i)(E)(*1*). Examples of specific factors serving the U.S. interest that are taken into account when considering whether to designate or terminate the designation of a country include, but are not limited to: fraud (*e.g.,* fraud in the H–2 petition or visa application process by nationals of the country, the country's level of cooperation with the U.S. Government in addressing H–2 associated visa fraud, and the country's level of information sharing to combat immigration-related fraud), nonimmigrant visa overstay rates for nationals of the country (including but not limited to H–2A and H–2B nonimmigrant visa overstay rates), and noncompliance with the terms and conditions of the H–2 visa programs by nationals of the country. *See, e.g., Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs,* 87 FR 67930 (Nov. 10, 2022).

Removing the eligible countries lists requirements would improve H–2 program efficiency by reducing burdens on DHS, USCIS, and H–2 employers, consistent with DHS's goal of streamlining the H–2 petition process. Further, removal of the eligible countries lists requirements would enhance accessibility of the H–2 programs, consistent with DHS's commitment to eliminate unnecessary barriers to legal migration and promote regular migration.[127] Along with the removal of 8 CFR 214.2(h)(5)(i)(F) and 214.2(h)(6)(C), DHS proposes to revise 8 CFR 214.2(h)(2)(ii) and (iii) to eliminate language about specific filing requirements for workers from countries that are not on the eligible country lists.

Removal of the eligible countries lists requirements would free up DHS resources devoted to developing and publishing the eligible countries lists in the **Federal Register** every year. Currently, several DHS components and agencies, as well as DOS, provide data, collaboration, and research towards the publication of the eligible countries lists.

USCIS incurs burdens associated with adjudicating waiver requests for nationals of countries not on the eligible countries lists. These waiver adjudications are generally complex, as they require officers to determine whether it is in the U.S. interest for a worker to be a beneficiary of such a petition based on numerous factors, including: whether a worker with the required skills is not available from among foreign workers from a country currently on the respective lists; whether the beneficiary has been admitted to the United States previously in H–2 status; the potential for abuse, fraud, or other harm to the integrity of the H–2 programs through the potential admission of a beneficiary from a country not currently on the lists; and such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(*1*)(*ii*) and 214.2(h)(6)(E)(*2*). USCIS may incur additional burdens by separating out requests for workers who are nationals on the respective eligible countries lists and workers who are not nationals on the respective eligible countries lists. For instance, while USCIS recommends that H–2A and H–2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately from petitions for workers from countries on the respective eligible countries lists, this is not a current regulatory requirement.[128]

The eligible countries lists also create burdens for petitioners. An unexpected change in the lists from one year to the next could impact a petitioner's operations or ability to plan for its workforce. Further, petitioners incur extra burdens to prepare a petition requesting a worker from a country not on the respective eligible countries list, including naming each beneficiary, providing initial evidence to support the waiver request, and providing any additional evidence requested by USCIS. DHS recognizes that the additional requirements imposed on petitioners seeking workers from non-participating countries may be burdensome to employers and delay time-sensitive H–2 petitions, particularly in the H–2A agricultural program context, which is highly time-sensitive. For instance, the time-delay associated with issuance of a request for additional evidence when the petitioner's initial evidence did not establish the requisite U.S. interest to have its H–2A petition approved, when seeking nationals from countries not on

[127] *See* E.O. 14012 of February 2, 2021, at 86 FR 8277, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, https://www.federalregister.gov/documents/2021/02/05/2021-02563/restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts;* The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/.*

[128] *See* 8 CFR 214.2(h)(2)(ii) (petitions for workers from designated countries and undesignated countries ''should be filed separately''); *see also* USCIS, Form I–129 Instructions for Petition for a Nonimmigrant Worker (recommending that H–2A and H–2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

the list, could profoundly impact the success of a harvest season. Eliminating the eligible countries lists in the entirety would therefore streamline adjudications and benefit petitioners, their prospective workers, and ease burdens on DHS and USCIS.

DHS acknowledges that the eligible countries lists have been used as a tool to ''encourage countries to work collaboratively with the United States to ensure the timely return of their nationals who have been subject to a final order of removal.'' [129] In proposing these regulations in 2008, DHS noted that it had faced ''an ongoing problem of countries refusing to accept or unreasonably delaying the acceptance of their nationals who have been removed,'' and further noted that ''Congress gave the Secretary of State the authority to discontinue the issuance of visas to citizens, subjects, nationals, and residents of a country upon notification by the Secretary of Homeland Security that the government of that country refuses to accept their return'' under INA sec. 243(d), 8 U.S.C. 1253(d).[130] However, neither the problem of countries refusing or delaying acceptance of removed nationals, nor the authority to discontinue issuance of visas under INA sec. 243(d), 8 U.S.C. 1253(d), is specific or unique to the H–2A and H–2B programs. Overall, DHS does not believe that using participation in these programs as a tool to address the problem or that the limited benefits of the eligible countries lists, outweigh the burdens associated with administering the eligible countries lists and the benefits of eliminating the lists.

Similarly, to the extent that the eligible countries lists have been used to address concerns of fraud and abuse, DHS believes that such concerns are instead better addressed at the petitioner level, rather than the country level. As noted above, DHS has referenced fraud concerns as among the examples of specific factors serving the U.S. interest that are taken into account when considering whether to designate or terminate the designation of a country.[131] Rather than seeking to address such concerns using the eligible countries lists, which affect all petitioners seeking to hire workers from a given country, DHS is proposing to enhance program integrity through various provisions in this proposed rule that focus specifically on individual petitioners that have violated program requirements.[132]

DHS considered an alternative to removing the provisions in title 8 of the CFR designating certain countries as eligible participants for the H–2 program. Under this alternative, instead of automatic expiration after 1 year, the H–2 eligible countries designations would remain in effect until DHS, with the concurrence of DOS, publishes new designations of countries. This alternative would also require that the Secretary of Homeland Security, in consultation with the Secretary of State, review the lists no less than every 3 years, instead of the current 1 year, following which review DHS could, if necessary and with the concurrence of DOS, publish new designations. Absent the mandate to publish a new notice annually, under this alternative DHS and DOS would have greater flexibility to consider important factors using more timely and relevant data than the current annual designation periods allow.

Ultimately, however, DHS has decided to forego this alternative and instead proposes to remove in their entirety the provisions requiring designation of countries eligible to participate in the H–2 programs. If DHS were to adopt the alternative to maintain the lists but simply amend the timing of designating eligible countries, the fundamental flaws of the provisions would largely remain, namely, the aforementioned significant burdens it places on petitioners, USCIS, and DHS. Furthermore, this alternative could lock in place the lists for a longer period and potentially tie the agency's hands when seeking to eliminate countries from the lists or delay the inclusion of countries for which favorable factors would warrant designation on the lists.

2. Eliminating the H–2 ''Interrupted Stay'' Calculation and Reducing the Period of Absence To Restart the 3-Year Maximum Period of Stay Clock

DHS is proposing to eliminate the regulations relating to absences from the United States that will ''interrupt'' the accrual of time toward an individual's total period of stay in H–2 status. *See* proposed 8 CFR 214.2(h)(5)(viii)(C) and (D); 8 CFR 214.2(h)(6)(vii)(A) through (C); 8 CFR 214.2(h)(13)(i)(B); 8 CFR 214.2(h)(13)(iv); and 8 CFR 214.2(h)(13)(v). An individual's total period of stay in H–2A or H–2B nonimmigrant status may not exceed 3 years. Under current regulations, an individual who has spent 3 years in H–2A or H–2B status may not seek extension, change status, or be readmitted to the United States in H–2 status unless the individual has been outside of the United States for an uninterrupted period of 3 months. *See* 8 CFR 214.2(h)(5)(viii)(C) and 214.2(h)(13)(iv). However, certain periods of time spent outside the United States are deemed to interrupt the period of stay and temporarily ''stop the clock'' toward the accrual of the 3-year limit. *See* 8 CFR 214.2(h)(5)(viii)(C) (relating to H–2A workers) and 8 CFR 214.2(h)(13)(v) (relating to H–2B workers). Specifically, under current regulations, a period of absence [133] from the United States will interrupt the stay of H–2 workers (the time periods are the same for both H–2A and H–2B workers) in the following circumstances:

- If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days.[134]
- If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months.[135]

If H–2 time is interrupted, time stops accruing toward the H–2 worker's 3-year

[129] *See Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,* 73 FR 78104, 78110 (Dec. 19, 2008).

[130] *See Changes to Requirements Affecting H–2A Nonimmigrants,*73 FR 8230, 8234 (Feb. 13, 2008); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,* 73 FR 49109, 49111 (Aug. 20, 2008).

[131] *See, e.g., Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs,* 87 FR 67930 (Nov. 10, 2022).

[132] For example, DHS removed Moldova from the list of countries eligible to participate in the H–2A program in 2021 based, in part, on DOS evidence of agents in Moldova charging prohibited recruitment fees. *See Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs,* 86 FR 62559, 62561 (Nov. 10, 2021). While the proposed removal of the eligible countries lists would mean that DHS could no longer bar participation by nationals of a country in which prohibited fees have been charged, the proposed regulation includes provisions that otherwise enhance DHS' ability to enforce the prohibition on prohibited fees.

[133] For purposes of interrupted stays, the terms ''a period of absence'' or ''an absence'' refer to a single, consecutive period of time spent outside of the United States.

[134] For purposes of interrupted stays, a day is a full 24-hour period (from midnight to midnight) outside the United States. USCIS calculates a travel day to or from the United States as a full day in the United States—even if the H–2 worker departs at 12:01 a.m. *See* USCIS, *Calculating Interrupted Stays for the H–2 Classifications, https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications.*

[135] For purposes of interrupted stays, a month can be anywhere from 28 to 31 days, depending on which month is used to calculate the interruption. *See* USCIS, *Calculating Interrupted Stays for the H–2 Classifications, https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications.*

limit. Once the individual returns to the United States in H–2 status, time toward the 3-year limit begins to accrue again from the point where it stopped. However, if at any time the H–2 worker is outside the United States for at least 3 months, their 3-year limit restarts from the beginning upon the worker's readmission to the United States in H–2 status.[136]

The current regulations regarding interrupted periods of stay were published in 2008.[137] The regulations made the time periods for interrupted periods of stay consistent for H–2A and H–2B nonimmigrants. In addition to making the time periods consistent, DHS explained in proposing the regulations relating to H–2A workers that the purpose was to ''reduce the amount of time employers are required to be without the services of needed workers and enable the employers to have a set timeframe from which they can better monitor compliance with the terms and conditions of H–2A status.'' [138]

However, the current regulations on interrupted periods of stay have caused confusion for employers and are challenging for USCIS to implement. The confusion often relates to the different timeframes for an interrupted stay—45 days or 2 months—that is determined by the duration of the accumulated stay—18 months or less, or more than 18 months. Currently, in order to accurately demonstrate when an individual's limit on H–2 status will be reached, employers and workers need to monitor and document the accumulated time in H–2 status, track when the amount of time required for an interruptive stay changes from 45 days to 2 months, and calculate the total time in H–2 status across multiple time periods following interruptive absences. Adjudicators must also make these same determinations in adjudicating H–2 petitions with named workers to assess whether a beneficiary is eligible for the requested period of stay. The varying timeframes and starting and stopping of the accumulated stay in H–2 status can be confusing and frequently results in RFEs in adjudicating H–2 petitions, which leads to delays for employers and workers and inefficiencies for USCIS. In an effort to streamline the administration of the H–2 programs, DHS seeks to eliminate the current interrupted stay provisions that temporarily ''stop the clock'' toward the accrual of the 3-year limit. Eliminating these interrupted stay provisions would reduce potential confusion for employers and workers and simplify USCIS adjudications, resulting in fewer RFEs and greater efficiency in adjudicating H–2 petitions.

Recognizing that the interrupted stay provisions provide some benefit to H–2 workers and employers in the event of a worker's departure from the country, DHS proposes to shorten the period of absence that will reset the 3-year limit of stay. Currently, once an H–2 worker is outside the United States for an uninterrupted period of 3 months (''period of absence''), their 3-year limitation on stay will restart from the beginning upon that worker's readmission to the United States in H–2 status.[139] DHS proposes to shorten the current 3-month period of absence to 60 days.

Under proposed 8 CFR 214.2(h)(5)(vi)(C) and (D) and 8 CFR 214.2(h)(6)(vii)(B) and (C), an uninterrupted absence for the designated period of at least 60 days would in all cases ''reset'' the H–2 clock, allowing for an additional 3 years in the United States in H–2 status upon the worker's readmission, regardless of whether an H–2 worker has already reached the 3-year maximum. This change would make it easier to determine how much time a given H–2 worker had remaining in H–2 status. For example, if an employer knew that a given worker had been outside the United States for at least 60 days, the employer would also know that the worker's H–2 clock had ''reset'' and thus the worker would again be eligible to spend up to 3 years in the United States in H–2 status. There would be no need for the employer or worker to look back at periods of stay prior to that 60-day absence to determine the amount of H–2 time remaining. Resetting the clock at 60 days instead of 3 months is also intended to benefit H–2 workers seeking readmission in H–2 status by allowing them the option to remain outside of the United States for a shorter period of time between periods of H–2 employment.

Further, reducing the period of absence from the United States from 3 months to 60 days would provide workers and their employers with greater flexibility while still ensuring that such workers' stay is temporary in nature. The intent of having a required period of absence is to ensure that the H–2 worker qualifies as a nonimmigrant and that their stay remains temporary in nature. H–2 eligibility requires that employment be seasonal or temporary. *See* INA secs. 101(a)(15)(H)(ii)(a)–(b); 8 CFR 214.2(h)(5)(iv)(A); 8 CFR 214.2(h)(6)(i)(A). It also requires that the beneficiary qualify as a nonimmigrant. *See* INA secs. 101(a)(15)(H)(ii)(a)–(b). In a 1987 interim final rule, the former INS maintained the existing 3-year limit on an H–2 worker's stay, and also imposed a new, but still ''significant absence'' standard of 6 months, in order to ensure a meaningful interruption in the H–2A worker's employment in the United States. *Nonimmigrant Classes,* 52 FR 20554 (June 1, 1987). The rule explained: ''If a significant absence is not required, an alien would be able to effectively bypass the limitation and indefinitely work in the United States at various temporary jobs by vacationing abroad every three years.'' 52 FR 20555. The INA does not specify what length of absence would be sufficient to ensure that the H–2A or H–2B worker's stay in the United States is considered temporary. The former INS, in its 1987 interim rule, chose to require a 6-month period of absence. In doing so, however, the agency did not state that 6 months must be the absolute floor to ensure compliance with the statute.

In 2008, this 6-month period of absence was reduced to 3 months ''in order to reduce the amount of time employers would be required to be without the services of needed workers, while not offending the fundamental temporary nature of employment under the H–2A program.'' [140] Beyond that

[136] *See* USCIS, *Calculating Interrupted Stays for the H–2 Classifications, https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications.*

[137] *See Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 76891 (Dec. 18, 2008); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,* 73 FR 78104 (Dec. 19, 2008).

[138] *See Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 8230, 8235 (Feb. 13, 2008).

[139] *See* 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(13)(iv); *see also* USCIS, Calculating Interrupted Stays for the H–2 Classifications (May 6, 2020), *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications.*

[140] *See Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 8230, 8235 (Feb. 13, 2008) (proposing the reduction to 3 months); *Changes to Requirements Affecting H–2A Nonimmigrants,* 73 FR 76891, 76904 (Dec. 18, 2008) (adopting the proposed reduction in waiting time without change and agreeing with comments stating that 3 months would ''enhance the workability of the H–2A program for employers while not offending the fundamental temporary nature of employment under the H–2A program''); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,* 73 FR 49109, 49111 (Aug. 20, 2008) (proposing to reduce the required absence period to 3 months to ''reduce the amount of time employers would be required to be without the services of needed workers while not offending the fundamental temporary nature of employment under the H–2B program''); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,* 73 FR 78104 (Dec. 19, 2008)

Continued

general explanation, however, DHS, in reducing the required period of absence from 6 months to 3 months, did not specifically explain how it arrived at 3 months as the appropriate period of absence as opposed to another period of time, nor did it state that 3 months is the absolute floor for ensuring that an H–2 worker's stay is temporary in nature.

It is DHS's position that reducing the current 3-month period of absence to 60 days would accomplish the same goal of reducing the amount of time employers would be required to be without the services of needed workers, while still ensuring adherence to the fundamental requirement under the H–2 programs that an H–2 worker's period of admission to this country be temporary by continuing to impose a significant absence.

The proposed regulation also clarifies that, to avail itself of the benefits of this provision, the petitioner must provide evidence that the beneficiary had an uninterrupted 60-day period of absence. The proposed regulation would provide examples of the types of evidence that may be provided to establish a period of absence from the United States. In addition, DHS is proposing to move the provisions relating to periods of absence for H–2B workers from its current location at 8 CFR 214.2(h)(13)(iv)–(v) to proposed 8 CFR 214.2(h)(6)(vii)(C) in order to consolidate provisions regarding period of admission into one section specific to H–2B workers and to reflect the change from 3 months to 60 days.[141] DHS proposes to keep the proposed H–2A period of absence provision under 8 CFR 214.2(h)(5)(viii) but would move it to a new dedicated subordinate paragraph (D) and revise the language to reflect the change from 3 months to 60 days. The proposed changes to the regulations regarding calculation of stay would benefit the agency, employers, and workers because they would provide greater clarity for employers and workers and greater efficiency for DHS. DHS seeks comments on all aspects of this provision, and particularly the 60-day duration of absence that would reset the clock for purposes of the 3-year maximum period of stay.

As an alternative to the complicated calculations needed to determine an interrupted stay under the current H–2 framework, DHS considered adopting an interrupted stay provision similar to the current ''recapture'' provision for H–1B beneficiaries. For H–1Bs, current DHS regulations at 8 CFR 214.2(h)(13)(iii)(C) generally state that time spent outside the United States exceeding 24 hours by a noncitizen will not be considered for purposes of calculating the H–1B beneficiary's total period of authorized admission. Furthermore, the time spent physically outside of the United States may be ''recaptured'' in a subsequent H–1B petition on behalf of the noncitizen, though it is the petitioner's burden to request and demonstrate the specific amount of time for recapture on behalf of the beneficiary. *See* 8 CFR 214.2(h)(13)(iii)(C)(*1*).

In the end, DHS chose to propose the changes explained above rather than match the H–1B provision because it believes the H–1B provision to ''recapture time'' would be only a minimally less confusing calculation for petitioners and H–2 workers, as well as for USCIS adjudicators. It is likely also that because of the shorter duration of H–2 petition validity periods relative to those in the H–1B program, and perhaps for other reasons specific to the different classifications (*e.g.,* different types of occupations), fewer H–2 beneficiaries travel outside of the United States or H–2 beneficiaries travel abroad for fewer days during their period of admission, so the amount of time available for these workers to ''recapture'' would be minimal compared to H–1B beneficiaries. DHS believes a single, consistent standard under which an uninterrupted absence of at least 60 days would reset the 3-year limitation represents the best way to reduce confusion, resulting in fewer RFEs and greater efficiency in adjudicating H–2 petitions.

Finally, DHS seeks to make clarifying edits at proposed 8 CFR 214.2(h)(5)(viii)(C)–(D) and 8 CFR 214.2(h)(6)(vii)(B)–(C). These edits would clarify that any time spent in H–2A or H–2B status would count toward the 3-year limitation of stay, consistent with current practice and other H–2 regulations governing the 3-year limitation on stay.[142]

D. Severability

As stated at proposed 214.2(h)(30), DHS intends for the provisions of this proposed rule, if finalized, to be severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule would remain in effect as to any other person or circumstance. While the various provisions of this proposed rule, taken together, would provide maximum benefit with respect to strengthening program integrity, increasing worker flexibility, and improving program efficiency, none of the provisions are interdependent and unable to operate separately, nor is any single provision essential to the rule's overall workability. DHS welcomes public input on the proposed severability clause at 8 CFR 214.2(h)(30).

E. Request for Preliminary Public Input Related to Future Actions/Proposals

DHS is seeking preliminary public input on ways to provide H–2 and other Form I–129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf, including receipt notices for a petition to extend, amend, or change status filed on their behalf. USCIS does not currently provide notices directly to Form I–129 beneficiaries. DHS is aware that the lack of petition information may leave Form I–129 beneficiaries unable to verify their own immigration status and susceptible to employer abuse.[143] DHS is also aware

(adopting the proposed reduction in waiting time without change).

[141] DHS is also proposing uniform evidentiary requirements for demonstrating an H–2B worker's absence(s) from the United States. Currently, the regulations require ''clear and convincing proof'' to establish that an H–2B worker resides abroad and commutes or is only seasonally or intermittently employed in the United States for 6 months or less per year, while the regulations only require ''information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States'' to show that an H–2B worker has been absent long enough to reset or interrupt the period of stay. *See* 8 CFR 214.2(h)(13)(v) and 214.2(h)(13)(i)(B), respectively.

[142] *See* 8 CFR 214.2(h)(13)(iv) (''An H–2B alien who has spent 3 years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediately preceding 3 months.''); 8 CFR 214.2(h)(15)(ii)(C) (''The alien's total period of stay as an H–2A or H–2B worker may not exceed three years'') 8 CFR 214.2(h)(13)(i)(B) (''When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States . . . for the time limit imposed on the particular H classification. . . . A certain period of absence from the United States of H–2A and H–2B aliens can interrupt the accrual of time spent in such status against the 3-year limit set forth in 8 CFR 214.2(h)(13).''); *see also* USCIS, H–2A Temporary Agricultural Workers, Period of Stay, *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers* (''A person who has held H–2A nonimmigrant status for a total of 3 years must depart and remain outside the United States for an uninterrupted period of 3 months before seeking readmission as an H–2A nonimmigrant. Additionally, previous time spent in other H or L classifications counts toward total H–2A time.'').

[143] *See, e.g.,* DHS, Office of the Citizenship and Immigration Services Ombudsman, *Recommendation to Remove a Barrier Pursuant to Executive Order 14012: Improving U.S. Citizenship and Immigration Services' Form I–129 Notification Procedures Recommendation Number 62* (Mar. 31, 2022), *https://www.dhs.gov/sites/default/files/2022-03/CIS%20OMBUDSMAN_I-129_*

that having case status information would promote the benefits intended by the proposed portability provisions in this rule, and more generally, improve worker mobility and protections as intended in this rule.

DHS is committed to addressing the issue of beneficiary notification but is not at this time proposing a specific beneficiary notification process or regulation. The agency continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this proposed rule. At this time, DHS would like to solicit preliminary public comments on requiring H–2 petitioners to provide a copy of the notice of USCIS actions to beneficiaries in the United States seeking extension or change of status. This option is being considered for potential future action separate from this rulemaking. In addition, DHS is interested in any other suggestions from the public regarding ways to ensure adequate notification to beneficiaries of actions taken with respect to petitions filed on their behalf.

Limiting this notification requirement to beneficiaries in the United States seeking extension or change of status is intended to recognize the challenges associated with providing notices to unnamed H–2 workers. In addition, DHS believes such notification may be especially beneficial in the context of extensions or changes of status. While petition beneficiaries who are outside of the United States will receive basic petition information on Form I–94, Arrival-Departure Record, and on their nonimmigrant visa, beneficiaries who are already in the United States must rely entirely on petitioners and employers to provide such information.[144] DHS recognizes this option would leave open the possibility that unscrupulous petitioners would not comply with this requirement, something DHS intends to forestall, but believes it would still provide benefits and worker protections while USCIS continues to explore other options, including the feasibility of technological solutions that would allow USCIS to directly notify beneficiaries or allow beneficiaries to directly access case status.[145] DHS is particularly interested in comments that cite evidence of the expected costs and burdens on petitioners as a result of such a requirement, as well as comments and evidence about the extent that such a provision would benefit H–2 workers, which DHS will take into consideration when crafting potential future solutions or regulatory proposals.

V. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)

Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review) and E.O. 14094 (Modernizing Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives. If a regulation is necessary, these Executive Orders direct that, to the extent permitted by law, agencies ensure that the benefits of a regulation justify its costs and select the regulatory approach that maximizes net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It explicitly draws attention to ''equity, human dignity, fairness, and distributive impacts,'' values that are difficult or impossible to quantify. All of these considerations are relevant in this rulemaking.

The Office of Management and Budget (OMB) has designated this rule a ''significant regulatory action'' as defined under section 3(f) of E.O. 12866, as amended by E.O. 14094. Accordingly, OMB has reviewed this regulation.

1. Summary of Major Provisions of the Regulatory Action

As discussed in the preamble, DHS is amending its regulations affecting temporary agricultural and temporary nonagricultural workers within the H–2 programs, and their employers. The proposed rule seeks to better ensure the integrity of the H–2 programs, enhance protection for workers, and clarify requirements and consequences of actions incongruent with the intent of H–2 employment. The provisions of this proposed rule subject to this regulatory analysis are grouped into four categories: (1) integrity and worker protections; (2) worker flexibilities; (3) improving H–2 program efficiencies and reducing barriers to legal migration; and (4) forms and technical updates.

2. Summary of Costs and Benefits of the Proposed Rule

This proposed rule would impose new direct costs on petitioners in the form of opportunity costs of time to complete and file H–2 petitions and time spent to familiarize themselves with the rule. The quantifiable costs of this rule that would impact petitioners consistently and directly are the increased opportunity cost of time to complete Form I–129 H Classification Supplement and opportunity costs of time related to the rule's portability provision. Over the 10-year period of analysis, DHS estimates the total costs of the proposed rule would be approximately $18,640,075 to $24,901,101 (undiscounted). DHS estimates annualized costs of this proposed rule range from $1,998,572 to $2,668,028 at a 3-percent discount rate and $2,186,033 to $2,915,885 at a 7-percent discount rate. In addition, the rule results in transfers from consumers to a limited number of H–2A and H–2B workers that may choose to supply additional labor. The total annualized transfer amounts to $2,918,958 in additional earnings at the 3-percent and 7-percent discount rate and related tax transfers of $337,122 ($168,561 from these workers + $168,561 from employers). Fees paid for Form I–129 and premium processing as a result of the proposed rule's portability provision constitute a transfer of $636,760 from

BENEFICIARY_RECOMMENDATION_fnl_03-2022_508.pdf (''lack of direct notification may leave them without status documentation, rendering them noncompliant with the law, susceptible to abuse by employers, and unable to access benefits requiring proof of status''). This report formally recommended that USCIS directly notify beneficiaries of Form I–129 actions taken in the petition on their behalf. DHS also received several stakeholder letters advocating for H–2 beneficiaries to receive case status information. For example, see the Letter from Migration that Works to DHS dated May 17, 2022; Letter from Centro de los Derechos del Migrante, Inc. to DHS dated June 1, 2022; Letter from AFL–CIO to DHS; Farmworkers Justice Comment to USCIS dated May 19, 2021. All of these letters are included in the docket for this proposed rulemaking. In addition, Members of Congress recently indicated in explanatory remarks the need to provide status documentation directly to certain beneficiaries so that they can better understand their immigration status. *See* Joint Explanatory Statement to Department of Homeland Security Appropriations Act, 2022, 168 Cong. Rec. H2395, H2418 (daily ed. March 9, 2022) (''USCIS shall also establish a process whereby workers may confirm that they are the beneficiaries of H–2A petitions and can receive information about their own immigration status, including their authorized period of stay and the status of any requested visa extensions.''), *available at https://www.congress.gov/congressional-record/volume-168/issue-42/house-section/article/H1709-1.*

[144] The Form I–797 approval notice instructs petitioners that the lower portion of the notice, including Form I–94, ''should be given to the beneficiary(ies).''

[145] *See* USCIS Memorandum, *Response to Recommendations on Improving Form I–129 Notification Procedures* (Aug. 11, 2022), *https://www.dhs.gov/sites/default/files/2022-08/SIGNED%20USCIS%20Response%20to%20Formal%20Recommendation%20-%20Form%20I-129.08122022_v2.pdf.*

petitioners of porting workers to USCIS (3 and 7-percent annualized equivalent).

Certain petitioners may also incur other difficult to quantify costs. For example, certain petitioners may incur additional opportunity costs of time should they be selected for a compliance review or a site visit. Other petitioners may face stricter consequences regarding prohibited fees, or may opt to transport and house H–2A beneficiaries earlier than they would have otherwise based on the proposed extension of the pre-employment grace period from 7 to 10 days. In general, petitioners who are found to be noncompliant with the provisions of the rule (or other existing authorities) may incur costs related to lost sales, productivity, or profits as well as additional opportunity costs of time spent attempting to comply with the rule. Moreover, USCIS may incur increased opportunity costs of time for adjudicators to review information regarding debarment and other past violation determinations more closely, issue RFEs or NOIDs, and for related computer system updates.

The benefits of this proposed rule would be diverse, though most are difficult to quantify. The proposed rule extends portability to H–2 workers lawfully present in the United States who are seeking to extend their stay regardless of a porting petitioner's E-Verify standing, allowing for greater consistency across portability regulations and other nonimmigrant worker categories. Beneficiaries would also benefit from the extended grace periods, the permanent ability to port, the clarification that employers who utilize porting workers must continue to abide by all H–2 requirements regarding worker benefits and protections, and eliminating the interrupted stay provisions and instead reducing the period of absence out of the country to reset their 3-year maximum period of stay. The Federal Government would also enjoy benefits, mainly through bolstering existing program integrity activities and providing a greater ability for USCIS to deny or revoke petitions for issues related to program compliance. Table 2 provides a more detailed summary of the proposed provisions and their impacts.

TABLE—SUMMARY OF PROVISIONS AND IMPACTS

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F).	DHS is proposing to add stronger language requiring petitioners or employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS's authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.	Cost: • Cooperation during a site visit or compliance review may result in opportunity costs of time for petitioners to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.7 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. • Employers that do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses. Benefit: • USCIS would have clearer authority to deny or revoke a petition if unable to verify information related to the petition. The effectiveness of existing USCIS program integrity activities would be improved through increased cooperation from employers.
8 CFR 214.2(h)(20)	DHS is proposing to provide H–2A and H–2B workers with ''whistleblower protection'' comparable to the protection currently offered to H–1B workers.	Cost: • Employers may face increased RFEs, denials, or other actions on their H–2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H–2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers. Benefit: • Such protections may afford workers the ability to expose issues that harm workers or are not in line with the intent of the H–2 programs while also offering protection to such workers (therefore potentially improving overall working conditions), but the extent to which this would occur is unknown.

TABLE—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C), 8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), and 8 CFR 214.2(h)(6)(i)(D).	DHS is proposing significant revisions to the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H–2A and H–2B workers, including new bars on approval for some H–2 petitions.	Cost: • Enhanced consequences for petitioners who charge prohibited fees could lead to increased financial losses and extended ineligibility from participating in H–2 programs. Benefit: • Possibly increase compliance with provisions regarding prohibited fees and thus reduce the occurrence and burden of prohibited fees on H–2 beneficiaries.
8 CFR 214.2(h)(10)(iii)	DHS is proposing to institute certain mandatory and discretionary bars to approval of an H–2A or H–2B petition.	Costs: • USCIS adjudicators may require additional time associated with reviewing information regarding debarment and other past violation determinations more closely, issuing RFEs or NOIDs, and conducting the discretionary analysis for relevant petitions. • The expansion of violation determinations that could be considered during adjudication, as well as the way debarments and other violation determinations would be tracked, would require some computer system updates resulting in costs to USCIS. Benefit: • Possibly increase compliance with H–2 program requirements, thereby increasing protection of H–2 workers.
8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E).	Eliminate the lists of countries eligible to participate in the H–2 programs.	Costs: • None expected. Benefits: • Employers and the Federal Government will benefit from the simplification of Form I–129 adjudications by eliminating the ''national interest'' portion of the adjudication that USCIS is currently required to conduct for beneficiaries from countries that are not on the lists. • Remove petitioner burden to provide evidence for beneficiaries from countries not on the lists. • Petitioners may have increased access to workers potentially available to the H–2 programs. • Free up agency resources devoted to developing and publishing the eligible country lists in the FEDERAL REGISTER every year.
8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A). 8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C).	Change grace periods such that they will be the same for both H–2A and H–2B Programs. Create a 60-day grace period following any H–2A or H–2B revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.	Costs [146]: • H–2A employers may face additional costs such as for housing, but employers likely would weigh those costs against the benefit of providing employees with additional time to prepare for the start of work. Benefits: • Provides employees (and their employers) with extra time to prepare for the start of work. Provides clarity for adjudicators and makes timeframes consistent for beneficiaries and petitioners. • Provides workers additional time to seek other employment or depart from the United States if their employer faces a revocation or if they cease employment.
8 CFR 214.2(h)(11)(iv)	Clarifies responsibility of H–2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.	Costs: • None expected since H–2A petitioning employers are already generally liable for the return transportation costs of H–2A workers. Benefits: • Beneficiaries would benefit in the event that clarified employer responsibility decreased the incidence of workers having to pay their own return travel costs in the event of a petition revocation.

TABLE—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(16)(i)	Clarifies that H–2 workers may take steps toward becoming a lawful permanent resident of the United States while still maintaining lawful nonimmigtarant status.	Costs: • None expected. Benefits: • DHS expects this could enable some H–2 workers who have otherwise been dissuaded to pursue lawful permanent residence with the ability to do so without concern over becoming ineligible for H–2 status.
8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), and 8 CFR 214.2(h)(13)(i)(B).	Eliminates the ''interrupted stay'' calculation and instead reduces the period of absence to reset an individual's 3-year period of stay.	Costs: • Workers in active H–2 status who would consider making trips abroad for periods of less than 60 days but more than 45 days, may be disincentivized to make such trip. Benefit: • Simplifies and reduces the burden to calculate beneficiary absences for petitioners, beneficiaries, and adjudicators. • May reduce the number of RFEs related to 3-year periods of stay. Transfers: • As a result of a small number of H–2 workers at the 3-year maximum stay responding to the proposed shorter absence requirement by working 30 additional days, DHS estimates upper bound annual transfer payment of $2,918,958 in additional earnings from consumers to H–2 workers and $337,122 in tax transfers from these workers and their employers to tax programs (Medicare and Social Security).
8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), and 8 CFR 274a.12(b)(21).	Make portability permanent for H–2B workers and remove the requirement that H–2A workers can only port to an E-Verify employer.	Costs: • The total estimated annual opportunity cost of time to file Form I–129 by human resource specialists is approximately $40,418. The total estimated annual opportunity cost of time to file Form I–129 and Form G–28 will range from approximately $90,554 if filed by in-house lawyers to approximately $156,132 if filed by outsourced lawyers. • The total estimated annual costs associated with filing Form I–907 if it is filed with Form I–129 is $4,728 if filed by human resource specialists. The total estimated annual costs associated with filing Form I–907 would range from approximately $9,006 if filed by an in-house lawyer to approximately $15,527 if filed by an outsourced lawyer. • The total estimated annual costs associated with the portability provision ranges from $133,684 to $198,851, depending on the filer. • DHS may incur some additional adjudication costs as more petitioners will likely file Form I–129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form.

TABLE—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
		Benefit: • Enabling H–2 workers present in the United States to port to a new petitioning employer affords these workers agency of choice at an earlier moment in time consistent with other portability regulations and more similar to other workers in the labor force. • Replacing the E-Verify requirement for employers wishing to hire porting H–2A workers with strengthened site visit authority and other provisions that maintain program integrity would aid porting beneficiaries in finding petitioners without first needing to confirm if that employer is in good standing in E-Verify. Although this change impacts an unknown portion of new petitions for porting H–2A beneficiaries, no reductions in E-Verify enrollment are anticipated. • An H–2 worker with an employer that is not complying with H–2 program requirements would have additional flexibility in porting to another employer's certified position. Transfers: • Annual undiscounted transfers of $636,760 from filing fees for Form I–129 combined with Form I–907 from petitioners to USCIS.
8 CFR 214.2(h)(2)(i)(I)(*3*)	DHS proposes to clarify that a beneficiary of an H–2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H–2 program requirements.	Benefits: • Provides H–2 workers with requisite protections and benefits as codified in the rule in the event that a porting provision is withdrawn or denied. Costs: • None expected.
Cumulative Impacts of Proposed Regulatory Changes		
DHS proposes to make changes to the Form I–129, to effectuate the proposed regulatory changes.		Costs: • The time burden to complete and file Form I–129, H Classification Supplement, would increase by 0.3 hours as a result of the proposed changes. The estimated opportunity cost of time for each petition by type of filer would be $15.28 for an HR specialist, $34.25 for an in-house lawyer, and $59.06 for an outsourced lawyer. The estimated total annual opportunity costs of time for petitioners or their representatives to file H–2 petitions under this proposed rule ranges from $745,330 to $985,540.
Petitioners or their representatives would familiarize themselves with the rule		Costs: • Petitioners or their representatives would need to read and understand the rule at an estimated opportunity cost of time that ranges from $9,739,715 to $12,877,651, incurred during the first year of the analysis.

Source: USCIS analysis.

[146] USCIS does not expect any additional costs to H–2B employers as, generally, they do not have to provide housing for workers. Employers are required to provide housing at no cost to H–2A workers. *See* INA sec. 218(c)(4), 8 U.S.C. 1188(c)(4). There is no similar statutory requirement for employers to provide housing to H–2B workers, although there is a regulatory requirement for an H–2B employer to provide housing when it is primarily for the benefit or convenience of the employer. *See* 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015).

OMB A–4 ACCOUNTING STATEMENT TIME PERIOD: FY 2024 THROUGH FY 2033

[$ millions, FY 2022)]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
Benefits				
Monetized Benefits	N/A	N/A	N/A	Regulatory Impact Analysis (''RIA'').
Annualized quantified, but unmonetized, benefits.	N/A	N/A	N/A	RIA.
Unquantified Benefits	Strengthened protections for workers who expose program or labor law violations, and for workers benefitting from increased grace periods; improvements to program integrity from reduced incentives for employers to collect prohibited fees and increased incentives to comply with program requirements; and increased access to workers potentially available to businesses that utilize the H–2 programs. Elimination of the eligible countries lists would reduce burdens upon DHS, USCIS, and H–2 employers. DHS would focus these resources on continuing to identify human trafficking and other forms of noncompliance with the H–2 visa programs.			RIA.
Costs				
Annualized monetized costs (7%)	$2.33	$2.00	$2.67	RIA
Annualized monetized costs (3%)	$2.55	$2.19	$2.92	
Annualized quantified, but unmonetized, costs.	Increased cooperation with existing USCIS site visits that average 1.7 hours in duration. Whereas 12-percent of petitioners underestimated compliance burdens, additional costs to comply with existing program requirements may occur.			
Qualitative (unquantified) costs	Certain employers may incur costs (including, but not limited to, lost sales, productivity, or profits and additional opportunity costs of time) for failing to comply with investigative or adjudicative actions undertaken due to the rule.			RIA.
Transfers				
Annualized monetized transfers: From consumers to limited number of workers supplying more labor.	(3% and 7%) $2.92	N/A	N/A	RIA.
Annualized monetized transfers: From limited number of H–2 workers to taxes.	(3% and 7%) $0.17	N/A	N/A	RIA.
Annualized monetized transfers: From limited number of H–2 employers to taxes.	(3% and 7%) $0.17	N/A	N/A	RIA.
Annualized monetized transfers: Fees from petitioners to USCIS.	(3% and 7%) $0.64	N/A	N/A	RIA.

Miscellaneous analyses/category	Effects	Source citation
Effects on State, local, or tribal governments	None	RIA.
Effects on small businesses	None	RIA.
Effects on wages	None	None.
Effects on growth	None	None.

3. Background and Purpose of the Rule

The purpose of this rulemaking is to modernize and improve the regulations relating to the H–2A temporary agricultural worker program and the H–2B temporary nonagricultural worker program (collectively ''H–2 programs''). Through this proposed rule, DHS seeks to strengthen worker protections and the integrity of the H–2 programs, provide greater flexibility for H–2A and H–2B workers, and improve program

efficiency and reduce barriers to legal migration.

The H–2A temporary agricultural nonimmigrant classification allows U.S. employers unable to find sufficient able, willing, qualified, and available U.S. workers to bring foreign nationals to the United States to fill seasonal and temporary agricultural jobs. To qualify as seasonal, employment must be tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing operations. To qualify as temporary, the employer's need to fill the position will, except in extraordinary circumstances, last no longer than 1 year.

The H–2B visa classification program was designed to serve U.S. businesses that are unable to find a sufficient number of qualified U.S. workers to perform nonagricultural work of a temporary or seasonal nature. For an H–2A or H–2B nonimmigrant worker to be admitted into the United States under one of these nonimmigrant classifications, the hiring employer is required to: (1) obtain a TLC from DOL (or, in the case of H–2B employment on Guam, from the Governor of Guam); and (2) file a Form I–129 with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I–129.[147]

For the H–2B program there is a statutory cap of 66,000 visas allocated per fiscal year, with up to 33,000 allocated in each half of a fiscal year, for the number of nonimmigrants who may be granted H–2B nonimmigrant status.[148] Any unused numbers from the first half of the fiscal year will be available for employers seeking to hire H–2B workers during the second half of the fiscal year. However, any unused H–2B numbers from one fiscal year do not carry over into the next and will therefore not be made available.[149]

4. Population

The proposed rule would impact petitioners (employers) who file Form I–129, Petition for a Nonimmigrant Worker, seeking to bring foreign nationals (beneficiaries or workers) to the United States to fill temporary agricultural and nonagricultural jobs through the H–2A and H–2B visa programs, respectively. This proposed rule also would have additional impacts on employers and workers presently in the United States under the H–2A and H–2B programs by permanently providing ''portability'' to all H–2A and H–2B workers. Portability, for purposes of this proposed rule, is the ability to begin new qualifying employment upon the filing of a nonfrivolous petition rather than upon petition approval. Workers may transfer, or ''port,'' to a qualifying new job offer that is in the same nonimmigrant classification that the worker currently holds. Porting, as proposed in this NPRM, does not include transferring from one H visa classification to another—for example, from H–2A to H–2B or vice versa. The new job offer may be through the same employer that filed the petition or a different employer after an H–2B petition is filed. This proposed provision would apply to all H–2A and H–2B workers on a permanent basis, whereas currently portability applies to only certain H–2A workers and on a time-limited basis to all H–2B workers.[150] Portability allows H–2A and H–2B workers to continue to earn wages and gaining employers to continue obtaining necessary workers. Table 3 and Table 4 present the total populations this proposed rule would impact. For provisions impacting a subset of these populations, the analysis provides separate population totals, when possible, for more specific analysis.

TABLE 3—TOTAL H–2A PETITIONS RECEIVED USING FORM I–129 FOR TOTAL BENEFICIARIES WITH TOTAL APPROVED H–2A PETITIONS AND BENEFICIARIES, FY 2013 THROUGH FY 2022

Fiscal year	Total petitions received	Total number of beneficiaries	Total petitions approved	Total beneficiaries approved
2013	7,332	105,095	7,280	104,487
2014	8,226	123,328	8,189	122,816
2015	9,158	157,622	9,077	155,683
2016	10,248	178,249	9,989	172,661
2017	11,602	218,372	11,504	216,000
2018	13,444	262,630	13,315	258,360
2019	15,509	287,606	15,356	282,133
2020	17,012	306,746	16,776	300,834
2021	20,323	353,650	19,853	339,419
2022	24,370	415,229	23,704	396,255
Total	137,224	2,408,527	135,043	2,348,648
10-year Average	13,722	240,853	13,504	234,865

Source: USCIS Office of Policy and Strategy—C3, ELIS USCIS Data System as of Oct. 18, 2022.

As shown in Table 3, the number of Form I–129 H–2A petitions increased from 7,332 in FY 2013 to 24,370 in FY 2022 while approved petitions increased from 7,280 in FY 2013 to 23,704 in FY 2022.[151] The number of beneficiaries also increased over this time period from 105,095 to 415,229 with approved beneficiaries increasing from 104,487 to 396,255. Note that petitioners can petition for multiple beneficiaries on one petition, hence the much larger number of beneficiaries to petitions received and approved. On average, 13,722 H–2A petitions were

[147] Revised effective January 18, 2009 (73 FR 78104).

[148] *See* INA sec. 214(g)(1)(B), (g)(10), 8 U.S.C. 1184(g)(1)(B), (g)(10).

[149] A TLC approved by DOL must accompany an H–2B petition. The employment start date stated on the petition generally must match the start date listed on the TLC. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D).

[150] *See Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022) (providing temporary H–2B portability to petitioners and H–2B nonimmigrant workers initiating employment through the end of January 24, 2024).

[151] DHS notes that the number of filed H–2A petitions has grown by an approximately 12.76 compound average growth rate between FY2013 and FY2022. DHS acknowledges that potential costs may be underestimated in this analysis if historical growth rates continue.

received for an average 240,853 beneficiaries and 13,504 H–2A petitions were approved for an annual average of 234,865 beneficiaries.

TABLE 4—TOTAL H–2B PETITIONS RECEIVED USING FORM I–129 FOR TOTAL BENEFICIARIES WITH TOTAL APPROVED H–2B PETITIONS AND BENEFICIARIES, FY 2013 THROUGH FY 2022

Fiscal year	Total petitions received	Total number of beneficiaries	Total petitions approved	Total beneficiaries approved
2013	4,720	81,220	4,546	78,532
2014	5,314	91,150	5,132	87,859
2015	5,412	93,160	5,165	90,031
2016	6,527	114,181	5,946	105,213
2017	6,112	110,794	5,860	105,839
2018	6,148	113,850	5,941	108,380
2019	7,461	128,122	7,337	125,773
2020	5,422	95,826	5,269	93,345
2021	9,160	160,790	8,937	156,528
2022	12,388	185,705	12,120	181,775
Total	68,664	1,174,798	66,253	1,133,275
10-year average	6,866	117,480	6,625	113,328

Source: USCIS Office of Policy and Strategy—C3, ELIS USCIS Data System as of Oct. 18, 2022.

Table 4 shows that the number of Form I–129 H–2B petitions and number of beneficiaries increased from FY 2013 through FY 2019, declined in FY 2020 due to labor market conditions during COVID–19, and then increased again in FY 2021 and FY 2022.[152] As previously discussed, the total number of H–2B visas is constrained in recent fiscal years by statutory numerical limits, or ''caps,'' with some exceptions, on the total number of noncitizens who may be issued an initial H–2B visa or otherwise granted H–2B status during each fiscal year.[153] Whereas the exact statutory limits (including any supplemental limits) on H–2B visas are unknown for FY 2024 and beyond, the receipts and approvals seen in FY 2022 are assumed to be a reasonable estimate of future H–2B petitions and beneficiaries.

As these tables show, U.S. employers and foreign temporary workers have been increasingly interested in the H–2A and H–2B programs from FY 2013 to FY 2022 as evidenced by an increasing number of petitions filed for an increasing number of beneficiaries. However, the H–2B program remains constrained by the statutory cap of 66,000 visas allocated per fiscal year, provided for under INA sec. 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B), though Congress, through time-limited legislation, has allowed, to date, supplemental allocations beyond that 66,000 visa cap.[154] The supplements allocate additional visas for nonimmigrants who may be granted H–2B nonimmigrant status in each half of a fiscal year.[155]

5. Cost-Benefit Analysis

The provisions of this proposed rule subject to this regulatory analysis are grouped into the following four categories: (1) integrity and worker protections; (2) worker flexibilities; (3) improving H–2 program efficiencies and reducing barriers to legal migration; and (4) forms and technical updates. Each subsection that follows explains the proposed provision, its population if available, and its potential impacts.

a. Integrity and Worker Protections

To improve the integrity of the H–2 programs, DHS proposes to provide clearer requirements for USCIS compliance reviews and inspections, to provide H–2A and H–2B workers ''whistleblower protections,'' revise the provisions relating to prohibited fees, and to institute certain mandatory and discretionary bars to approval of an H–2A or H–2B petition. We address each of these provisions in turn below.

(1) USCIS Compliance Reviews and Inspections

DHS is proposing new provisions specific to the H–2A and H–2B programs to conduct compliance inspections, clarify the scope of inspections, and specify the consequences of a refusal or failure to fully cooperate with such compliance reviews and inspections. While no inspection that the USCIS Fraud Detection and National Security Directorate (FDNS) conducts is mandatory, if an inspection is conducted, this provision would make the successful completion of an inspection required for a petition's approval.[156] Inspections can include site visits, telephone interviews, or correspondence (both electronic and mail).[157] This regulatory change would

[152] Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase the H–2B cap in FY 2020, the Secretary did not exercise that authority. *See Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 86 FR 28202 (May 25, 2021).

[153] On October 12, 2022, DHS announced that it will make available to employers an additional 64,716 H–2B temporary nonagricultural worker visas for fiscal year 2023. *See* DHS, *DHS to Supplement H–2B Cap with Nearly 65,000 Additional Visas for Fiscal Year 2023* (Oct. 12, 2022), *https://www.dhs.gov/news/2022/10/12/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2023.*

[154] *See* section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115–31; section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141; section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116–6; section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116–94; section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, FY 2021 Omnibus, sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022; section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103, and section 101(6) of Division A of Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, and section 303 of Division O, Consolidated Appropriations Act, 2023, Public Law 117–328.

[155] *See* INA sec. 214(g)(1)(B), (g)(10), 8 U.S.C. 1184(g)(1)(B), (g)(10).

[156] For more information on site visits, *see* USCIS, *Administrative Site Visit and Verification Program* (Sept. 9, 2019), *https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program.*

[157] The expected time burden to comply with audits conducted by DHS and OFLC is 12 hours. The number in hours for audits was provided by

apply to both pre- and post-adjudication petitions, which would provide USCIS the ability to either deny or revoke petitions accordingly. This proposed rule would provide USCIS with a greater ability to obtain compliance from petitioners and employers. Outside of this proposed rulemaking, USCIS is planning to conduct future site visits for both H–2A and H–2B work sites, some of which are expected to occur in late FY 2023.

Data on H–2 program inspections are limited and generally consist of site visits. USCIS has conducted only 189 H–2A program site visits associated with fraud investigations since calendar year 2004. With respect to H–2B program inspections, USCIS conducted a limited site visit pilot in FY 2018 and FY 2019 in which USCIS completed 364 (randomly selected) H–2B employment sites for inspection and conducted site visits.[158] Of the site visits USCIS conducted, USCIS officers were unable to make contact with employers or workers over 12 percent of the time (45 instances).[159] On average, each site visit took 1.7 hours.[160] Of the limited number of site visits USCIS has conducted thus far, non-cooperation exists in at least some cases. Cooperation is crucial to USCIS's ability to verify information about employers and workers, and the overall conditions of employment.

This proposed rule would provide a clear disincentive for petitioners who do not cooperate with compliance reviews and inspections while giving USCIS a greater ability to access and confirm information about employers and workers as well as identify fraud. Employers who may be selected to participate in such inspections may incur costs related to the opportunity cost of time to provide information to USCIS instead of performing other work. As discussed above, FDNS data on previous H–2B site visits show that the average site visit takes 1.7 hours. DHS believes that, due to the rule's provisions clarifying the consequences of a refusal or failure to fully cooperate with compliance reviews and inspections, the rate of ''inconclusive'' site visits will be negligible. As such, each site visit that warrants a conclusive finding under the rule that would have warranted an ''inconclusive'' finding under the baseline scenario would therefore cause a 1.7-hour time burden to accrue to the respective petitioner due the petitioner now expending time cooperating that they would not have under the baseline.

DHS cannot quantify these costs, however, because the relevant hourly opportunity cost of time is highly specific to the affected petitioner and, as such, any average would likely not be informative. DHS expects the benefit of participation in the H–2 program would outweigh these costs, however. Additionally, employers who do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses.

USCIS does not expect this proposed provision would result in additional costs to the Federal Government because it would not require additional resources or time to perform compliance reviews and inspections and, at the same time, USCIS is not proposing to establish a particular number of compliance reviews and inspections to complete annually or increase the number of compliance reviews and inspections or the number of H–2 program site visits. A benefit is that USCIS would have the authority to deny or revoke a petition if unable to verify information related to the petition. Additionally, existing USCIS program integrity activities would be made more effective by additional cooperation from employers.

DHS welcomes public comment on the costs H–2 program employers and workers would incur based on the proposed changes related to compliance reviews and inspections.

(2) Whistleblower Protections

DHS is proposing to provide H–2A and H–2B workers with ''whistleblower protections'' comparable to the protections currently offered to H–1B workers.[161] For example, if an H–1B worker (1) applies to extend their H–1B status or change their nonimmigrant status; (2) indicates that they faced retaliatory action from their employer because they reported an LCA violation; and (3) lost or failed to maintain their H–1B status, USCIS may consider this situation to be an instance of ''extraordinary circumstances'' as defined by sections 8 CFR 214.1(c)(4) and 248.1(b). In addition, H–1B workers normally are not eligible to extend or change their status if they have lost or failed to maintain their H–1B status. However, if they can demonstrate ''extraordinary circumstances,'' USCIS may use its discretion to excuse this requirement on a case-by-case basis.

USCIS does not currently have data specific to whistleblower protections for the H–1B program nor does it have data on other similar types of reports on worker issues from the H–2 population.[162] Therefore, it is possible that whistleblower protections may afford H–2 workers the ability to expose issues that harm beneficiaries or are not congruent with the intent of H–2 employment. This impact could, potentially, improve working conditions but the extent to which H–2 workers would cooperate in program integrity activities as a direct result of prohibitions on specified employer retaliations is unknown. It is also possible that employers may face increased RFEs, denials, or other actions on their H–2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H–2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers. The Department invites comments from petitioners regarding compliance costs resulting from whistleblower protections.

(3) Prohibited Fees

DHS is proposing to revise the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H–2A and H–2B workers, including new bars on approval for some H–2 petitions. The economic impacts of these proposed changes are difficult to assess because USCIS currently does not have the means to track or identify petitions associated with the payment of prohibited fees. Prohibited fees are paid by a worker and include, but are not limited to, withholding or deducting workers'

USCIS, Service Center Operations. *See Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022).

[158] The H–2B petitions were randomly selected so they do not represent a population that data led USCIS to believe were more vulnerable to fraud or abuse.

[159] Site visits can be categorized as ''inconclusive'' for a variety of reasons including, but not limited to, noncooperation or a lack of personnel (petitioner, beneficiary, or other relevant personnel) present at the respective site.

[160] Data from USCIS FDNS, Reports and Analysis Branch.

[161] *See* USCIS, Combating Fraud and Abuse in the H–1B Visa Program (Feb. 9, 2021), *https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program.*

[162] WHD prohibits retaliation and publishes fact sheets and other resources online. *See, e.g.,* Retaliation | U.S. Department of Labor (dol.gov); WHD, Fact Sheet #77D: Retaliation Prohibited under the H–2A Temporary Visa Program (Apr. 2012), *https://www.dol.gov/agencies/whd/fact-sheets/77d-h2a-prohibiting-retaliation;* Fact Sheet #78H: Retaliation Prohibited under the H–2B Temporary Visa Program, *https://www.dol.gov/agencies/whd/fact-sheets/78h-h2b-retaliation-prohibited.*

wages; directly or indirectly paying a recruiter, employer, agent, or anyone else in the recruitment chain agent; or paying for other work-related expenses the employer is required by statute or regulation to cover.

USCIS generally has no direct interaction with beneficiaries, so it currently depends in significant part on findings by DOS consulates to determine if prohibited fees have been paid, usually in relation to applicant interviews or investigations. For example, the DOS Office of Fraud Prevention, in collaboration with several consulates in Mexico, confirmed they do not have data on the average number of prohibited fees charged nor the amount paid.[163] A consulate in Mexico shared that during visa interviews beneficiaries may disclose the payment of prohibited fees, but typically these admissions are for fees paid to previous facilitators or employers from returning applicants who are going to work for a new employer.[164] This is likely due to disincentives to admitting to the payment of fees for current petitions for fear of losing the proffered job opportunity in the United States.[165] DOS assumes it only receives reports from a small fraction of the workers who pay prohibited fees because they still are able to obtain work and make more money in the United States than they would in Mexico regardless of whether they pay fees or not leading some workers to choose not to report the prohibited fees.[166] Further, DOS also noted that workers usually only report paying prohibited fees when fees are increased, when they do not have the money to pay the fee in a current year, or they are excluded from being listed on a petition.

Moreover, DOS noted that prohibited fees are commonplace and pervasive in the H–2 program, but that this issue largely goes unreported.[167] Consular employees noted, in their experience, that fees ordinarily range from $800 to $1,000 for a beneficiary to be included on a petition but that non-monetary transfers may also occur.[168]

Data on the prevalence of prohibited fees is very limited. However, according to one non-profit organization that conducted a survey, about 58 percent of H–2 workers reported paying a prohibited fee.[169] Since data on the prevalence of prohibited fees is very limited, we use the 58 percent estimate as a primary estimate of beneficiaries that may be subject to some form of prohibited fee. Using this estimated percentage, we can multiply by the total number of FY 2022 beneficiaries to consider the potential population impacted by prohibited fees.[170] If we assume 58 percent of beneficiaries pay an average fee of $900,[171] we estimate that prohibited fees (including those incurred both within and outside of the United States) may have cost H–2A workers around $216.7 million and H–2B workers around $96.9 million in FY 2022.[172] If prohibited fees are a prevalent problem on such an economically significant scale, it may not be reasonable to assume that this rule would stop all fees paid by H–2 workers. However, for beneficiaries who currently pay prohibited fees or could pay them in the future, this proposed provision seeks to minimize the occurrence and burden of prohibited fees on H–2 beneficiaries.

It is difficult to estimate the specific impacts that this proposed change would have, but DHS expects that enhanced consequences for petitioners would act as a deterrent to charge or collect prohibited fees from H–2 workers. In addition, the harsher consequences for employers charging prohibited fees could, in conjunction with whistleblower protections proposed in this rule, reduce disincentives for workers to report that prohibited fees had been charged. However, DHS is not able to estimate whether and to what extent those disincentives are expected to be reduced. Consequently, under this proposed rule, there would be additional unquantifiable and non-monetizable reductions in indenture and harms from other more serious abuses such as those discussed in section III, Background.

DHS welcomes public comment on the prevalence, population, and cost of prohibited fees and their impacts on H–2 workers.

(4) Mandatory and Discretionary Bars

As another integrity measure and deterrent for petitioners that have been found to have committed labor law violations or abused the H–2 programs, DHS is proposing to institute certain mandatory and discretionary bars to approval of an H–2A or H–2B petition. The impacts of this proposed provision are targeted at H–2 petitioners that have committed serious violations or have otherwise not complied with H–2 program requirements.

To understand the baseline, USCIS has data on current debarments. USCIS relies on debarment data shared by DOL to determine the eligibility of certain H–2 petitions. As of December 19, 2022, there were 76 active debarments for both the H–2A and H–2B programs. Historically, from FY 2013 through FY 2022, USCIS has tracked a total of 326 recorded debarments for a company, individual or agent as provided by DOL. USCIS regularly performs additional research to confirm debarment and petitioner information to assist in adjudications. For the period of debarment, a petition covered by the debarment may not be approved where the debarred organization, or its successor-in-interest in some limited circumstances, whether or not having the same name as that listed, is the petitioner or employer.

Costs under this provision of the proposed rule would be borne by such petitioners or their successor in interest through denials and bars to participating in the H–2 program for a period of between 1 to 5 years. More petitioners may face financial losses as a result of these bars because they may lose access to labor for extended periods, which could result in too few workers, loss of revenue, and some could go out of business. DHS expects program participants to comply with program requirements, however, and notes that those that do not could experience significant impacts due to this proposed rule. DHS expects that the proposed rule would hold certain petitioners more accountable for violations, including certain findings of labor law and other violations, and would result in fewer instances of worker exploitation and safer working environments for beneficiaries.

The Federal Government may experience costs associated with implementing this provision.

[163] Information from email discussions. *See* DOS Emails Re_Prohibited fees (H–2) (Sept. 19, 2022).

[164] *Id.*

[165] Workers have a disincentive to report prohibited fees since regulations stipulate that a visa should be denied to those admitting to paying these fees.

[166] Information from email discussions. *See* DOS Emails Re_Prohibited fees (H–2) (Sept. 19, 2022).

[167] *Id.*

[168] In additional to the non-exhaustive list of prohibited fees, there are also other types of non-fee payments, including favors, meals, or even the transfer of livestock.

[169] *See* Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H–2 Temporary Worker Program and Recommendations for Change.* Not dated. Available at *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.* Last accessed Mar. 31, 2023.

[170] FY 2022 Total H–2A beneficiaries 415,229 × 0.58 = 240,833 (rounded); FY 2022 Total H–2B beneficiaries 185,705 × 0.58 = 107,709 (rounded).

[171] We take an average of the range provided by the consular office in Mexico: ($800+$1000)/2=$900.

[172] Calculations: Half of FY 2022 H–2A beneficiaries 240,833 × $900 fee = $216.7 million (rounded); Half of FY 2022 H–2B beneficiaries 107,709 × $900 fee = $96.9 million (rounded).

Specifically, USCIS adjudicators may require additional time associated with reviewing petitioner information relating to debarment by DOL and other determinations of past violations more closely (as they would now be able to consider past noncompliance in the current adjudications), issuing an RFE or NOID, and, if the violation determination is covered under the discretionary bar provision, including when debarment has concluded, conducting the discretionary analysis for relevant petitions. Additionally, the proposed expansion of bases for debarment as well as the way debarments are tracked in current USCIS systems would require additional inter-agency coordination and information sharing.

DHS welcomes public comments on any costs resulting from these proposed mandatory and discretionary bars to employers, if the proposed bars are adequate to address misconduct, and if there are data available that should be considered.

b. Worker Flexibilities

DHS is proposing changes to provide greater flexibility to H–2A and H–2B workers by implementing grace periods, clarifying the responsibility of H–2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation, clarifying expressly that H–2 workers may take steps toward becoming a permanent resident of the United States while still maintaining lawful nonimmigrant status, and expanding job portability. We address each of the provisions regarding these worker flexibilities in turn below.

(1) Grace Periods

DHS proposes to provide increased flexibility for H–2 workers by extending grace periods. Workers would not experience an increase in work time due to these extended grace periods. More specifically, this rule proposes to provide the same 10-day grace period prior to a petition's validity period that H–2B nonimmigrants currently receive to H–2A nonimmigrants, resulting in the extension of the initial grace period of an approved H–2A petition from 1 week to 10 days. The proposed initial grace period would also apply to their dependents in the H–4 visa classification. USCIS does not have data on how early H–2 workers arrive in the United States prior to a petition's validity period. As a result, we do not know how many H–2B workers currently or historically arrive up to 10 days prior to their employment start date, nor do we know how many H–2A workers currently or historically arrive a full week (7 days) early. Further, the portion of the H–2A populations that may benefit from this proposed provision is unknown. Extending the grace period prior to a petition's validity period for H–2A workers by 3 days may result in additional costs to employers, such as for housing.[173] However, since H–2A employers pay for and normally arrange transportation to the worksite, USCIS assumes employers would weigh the costs of providing additional days of housing to H–2A workers against the benefit of providing their employees with additional time to prepare for the start of work. For example, it may be beneficial for an employer to provide workers additional time to adjust to a new time zone or climate.

DHS also proposes to extend the 10-day grace period following the expiration of their petition from 10 days to 30 days for H–2B nonimmigrants, subject to the 3-year maximum limitation of stay. USCIS does not have data on the length of time H–2A or H–2B workers typically spend in the United States following the validity period of a petition because departures from the United States are not always tracked. Unlike the general practice regarding entries, departures are not always tracked and do not typically require an encounter with U.S. Customs and Border Protection, so it is difficult to determine when nonimmigrants leave the United States. Therefore, the population that may benefit from this proposed provision is unknown. However, because this proposed rule would extend only the H–2B grace period, USCIS does not expect any additional costs to employers as they generally are not required to provide housing for their workers during the time of employment or during the grace period. The extended grace period for H–2B workers would benefit the workers by providing additional time to prepare for departure or seek alternative work arrangements such as applying for an extension of stay based on a subsequent offer of employment or porting to a new employer. Additionally, this proposed provision would align the grace periods for H–2A and H–2B workers so that they both are afforded 10 days prior to the approved validity period and 30 days following the expiration of an H–2 petition, thereby reducing confusion for potential employers and better ensuring consistency in granting workers the grace periods.

DHS is also proposing to provide a new 60-day grace period following a cessation of H–2 employment or until the end of the authorized period of admission, whichever is shorter. USCIS does not have data on H–2 employment cessations and, therefore, the impact of this provision on the portion of the H–2A and H–2B populations is unknown. However, this provision would likely offer H–2 workers time to respond to sudden or unexpected changes related to their employment, regardless of the reason for employment cessation. The time could be used to seek new employment, prepare for departure from the United States, or seek a change of status to a different nonimmigrant classification.

DHS welcomes public comments on any costs resulting from the proposed grace period extensions from 1 week to 10 days prior to a petition's validity period for H–2A nonimmigrants and from 10 days to 30 days following the expiration of their petition for H–2B nonimmigrants, subject to the 3-year maximum limitation of stay. DHS also welcomes public comments on the proposed grace period of 60 days following a cessation of H–2 employment or until the end of the authorized period of admission, whichever is shorter.

(2) Transportation Costs for Revoked H–2 Petitions

DHS proposes to add language clarifying that upon revocation of an H–2A or H–2B petition, the petitioning employer would be liable for the H–2 beneficiary's reasonable costs of return transportation to their last place of foreign residence abroad. Under existing 20 CFR 655.20(j)(1)(ii) and 20 CFR 655.122(h)(2), as well as 8 CFR 214.2(h)(6)(i)(C) and 8 CFR 214.2(h)(6)(vi)(E), petitioning employers are already generally liable for the return transportation costs of H–2 workers, so this proposed change is not expected to result in any additional costs to employers.

(3) Effect on an H–2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or Immigrant Visa

DHS proposes to clarify that H–2 workers may take certain steps toward becoming lawful permanent residents of the United States while still maintaining lawful nonimmigrant status. The population impacted by this provision can be seen in Table 5. Historical receipts data for Form I–485

[173] H–2A workers must be provided housing. *See* WHD, *H–2A: Temporary Agricultural Employment of Foreign Workers, https://www.dol.gov/agencies/whd/agriculture/h2a.*

(Application to Register Permanent Residence or Adjust Status) show a 5-year total of 9,748 receipts from applicants with H–2A and H–2B status. The annual average is 1,950 receipts.

TABLE 5—FORM I–485 RECEIPTS FROM APPLICANTS WITH H–2A AND H–2B STATUS, FY 2018 THROUGH FY 2022

Fiscal year	Receipts	Approved	Denied	Admin close/ withdraw
2018	1,294	240	22	2
2019	1,698	1,032	81	2
2020	2,491	1,366	87	1
2021	2,701	2,411	97	2
2022	1,564	1,832	138	6
Total	9,748	6,881	425	13
5-year average	1,950	1,376	85	3

Source: USCIS Office of Policy and Strategy—C3, ELIS USCIS Data System as of Nov. 4, 2022.

USCIS does not have information on how many H–2 workers have been deemed to have violated their H–2 status or abandoned their foreign residence. However, DHS expects this could enable some H–2 workers who have otherwise been dissuaded to pursue lawful permanent residence with the ability to do so without concern over becoming ineligible for H–2 status. This proposed rule would not expand the underlying eligibility of H–2 workers for lawful permanent resident status.

DHS welcomes public comments on the impacts that may result from this proposed provision to allow H–2 workers to take steps toward becoming permanent residents of the United States.

(4) Portability

DHS proposes to permanently provide portability for eligible H–2A and H–2B nonimmigrants. The population affected by this provision are nonimmigrants in H–2A and H–2B status who are present in the United States on whose behalf a nonfrivolous H–2 petition for new employment has been filed, with a request to amend or extend the H–2A or H–2B nonimmigrant's stay in the same classification they currently hold, before their period of stay expires and who have not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment. Codifying this provision in regulation for H–2 nonimmigrants would provide stability and job flexibility to the beneficiaries of approved H–2 visa petitions. This portability provision would facilitate the ability of individuals to move to more favorable employment situations and/or extend employment in the United States without being tied to one position with one employer. Additionally, DHS is proposing an additional portability provision that would clarify that H–2 employers must comply with all H–2 program requirements and responsibilities (such as worker protections) in the event that a petition for a porting worker is withdrawn or denied.

Currently, portability is available on a permanent basis to H–2A workers, but it is limited to E-Verify employers.[174] E-Verify is a DHS web-based system that allows enrolled employers to confirm the identity and eligibility of their employees to work in the United States by electronically matching information provided by employees on the Employment Eligibility Verification (Form I–9) against records available to DHS and the Social Security Administration (SSA).[175] DHS does not charge a fee for employers to participate in E-Verify and create cases to confirm the identity and employment eligibility of newly hired employees. Under this proposed rule, employers petitioning for a porting H–2A worker would no longer need to be enrolled in E-Verify, but would remain subject to all program requirements based on the approved TLC and the filing of the H–2 petition.

Although there is no fee to use E-Verify, this proposed requirement would result in savings to newly enrolling employers. Employers that newly enroll in E-Verify to hire H–2 workers incur startup enrollment or program initiation costs as well as additional opportunity costs of time for users to participate in webinars and learn about and incorporate any new features and system updates that E-Verify may have every year. DHS assumes that most employers that are currently participating in E-Verify would not realize cost savings of these expenses since they previously incurred enrollment costs and would continue to participate in webinars and incorporate any new E-Verify features and system changes regardless of this proposed rule.[176] Additionally, DHS expects that only those employers who would have enrolled for the explicit purpose of petitioning on behalf of a porting employee would realize a cost savings for verifying the identity and work authorization of all their newly hired employees, including any new H–2A workers as a result of this proposed rule. For employers currently enrolled in E-Verify that choose to hire an H–2A worker, the proposed rule would not result in a cost savings to such employers since they already must use E-Verify for all newly hired employees as of the date they signed the E-Verify Memorandum of Understanding

[174] While unrelated to this NPRM, we note that on April 20, 2020, a final rule published to temporarily amend its regulations to allow H–2A workers to immediately work for any new H–2A employer to mitigate the impact on the agricultural industry due to COVID–19. This temporary final rule (TFR) was effective from April 20, 2020, through August 18, 2020. *See Temporary Changes to Requirements Affecting H–2A Nonimmigrants Due to the COVID–19 National Emergency,* 85 FR 21739 (Apr. 20, 2020). Another TFR published August 20, 2020, again allowing H–2A workers to immediately work for any new H–2A employer. That TFR was effective from August 19, 2020, through August 19, 2023 and allowed employers to request the flexibilities under this TFR by filing an H–2A petition on or after August 19, 2020, and through December 17, 2020. *See Temporary Changes to Requirements Affecting H–2A Nonimmigrants Due To the COVID–19 National Emergency: Partial Extension of Certain Flexibilities,* 85 FR 51304 (Aug. 20, 2020).

[175] *See* DHS, *About E-Verify, https://www.e-verify.gov/about-e-verify* (last updated Apr. 10, 2018).

[176] Employers already participating in E-Verify likely already attend webinars and learn about and incorporate new features and system changes annually because they voluntarily chose to enroll or because of rules or regulations beyond the scope of this proposed rule. DHS anticipates that such employers would continue to use E-Verify regardless of their decision to hire H–2A workers or not.

(MOU).[177] Therefore, with or without the proposed rule, an employer already enrolled in E-Verify that chooses to hire a porting H–2A worker would continue to incur the opportunity cost of time to confirm the employment authorization of any newly hired employees.

Participating in E-Verify and remaining in good standing requires employers to enroll in the program online,[178] electronically sign the associated MOU with DHS that sets the terms and conditions for participation and create E-Verify cases for all newly hired employees. The MOU requires employers to abide by lawful hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of E-Verify.[179] If an employer violates the terms of this agreement, it can be grounds for immediate termination from E-Verify.[180] Additionally, employers are required to designate and register at least one person that serves as an E-Verify administrator on their behalf.

For this analysis, DHS assumes that each employer participating in E-Verify designates one HR specialist to manage the program on its behalf. Based on the most recent Paperwork Reduction Act (PRA) Information Collection Package for E-Verify, DHS estimates the time burden for an HR specialist to undertake the tasks associated with E-Verify. DHS estimates the time burden for an HR specialist to complete the enrollment process is 2 hours 16 minutes (2.26 hours), on average, to provide basic company information, review and sign the MOU, take a new user training, and review the user guides.[181] Once enrolled in E-Verify, DHS estimates the time burden is 1 hour to users who may participate in voluntary webinars and learn about and incorporate new features and system updates to E-Verify annually.[182] This may be an overestimate in some cases as webinars are not mandatory, but we recognize that some recurring burden to users exists to remain in good standing with E-Verify.

Cost savings due to this provision relate only to the opportunity costs of time to petitioners associated with the time an employer would save by not newly enrolling or participating in E-Verify. In this analysis, DHS uses an hourly compensation rate for estimating the opportunity cost of time for an HR specialist. DHS uses this occupation as a proxy for those who might prepare and complete the Form I–9, Employment Eligibility Verification, and create the E-Verify case for an employer. DHS notes that not all employers may have an HR specialist, but rather some equivalent occupation may prepare and complete the Form I–9 and create the E-Verify case.

According to Bureau of Labor Statistics (BLS) data, the average hourly wage rate for HR specialists is $35.13.[183] DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per E-Verify user, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.[184] Therefore, DHS calculates an average hourly compensation rate of $50.94 for HR specialists.[185] Applying this average hourly compensation rate to the estimated time burden of 2.26 hours for the enrollment process, DHS estimates an average opportunity cost of time savings for a new employer to enroll in E-Verify is $115.12.[186] DHS assumes the estimated opportunity cost of time to enroll in E-Verify is a one-time cost to employers. In addition, DHS estimates an opportunity cost of time savings associated with 1 hour of each E-Verify user to attend voluntary webinars and learn about and incorporate new features and system changes for newly enrolled entities would be $50.94 annually in the years following enrollment.

Newly enrolled employers would also incur opportunity costs of time savings from not having to enter employee information into E-Verify to confirm their identity and employment authorization. DHS estimates the time burden for an HR specialist to create a case in E-Verify is 7.28 minutes (or 0.121 hours).[187] Therefore, DHS estimates the opportunity cost of time savings would be approximately $6.57 per case.[188] These employers would not be able to verify the employment eligibility information of newly hired employees against government data systems if they fail to register and use E-Verify.

Table 6 shows the number of Form I–129 H–2A petitions filed for extensions of stay due to change of employer and Form I–129 H–2A petitions filed for new employment for FY 2018 through FY 2022. The average rate of extension of stay due to change of employer compared to new employment was approximately 6.7 percent over this time period. USCIS also considered the number of beneficiaries that correspond to the Form I–129 H–2A petitions that filed extensions of stay due to a change of employer to estimate the average number of beneficiaries per petition of six. Table 6 also shows that although petitions have been increasing for extension of stay due to change of employer, the number of beneficiaries on each petition has declined from FY 2018 to FY 2022. This indicates that it may be harder for petitioners to find porting workers. One reason may be because petitioners face certain constraints such as the ability for petitioners to access workers seeking to port or a limited number of workers seeking to port.

[177] *See* DHS, *About E-Verify, Questions and Answers* (last updated Sept. 15, 2022), *https://www.e-verify.gov/about-e-verify/questions-and-answers?tid=All&page=0.*

[178] *See* DHS, *Enrolling in E-Verify, The Enrollment Process* (last updated Aug. 9, 2022), *https://www.e-verify.gov/employers/enrolling-in-e-verify/the-enrollment-process.*

[179] An employer that discriminates in its use of E-Verify based on an individual's citizenship status or national origin may also violate the INA's anti-discrimination provision, at 8 U.S.C. 1324b.

[180] *See* USCIS, *The E-Verify Memorandum of Understanding for Employers* (June 1, 2013), *http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.*

[181] The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. *See* PRA E-Verify Program (OMB Control Number 1615–0092) (Mar. 30, 2021). The PRA Supporting Statement can be found at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202103-1615-015,* under Question 12 (Last accessed Apr. 4, 2023).

[182] *Id.*

[183] *See* BLS, Occupational Employment and Wages, May 2022, Human Resources Specialist (13–1071), *https://www.bls.gov/oes/2022/may/oes131071.htm.*

[184] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $42.48/$29.32 = 1.45 (rounded). See BLS, Economic News Release, *Employer Cost for Employee Compensation—December 2021,* Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (Mar. 17, 2023), *https://www.bls.gov/news.release/archives/ecec_03172023.pdf.*

[185] Calculation: $35.13 average hourly wage rate for HR specialists × 1.45 benefits-to-wage multiplier = $50.94 (rounded).

[186] Calculation: 2.26 hours for the enrollment process × $50.94 total compensation wage rate for an HR specialist = $115.12.

[187] The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. *See* PRA E-Verify Program (OMB Control Number 1615–0092), March 30, 2021. The PRA Supporting Statement can be found at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202103-1615-015* under Question 12 (Last accessed Apr. 4, 2023)

[188] Calculation: 0.121 hours to submit a query × $50.94 total compensation wage rate for an HR specialist = $6.57 (rounded).

TABLE 6—NUMBER OF FORM I–129 H–2A PETITIONS AND BENEFICIARIES FILED FOR EXTENSION OF STAY DUE TO CHANGE OF EMPLOYER AND FORM I–129 H–2A PETITIONS FILED FOR NEW EMPLOYMENT, FY 2018—FY 2022

Fiscal year	Form I–129 H–2A petitions filed for extension of stay due to change of employer	Form I–129 H–2A petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings	Number of beneficiaries corresponding to Form I–129 H–2A extension of stay petitions filed	Average number of beneficiaries per petition filed for extension of stay due to change of employer
	A	B	C = A/B	D	E = D/A
2018	425	10,841	0.039	3,566	8
2019	626	12,177	0.051	4,265	7
2020	915	12,989	0.070	5,995	7
2021	1,334	15,128	0.088	7,226	5
2022	1,526	18,093	0.084	7,250	5
Total	4,826	69,228	.....	28,302	.....
5-year Average	965	13,846	0.067	5,660	6

Source: USCIS, Office of Policy and Strategy—C3, ELIS USCIS Data System, as of Oct. 18, 2022 and USCIS Analysis.

DHS expects that existing H–2A petitioners would continue to participate in E-Verify and would thus not realize a cost savings due to this proposed rule. For employers that do not yet port H–2A workers but do obtain TLCs from DOL, they would experience a cost-savings relevant to avoiding enrollment and participation in E-Verify but would not be able to verify the employment eligibility information of newly hired employees against government data systems. However, for employers that do not yet port H–2A workers and do not yet obtain TLCs, the cost-savings would be offset by their need to submit DOL's Employment and Training Administration (ETA) Form 9142A. The public reporting burden for Form ETA–9142A is estimated to average 3.63 hours per response for H–2A.[189] Depending on the filer, the cost to submit Form ETA–9142A is estimated at $184.91 for an HR specialist, $414.44 for an in-house lawyer, and $ 714.57 for an out-sourced lawyer.[190] Compared to the absolute minimum opportunity cost of time to enroll in, participate in an hour of training, and submit one query in E-Verify of $172.63,[191] regardless of the filer, a new H–2A porting employer needing to obtain TLCs would not experience a cost-savings in the first year following this rule.[192]

By removing the requirement for a petitioner to participate in E-Verify in order to benefit from portability, this provision may result in some increased demand for H–2A petitioners to apply to port eligible H–2A workers. DHS expects H–2A petitioners that already hire porting H–2A beneficiaries to continue to use E-Verify in the future. However, DHS is unable to estimate the number of future employers that would opt not to enroll in E-Verify in the future as a result of this rule or how many would need to obtain TLCs. DHS does not expect any reduction in protection to the legal workforce as a result of this rule as some H–2A petitioners would continue to use E-Verify. Any new petitioners for porting H–2A workers would still be required to obtain TLCs through DOL, these H–2A employers would be subject to the site visit requirements and comply with the terms and conditions of H–2 employment set forth in this NPRM and under other related regulations, and the porting worker would have already been approved to legally work in the United States as an H–2A worker.

Temporary portability for H–2B workers has been provided as recently as the FY 2023 H–2B Supplemental Cap temporary final rule (TFR) and was available under previous supplemental caps dating back to FY 2021.[193] However, data show that there is a longer history of extensions of stay due to changes of employer for H–2B petitions filed even in years when portability was not authorized.[194] Since it is difficult to isolate the impacts of inclusion of temporary portability provisions in the FY 2021 through FY 2023 H–2B Supplemental Cap TFRs from the extensions of stay due to changes of employer that would be expected in the absence of this proposed provision, we reproduce the FY 2023 H–2B Supplemental Cap TFR's analysis here.[195] Additionally, USCIS is unclear how many additional H–2B visas Congress would allocate in future fiscal

[189] *See* DOL, H–2A Application for Temporary Employment Certification Form ETA–9142A (OMB Control Number 1205–0466), Expires Oct. 31, 2025. The PRA Supporting Statement can be found at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202303-1205-002* under Question 12 (Last accessed Apr. 4, 2023); *see also* DOL, Supplementary Documents, Appendix—Breakdown of Hourly Burden Estimates, H–2A Application for Temporary Employment Certification Form ETA–9142A (OMB Control Number 1205–0537), *Id.* at Section C. (Last accessed Apr. 4, 2023). DOL estimates the time burden for completing Form ETA–9142A is 3.63 hours, including 0.33 hours to complete Form ETA–9142A, 1.33 hours to H–2ALC Filing Requirements, 0.50 hours to complete Waiver for Emergency Situations, 0.25 hours to complete Modify Application/Job Order, 0.50 hours to complete Amend Application/Job Order, and 0.50 hours to complete Herder Variance Request.

[190] *Calculations:* HR specialist: $50.94 hourly wage × 3.63 hours = $184.91 (rounded), In-house lawyer: $114.17 hourly wage × 3.63 hours = $414.44 (rounded); Out-sourced lawyer = $196.85 hourly wage × 3.63 hours = $714.57 (rounded).

[191] Calculation: $115.12 enrollment + $50.94 annual training + $6.57 query submission = $172.63.

[192] DHS recognizes that the opportunity cost of time would be higher than this absolute minimum because employers would have more than one employee and E-Verify participants are required to query every employee.

[193] *See Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022).

[194] *Id.*

[195] On May 14, 2020, a final rule published to temporarily amend its regulations to allow H–2B workers to immediately work for any new H–2B employer to mitigate the impact on nonagricultural services or labor essential to the U.S. food supply chain due to COVID–19. Since the analysis is based on annual fiscal years, data from the months between May and September 2020 are not able to be separated out to determine those early impacts on portability. *See Temporary Changes to Requirements Affecting H–2B Nonimmigrants Due to the COVID–19 National Emergency,* 85 FR 28843 (May 14, 2020).

years beyond the 66,000 statutory cap for H–2B nonimmigrants.

The population affected by this provision are nonimmigrants in H–2B status who are present in the United States and the employers with valid TLCs seeking to hire H–2B workers. In the FY 2023 H–2B Supplemental Cap TFR, USCIS uses the population of 66,000 H–2B workers authorized by statute and the 64,716 additional H–2B workers authorized by the rule as a proxy for the H–2B population that could be currently present in the United States.[196] USCIS uses the number of Form I–129 petitions filed for extension of stay due to change of employer relative to the number of petitions filed for new employment from FY 2011 though FY 2020. This includes the 10 years prior to the implementation of the first portability provision in an H–2B Supplemental Cap TFR. Using these data, we estimate the baseline rate and compare it to the average rate from FY 2011 through FY 2020 (Table 7). We find that the average rate of extension of stay due to change of employer compared to new employment from FY 2011 through FY 2020 is approximately 10.5 percent.

TABLE 7—NUMBERS OF FORM I–129 H–2B PETITIONS FILED FOR EXTENSION OF STAY DUE TO CHANGE OF EMPLOYER AND FORM I–129 H–2B PETITIONS FILED FOR NEW EMPLOYMENT, FY 2011 THROUGH FY 2020

Fiscal year	Form I–129 H–2B petitions filed for extension of stay due to change of employer	Form I–129 H–2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings
2011	360	3,887	0.093
2012	293	3,688	0.079
2013	264	4,120	0.064
2014	314	4,666	0.067
2015	415	4,596	0.090
2016	427	5,750	0.074
2017	556	5,298	0.105
2018	744	5,136	0.145
2019	812	6,251	0.130
2020	804	3,997	0.201
FY 2011 through FY 2020 Total	4,990	47,389	0.105

Source: USCIS, Office of Performance and Quality—SAS PME C3 Consolidated, as of Oct. 10, 2022, TRK 10638

In FY 2021, the first year an H–2B Supplemental Cap TFR included a portability provision, there were 1,113 petitions filed using Form I–129 for extension of stay due to change of employer compared to 7,207 petitions filed for new employment.[197] In FY 2022, there were 1,791 petitions filed using Form I–129 for extension of stay due to change of employer compared to 9,233 petitions filed for new employment.[198] Over the period when a portability provision was in place for H–2B workers, the rate of petitions filed using Form I–129 for extension of stay due to change of employer relative to new employment was 17.7 percent.[199] This is above the 10.5 percent rate of filings expected when there was no portability provision in place. We estimate that a rate of about 17.7 percent should be expected in periods with a portability provision in a H–2B Supplemental Cap TFR that provides an additional allocation of visas. Using 4,398 as our estimate for the number of petitions filed using Form I–129 for H–2B new employment in FY 2023, we estimate that 462 petitions for extension of stay due to change of employer would be filed in absence of this rulemaking's portability provision. [200] [201] With the rule's portability provision in effect, we estimate that 778 petitions would be filed using Form I–129 for extension of stay due to change of employer.[202] As a result of this provision, we estimate 316 additional petitions using Forms I–129 would be filed.[203] As shown in Table 12

[196] This number may overestimate H–2B workers who have already completed employment and departed and may underestimate H–2B workers not reflected in the current cap and long-term H–2B workers. In FY 2021, USCIS approved 735 requests for change of status to H–2B, and Customs and Border Protection (CBP) processed 1,341 crossings of visa-exempt H–2B workers. *See* USCIS, *Characteristics of H–2B Nonagricultural Temporary Workers FY2021 Report to Congress, https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf* (Mar. 10, 2022). DHS assumes some of these workers, along with current workers with a valid H–2B visa under the cap, could be eligible to port under this new provision. DHS does not know the exact number of H–2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.

[197] USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, data queried October 2022, TRK 10638.

[198] USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, data queried October 2022, TRK 10638.

[199] *Calculation, Step 1:* 1,113 Form I–129 petitions for extension of stay due to change of employer FY 2021 + 1,791 Form I–129 petitions for extension of stay due to change of employer in FY 2022 = 2,904 Form I–129 petitions filed extension of stay due to change of employer in portability provision years.

Calculation, Step 2: 7,207 Form I–129 petitions filed for new employment in FY 2021 + 9,233 Form I–129 petitions filed for new employment in FY 2022 = 16,440 Form I–129 petitions filed for new employment in portability provision years.

Calculation, Step 3: 2,904 extensions of stay due to change of employment petitions/16,440 new employment petitions = 17.7 percent rate of extension of stay due to change of employment to new employment.

[200] *Calculation for expected petitions:* 66,000 beneficiaries allowed by the annual statutory cap/15.01 historical average of beneficiaries per petition = 4,398 Forms I–129 filed due to the rule's portability provision (rounded).

[201] *Calculation:* 4,398 Form I–129 H–2B petitions filed for new employment × 10.5 percent = 462 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision.

[202] *Calculation:* 4,398 Form I–129 H–2B petitions filed for new employment × 17.7 percent = 778 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision.

45.84 percent of petitions using Form I–129 will be filed by an in-house or outsourced lawyer. Therefore, we expect that a lawyer would file 145 of these petitions and an HR specialist would file the remaining 171.[204] Similarly, we estimated that about 93.57 percent of petitions using Form I–129 for H–2B beneficiaries are filed with Form I–907 to request premium processing. As a result of this portability provision, we expect that an additional 296 requests using Form I–907 would be filed.[205] We expect lawyers to file 136 requests using Forms I–907 and HR specialists to file the remaining 160 requests.[206]

Petitioners seeking to hire H–2B nonimmigrants who are currently present in the United States in lawful H–2B status would need to file Form I–129 and pay the associated fees.[207] Additionally, if a petitioner is represented by a lawyer, the lawyer must file Form G–28; if premium processing is desired, a petitioner must file Form I–907 and pay the associated fee. We expect these actions to be performed by an HR specialist, in-house lawyer, or an outsourced lawyer. Moreover, as previously stated, we expect that about 45.84 percent of petitions using Form I–129 would be filed by an in-house or outsourced lawyer. Therefore, we expect that 145 petitions would be filed by a lawyer and the remaining 171 petitions would be filed by an HR specialist. The opportunity cost of time to file a Form I–129 H–2B petition would be $236.36 for an HR specialist; and the opportunity cost of time to file a Form I–129 H–2B petition with accompanying Form G–28 would be $624.51 for an in-house lawyer and $1,076.77 for an outsourced lawyer.[208] Therefore, we estimate the cost of the additional petitions filed using Form I–129 from the portability provision for HR specialists would be $40,418.[209] The estimated cost of the additional petitions filed using Form I–129 accompanied by Forms G–28 from the portability provision for lawyers would be $90,554 if filed by in-house lawyers and $156,132 if filed by outsourced lawyers.[210]

We previously stated that about 93.57 percent of Form I–129 H–2B petitions are filed with Form I–907 for premium processing. As a result of this provision, we expect that an additional 296 requests for premium processing using Form I–907 will be filed.[211] We expect 136 of those requests would be filed by a lawyer and the remaining 160 would be filed by an HR specialist.[212] The estimated opportunity cost of time to file Form I–907 would be about $29.55 for an HR specialist; and the estimated opportunity cost of time for an in-house lawyer to file Form I–907 would be approximately $66.22 and for an outsourced lawyer it would be about $114.17.[213] The estimated annual cost of filing additional requests for premium processing using Form I–907 if HR specialists file would be approximately $4,728.[214] The estimated annual cost of filing additional requests for premium processing using Form I–907 would be about $9,006 if filed by in-house lawyers, and approximately $15,527 if filed by outsourced lawyers.[215]

The estimated annual cost of this provision ranges from $144,706 to $216,805 depending on what share of the forms are filed by in-house or outsourced lawyers.[216]

The transfer payments from filing petitions using Form I–129 for an H–2B beneficiary include the filing costs to submit the form. The current filing fee for Form I–129 is $460 plus an additional fee of $150 for employers petitioning for H–2B beneficiaries.[217] These filing fees are not a cost to society or an expenditure of new resources but a transfer from the petitioner to USCIS in exchange for agency services. USCIS anticipates that petitioners would file an additional 316 petitions using Form I–129 due to the portability provision in the proposed rule. The annual value of transfers from petitioners to the Government for filing Form I–129 due to the proposed rule would be approximately $192,760.[218]

Additionally, employers may use Form I–907 to request premium processing of Form I–129 petitions for H–2B visas. The current filing fee for Form I–907 to request premium processing for H–2B petitions is $1,500.[219] Based on historical trends,

[203] *Calculation:* 778 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision—462 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision = 316 Form I–129 H–2B petition increase as a result of portability provision.

[204] *Calculation, Lawyers:* 316 additional Form I–129 due to portability provision × 45.84 percent of Form I–129 for H–2B positions filed by an attorney or accredited representative = 145 (rounded) estimated Form I–129 filed by a lawyer.

Calculation, HR specialist: 316 additional Form I–129 due to portability provision—145 estimated Form I–129 filed by a lawyer = 171 estimated Form I–129 filed by an HR specialist.

[205] *Calculation:* 316 Form I–129 H–2B petitions × 93.57 percent premium processing filing rate = 296 (rounded) Forms I–907.

[206] *Calculation, Lawyers:* 296 Forms I–907 × 45.84 percent filed by an attorney or accredited representative = 136 Forms I–907 filed by a lawyer.

Calculation, HR specialists: 296 Forms I–907—136 Forms I–907 filed by lawyer = 160 Forms I–907 filed by an HR specialist.

[207] The current filing fee for Form I–129 is $460 and employers filing H–2B petitions must submit an additional fee of $150. *See* Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I–129, OMB Control Number 1615–0009 (expires November 30, 2025), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

[208] *Calculation, HR Specialist:* $50.94 hourly opportunity cost of time x 4.64-hour time burden for form I–129 = $236.36 estimated cost to file a Form I–129 H–2B petition.

Calculation, In-house lawyer: $114.17 hourly opportunity cost of time × 5.47-hour time burden for form I–129 and Form G–28 = $624.51 estimated cost to file a Form I–129 H–2B petition.

Calculation, outsourced lawyer: $196.85 hourly opportunity cost of time × 5.47-hour time burden for form I–129 and Form G–28 = $1,076.77 (rounded) estimated cost to file a Form I–129 H–2B petition.

[209] *Calculation, HR specialist:* $236.36 estimated cost to file a Form I–129 H–2B petition × 171 petitions = $40,418 (rounded).

[210] *Calculation, In-house Lawyer:* $624.51 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 × 145 petitions = $90,554 (rounded).

Calculation, Outsourced Lawyer: $1,076.77 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 × 145 petitions = $156,132 (rounded).

[211] *Calculation:* 316 estimated additional Form I–129 H–2B petitions × 93.57 percent accompanied by Form I–907 = 296 (rounded) additional Form I–907.

[212] *Calculation, Lawyers:* 296 additional Form I–907 × 45.84 percent = 136 (rounded) Form I–907 filed by a lawyer. Calculation, HR specialists: 296 Form I–907—136 Form I–907 filed by a lawyer = 160 Form I–907 filed by an HR specialist.

[213] *Calculation, HR Specialist:* $50.94 hourly opportunity cost of time x 0.58-hour time burden to file Form I–907 = $29.55 cost to file Form I–907.

Calculation, In-house lawyer: $114.17 hourly opportunity cost of time x 0.58-hour time burden to file Form I–907 = $66.22 cost to file Form I–907.

Calculation, outsourced lawyer: $196.85 hourly opportunity cost of time x 0.58-hour time burden to file Form I–907 = $114.17 cost to file Form I–907.

[214] *Calculation, HR specialist:* $29.55 to file a Form I–907 × 160 forms = $4,728 (rounded).

[215] *Calculation, In-house lawyer:* $66.22 to file a Form I–907 × 136 forms = $9,006 (rounded).

Calculation for an outsourced lawyer: $114.17 to file a Form I–907 × 136 forms = $15,527 (rounded).

[216] *Calculation for HR specialists and in-house lawyers:* $40,418 for HR specialists to file Form I–129 H–2B petitions + $90,554 for in-house lawyers to file Form I–129 and the accompanying Form G–28 + $4,728 for HR specialists to file Form I–907 + $9,006 for in-house lawyers to file Form I–907 = $144,706.

Calculation for HR specialists and outsourced lawyers: $40,418 for HR specialists to file Form I–129 H–2B petitions + $156,132 for outsourced lawyers to file Form I–129 and the accompanying Form G–28 + $4,728 for HR specialists to file Form I–907 + $15,527 for outsourced lawyers to file Form I–907 = $216,805.

[217] *See* Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I–129, OMB Control Number 1615–0009 (expires Nov. 30, 2025), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf; see also* INA sec. 214(c)(13), 8 U.S.C. 1184(c)(13).

[218] *Calculation:* 316 petitions × $610 per petition = $192,760.

[219] *See* Instructions for Request for Premium Processing Service, USCIS Form I–907, OMB Control Number 1615–0048 (expires Nov. 30, 2022),

DHS expects that 93.57 percent of petitioners would file a Form I–907 with Form I–129. Applying that rate to the expected number of filings of Form I–129 petitions would result in 296 requests for premium processing using Form I–907 filed due to the rule.[220] We estimate that the annual transfers from petitioners to the Federal Government related to filing Form I–907 due to the rule would be approximately $444,000.[221] The undiscounted annual transfers from petitioners to the Federal Government due to the rule are $636,760.[222] [223]

Portability is a benefit to employers that cannot find U.S. workers, and as an additional flexibility for H–2 employees seeking to begin work with a new H–2 employer. This rule would allow petitioners to immediately employ certain H–2 workers who are present in the United States in H–2 status without waiting for approval of the H–2 petition.

DHS welcomes public comments on the annual time burden associated with users remaining in good standing with E-Verify as well as the impacts of permanent portability on H–2 petitioners and beneficiaries.

c. Improving H–2 Program Efficiencies and Reducing Barriers to Legal Migration

This section is divided into two subheadings where each provision and its expected impacts are discussed. DHS's proposals include the following: (1) removing the eligible countries lists; and (2) eliminating the calculation of interrupted stays and reducing the period of absence that would reset an individual's 3-year maximum period of stay.

(1) Eligible Countries Lists

USCIS is proposing to remove the lists that designate certain countries as eligible to participate in the H–2 programs. Currently, nationals of countries that are not eligible to participate in the H–2 programs may still be named as beneficiaries on an H–2A or H–2B petition. However, petitioners must: (1) name each beneficiary who is not from an eligible country; and (2) provide evidence to show that it is in the U.S. interest for the individual to be the beneficiary of such a petition. USCIS also recommends that H–2A and H–2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately.[224]

To understand the population of beneficiaries who come from countries not on the eligible countries lists and the petitioners who apply for these workers, we considered historical data from FY 2013 through FY 2022 on the beneficiary country of birth for both H–2A and H–2B receipts by fiscal year.[225] The data are extremely limited, with an average of 77 percent and 75 percent of H–2A and H–2B receipts, respectively, missing the beneficiary country of birth. Data are primarily limited because of the high percentage of H–2 petitions filed requesting unnamed beneficiaries. Additionally, this data is input manually, with only certain fields entered. Country of birth is not a mandatory field and tends to be blank.

On the eligible countries lists published November 10, 2021, FY 2022 [226] data did not identify any H–2A beneficiaries with a country of birth from 55 of 85 eligible countries.[227] Additionally, 30 petitions with 141 beneficiaries from 12 countries were not on the eligible countries list. Of the 86 eligible countries for H–2B beneficiaries, the FY 2022 data did not identify any beneficiaries with a country of birth from 43 of these countries. It also showed that there was only a total of 12 petitions with 79 beneficiaries from five countries not on the eligible countries list.

From these limited data, we can see that USCIS does receive petitions for beneficiaries outside of those on the eligible countries lists. However, it is unclear if the lists may act as a deterrent with the additional burden on petitioners. The data provide some insight into the potential concentration of H–2 visas in FY 2022, where the greatest number of petitions had beneficiaries listed with Mexico as their country of birth (1,628 petitions and 30,075 H–2A beneficiaries, and 1,523 petitions and 21,136 H–2B beneficiaries, respectively). However, because only about 12 percent of H–2A beneficiaries and 29 percent of H–2B beneficiaries in FY 2022 had a country of birth listed, it is difficult to draw any strong conclusions.

As stated earlier, USCIS recommends that H–2A and H–2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately. USCIS does not have data on the number of H–2 employers that file petitions separately for workers from countries not listed on the respective eligible countries lists from those on the eligible countries lists. For those that file separately, though, this proposed provision would result in saved fees.[228] The current base fee to file Form I–129 is $460. Employers filing H–2B petitions must also submit an additional fee of $150. Therefore, employers currently filing separate petitions could save $460 per H–2A petition and $610 ($460 + $150) per H–2B petition.[229]

To produce the eligible countries lists each year, several DHS components and agencies provide data, collaboration, and research. For DHS, this includes months of work to gather recommendations and information from offices across U.S. Immigration and Customs Enforcement (ICE), CBP, and USCIS, compile statistics, and cooperate closely with DOS. Research in these efforts focuses on topics including overstays, fraud, human trafficking concerns, and more. However, some of the work involved in creating the eligible countries lists is duplicative, time-consuming, and limited in its response to ever-changing global dynamics. For example, DOS already performs regular national interest assessments and would not approve H–

https://www.uscis.gov/sites/default/files/document/forms/i-907instr.pdf.

[220] *Calculation:* 316 petitions × 93.57 Form I–907 rate = 296 Forms I–907 (rounded).

[221] *Calculation:* $1,500 per petition × 296 Forms I–907 = $444,000.

[222] *Calculation:* $192,760 + $444,000 = $636,760.

[223] It is possible that the combination of porting workers and workers availing themselves of increased grace periods may increase tax transfers from workers to the Federal Government. DHS cannot estimate the magnitude of these transfers, however, because of a lack of detailed data regarding the workers utilizing these provisions separately or jointly.

[224] *See* Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I–129, OMB Control Number 1615–0009 (expires November 30, 2025), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

[225] Country of citizenship data is available for about 20 percent of the H–2A category but not for the H–2B category. For consistency and because there is slightly more data available, we use country of birth data in this analysis.

[226] The most recent publication of the eligible countries lists for H–2A and H–2B visa programs was published on November 10, 2022. *See Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs,* 87 FR 67930 (Nov. 10, 2022). For the purpose of this analysis, we rely on the eligible countries lists from 2021 because we have data from FY 2022 that would include any impacts of that prior lists on the behavior of petitioners and their beneficiaries.

[227] *See Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H–2A and H–2B Nonimmigrant Worker Programs,* 87 FR 67930 (Nov. 10, 2022).

[228] *See* USCIS, *Calculating Interrupted Stays for the H–2 Classifications, What do I need to know if I choose to file separate petitions for H–2 workers?* (May 6, 2020), *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications.*

[229] *See* Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I–129, OMB Control Number 1615–0009 (expires Nov. 30, 2025), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

2 work visas that it deems problematic regardless of the country's standing on the eligible countries lists.

Benefits of this proposed provision include freeing up resources currently dedicated to publishing the eligible countries lists every year, which could be used more effectively on other pressing projects across DHS and DOS. This change would also reduce the burden on petitioners that seek to hire H–2 workers from countries not designated as eligible since they would no longer need to meet additional criteria showing that it is in the U.S. interest to employ such workers. This provision would also increase access to workers potentially available to businesses that utilize the H–2 programs.

DHS welcomes public comments on impacts on petitioners, beneficiaries, and the Federal Government resulting from the proposal to eliminate the eligible countries lists.

(2) Eliminate Interrupted Stays and Reduce Period of Absence

DHS is proposing to eliminate the ''interrupted stay'' calculation and reduce the period of absence from the United States from 3 months to 60 days to reset an individual's 3-year period of stay.[230] Under current regulations, an individual's total period of stay in H–2A or H–2B nonimmigrant status may not exceed 3 years. Currently, an individual who has spent 3 years in H–2A or H–2B status may not seek extension, change status, or be readmitted to the United States in H–2 status unless the individual has been outside of the United States for an uninterrupted period of 3 months. In the proposed rule, the total period of stay of 3 years would remain unchanged, but the period of absence that would reset an individual's 3-year period of stay would be reduced. For ease of understanding, the term ''clock'' will be used in this section to describe the 3-year maximum period of stay for an H–2 worker and the term ''absence'' will generally be used in place of ''interruption.'' As critical context, the estimated population impacted by this proposed change is constrained because the DOL-certified seasonal or temporary nature of H–2A and H–2B labor needs means that, currently, most beneficiaries' clocks are effectively reset each year upon completion of the first and only petitioner's labor need and subsequent departure from the country. Instructions on DOL's Foreign Application Gateway (FLAG) state that petitioners' certified seasonal or temporary labor needs must not exceed 9 months for H–2B labor certifications and should not normally exceed 10 months for H–2A certifications, so there would be no direct impacts nor costs to an employer from the proposed simplifications to the existing definition of absence for the purpose of resetting the 3-year clock.[231]

Additionally, under this proposed simplification, USCIS would no longer recognize certain absences as an ''interrupted stay'' for purposes of pausing the calculation of the 3-year limit of stay. Thus, if a worker leaves the United States for less than 60 days, the absence would not pause the 3-year maximum period of stay clock nor extend the timeframe in which a worker could work in H–2 status upon their return from abroad. This change to the calculation of interrupted stay is not expected to impact the two current subset populations of H–2A and H–2B workers whose accumulated stay is 18 months or less whose clock currently pauses when they leave the United States for at least 45 days but less than 3 months, and those whose accumulated stay is greater than 18 months but less than 3 years. Under this proposed rule, the 3-year clock would no longer pause, as it does now, when an individual leaves the United States for the period of time specified in rows 2 and 3 of Table 8; rather, the 3-year clock would now reset following an uninterrupted absence of 60 days, irrespective of the individual's period of accumulated stay in the United States.

TABLE 8—H–2 CLOCK AND ABSENCES FROM THE UNITED STATES DURING A 3-YEAR MAXIMUM PERIOD OF STAY.

Time worked in H–2 status	Current clock reset or interruption *	Proposal and impact to H–2 workers and employers		
		Proposed absence counted as reset	Cost	Benefit
3 years	Reset at 3 months	Reset at 60 days	N/A	30 fewer days required to reset clock.
18 months or less	Interruption pause accrues at 45 days, but less than 3 months.	Reset at 60 days	N/A	N/A.
More than 18 months, but less than 3 years.	Interruption pause accrues at 2 months, but less than 3 months.	Reset at 60 days	N/A	N/A.

Source: USCIS analysis.

* An interruption is when the 3-year clock is paused, meaning the period of time outside the United Stated, the absence, isn't counted towards 3-year maximum period of stay.

USCIS next considers a potential subpopulation of workers who, under the baseline, might port from one petitioning employer with a labor certification to a subsequent petitioner with a temporary labor certification three or more times in an effort to maximize earnings over the 3-year (1,095 days) limit. USCIS does not have

[230] USCIS officers use the term ''interrupted stay'' when adjudicating extension of stay requests in the H–2A and H–2B nonimmigrant classifications. It refers to certain periods of time an H–2 worker spends outside the United States during an authorized period of stay that do not count toward the noncitizen's maximum 3-year limit in the classification. *See* USCIS, *Calculating Interrupted Stays for the H–2 Classifications* (May 6, 2020), *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications.*

[231] *See* DOL, *H–2A Temporary Labor Certification for Agriculture Workers* (''The need for the work must be seasonal or temporary in nature [. . .] normally lasting 10 months or less'' for H–2A Temporary Certification For Agriculture Workers), *https://flag.dol.gov/programs/H-2A* (last visited May 31, 2023); DOL, *H–2B, Temporary Labor Certification for Non-Agriculture Workers* (''The employer's job opportunities must be. . . [t]emporary (9 months or less, except one-time occurrences)''), *https://flag.dol.gov/programs/H-2B* (last visited May 31, 2023). DOL regulations at 20 CFR 655.6(b) limit an H–2B period of need to 9 months, except where the employer's need is based on a one-time occurrence, but due to an appropriations rider that is currently in place, DOL uses the definition of temporary need as provided in 8 CFR 214.2(h)(6)(ii)(B), which does not list a 9 month limit. *Consolidated Appropriations Act 2023,* Public Law 117–328, Division H, Title I, Sec. 111.

data on the size of the H–2A or H–2B worker populations that currently leave the United States while in H–2 status or for how long. Without information on the number of workers who experience absences from the United States, it is not possible to predict additional impacts to the behavior of H–2 visa holders and the petitioners with DOL-certified seasonal or temporary labor needs, however, the observed rates of porting shown in Tables 6 and 7 suggest beneficiaries porting more than 3 times without leaving the country is small to non-existent at present. DOL requires H–2A and H–2B employers to pay workers at least the highest of the prevailing wage rate obtained from the ETA or the applicable Federal, State, or local minimum wage.[232] Additionally, we know that the Fair Labor Standards Act covers requirements for all workers in the United States with respect to overtime and a job offer must always be consistent with Federal, State, and local laws.[233]

To estimate the potential impacts from a small number of H–2 workers choosing to provide 30 additional days of labor every 3 years, we first consider wages. The Federal minimum wage is currently $7.25.[234] While using the Federal minimum wage may be appropriate in some instances, DHS recognizes that many States have higher minimum wage rates than the Federal minimum. Therefore, DHS believes that a more accurate and timely estimate of wages is available via data from the Department of Labor. More specifically, DHS uses the most recent wage data from DOL's Bureau of Labor Statistics' (BLS) National Occupational Employment and Wage Estimates. DHS believes that the unweighted, 10th percentile wage estimate for all occupations of $13.14 per hour is a reasonable lower bound for the population in question.[235] DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.[236] Although the Federal minimum wage could be considered a lower bound income for the population of interest, DHS calculates the total rate of compensation for the 10th percentile hourly wage is $19.05, which is 81.3 percent higher than the Federal minimum wage.[237]

DHS does not rule out the possibility that some portion of H–2A and H–2B employees might earn more than the 10th percentile wage, but without empirical information, DHS believes that including a range with the lower bound relying on the 10th percentile wage with benefits of $19.05 is justifiable for both H–2A and H–2B workers. For H–2A workers, DHS uses an upper bound wage specific to agricultural workers of $17.04.[238] DHS calculates the average total rate of compensation for agricultural workers as $24.71 per hour, where the mean hourly wage is $17.04 per hour worked and average benefits are $7.67 per hour.[239] For H–2B workers, DHS relies on the average wage rate for all occupations of $29.76 as an upper bound in consideration of the variance in average wages across professions and States.[240] Therefore, DHS calculates the average total rate of compensation for all occupations as $43.15 per hour, where the mean hourly wage is $29.76 per hour worked and average benefits are $13.39 per hour.[241]

Since DHS calculated absences from the United States centered on calendar days, and wage estimates are specifically linked to hours, we apply the scalar developed as follows. Calendar days are transformed into workdays to account for the actuality that typically, 5 out of 7, or 71.4 percent, of the calendar week is allotted to work-time, and that a workday is typically 8 hours.[242] Thus, in limited instances, individuals resetting their clock at or immediately after the 1,095th day of the 3-year limitation may be afforded an opportunity to work 30 additional calendar days, or approximately 21 days of H–2. DHS notes that some H–2 workers may work more days or hours per week in some instances. Additionally, if overtime hours are worked, DHS has no basis for which to measure the extent to which this may occur among these populations. Based on the 10th percentile wage (lower bound), each calendar day generates about $108.81 in relevant earnings for potential H–2 workers. It follows that for the upper wage bounds that each calendar day generates about $141.14 per H–2A worker and about $246.47 per H–2B worker in relevant earnings.[243] Over 30 potential workdays, this equates to a lower bound of $3,264 in additional earnings with upper bounds of $4,234 for H–2A workers and $7,394 for H–2B workers (see Table 9).[244]

[232] *See* WHD, *Fact Sheet #26: Section H–2A of the Immigration and Nationality Act (INA)* (Feb. 2010), *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs26.pdf,* and *Fact Sheet #78C: Wage Requirements under the H–2B Program* (Apr. 2015), *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs78c.pdf.*

[233] *See* WHD, *Wages and the Fair Labor Standards Act, https://www.dol.gov/agencies/whd/flsa* (last visited Dec. 15, 2022).

[234] *See* 29 U.S.C. 206, ''Minimum wage,'' *https://www.gpo.gov/fdsys/pkg/USCODE-2011-title29/html/USCODE-2011-title29-chap8-sec206.htm* (accessed Dec. 15, 2022). *See also* WHD, *Minimum Wage, https://www.dol.gov/general/topic/wages/minimumwage* (the minimum wage in effect as of Dec. 15, 2022).

[235] *See* Occupational Employment and Wage Estimates United States. May 2022. BLS, Occupational Employment Statistics program, All Occupations, available at *https://www.bls.gov/oes/2022/may/oes_nat.htm#00-0000* (last visited July 28, 2023).

[236] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $42.48/$29.32 = 1.450 = 1.45 (rounded). *See* BLS, Economic News Release, *Employer Cost for Employee Compensation—December 2022,* Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (Mar. 17, 2023), *https://www.bls.gov/news.release/archives/ecec_03172023.pdf.*

[237] Calculations (1) for lower bound compensation: $13.14 lower bound wage * 1.45 total compensation factor = $19.05 (rounded to 2 decimal places); (2) (($19.05 wage − $10.51 wage)/$10.51)) wage = 0.813, which rounded and multiplied by 100 = 81.3 percent.

[238] The average wage for agricultural workers is found at BLS, Occupational Employment and Wages—May 2022 (Apr. 25, 2023), Table 1. National employment and wage data from the Occupational Employment and Wage Statistics survey by occupation, May 2022, *https://www.bls.gov/news.release/archives/ocwage_04252023.pdf.*

[239] Calculation of the weighted mean hourly wage for agricultural workers: $17.04 per hour × 1.45 benefits-to-wage multiplier = $24.71 (rounded).

[240] The average wage for all occupations is found at BLS, Occupational Employment and Wages—May 2022 (Apr. 25, 2023), Table 1. National employment and wage data from the Occupational Employment and Wage Statistics survey by occupation, May 2022, *https://www.bls.gov/news.release/archives/ocwage_04252023.pdf.*

[241] The calculation of the weighted mean hourly wage for applicants: $29.76 per hour × 1.45 benefits-to-wage multiplier = $43.15 (rounded) per hour.

[242] USCIS did review DOL disclosure data on basic number of hours and found the average number of hours per week to be around 40 hours. For this reason, we assume a typical 40-hour workweek for both H–2A and H–2B workers for this analysis.

[243] Calculations: E10th percentile wage (lower bound): 0.714 × 8 hours per day × $19.05 wage = $108.81 (rounded). H–2A average wage for agricultural workers (upper bound): 0.714 × 8 hours per day × $24.71 wage = $141.14 (rounded). H–2B average wage for all occupations (upper bound): 0.714 × 8 hours per day × $43.15 wage = $246.47 rounded.

[244] Calculations: t10th percentile wage (lower bound): $108.81 × 30 days = $3,264 (rounded). H–2A average wage for agricultural workers (upper bound): $141.14 × 30 days = $4,234 (rounded). H–

Continued

TABLE 9—EARNINGS ESTIMATES FOR H–2 WORKERS WITH 30 ADDITIONAL DAYS.

	Hourly wage	Calendar day scalar	Work hours	Daily additional wages	Additional wages for 30 days	Additional taxes
	A	B	C	D = A × B × C	E = D × 30	F = E × 15.3%
Lower Bound	$19.05	0.714	8	$108.81	$3,264	0 *
H–2A Upper Bound	24.71	.....	.....	141.14	4,234	0 *
H–2B Upper Bound	43.15	.....	.....	246.47	7,394	1,131

Source: USCIS analysis.
* H–2A workers and employers are not subject to U.S. social security and Medicare taxes.

In instances where an employer with a DOL-certified temporary labor need cannot transfer the 21 days of work onto other H–2 workers, DHS acknowledges that this additional work may result in additional tax revenue to the government. It is difficult to quantify income tax transfers because individual tax situations vary widely,[245] but DHS estimates the potential payments to other employment tax programs, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).[246] While H–2A wages are exempt from these taxes, H–2B wages are not.[247] With both the employee and employer paying their respective portion of Medicare and Social Security taxes, the total estimated tax transfer for Medicare and Social Security is 15.3 percent.[248] DHS recognizes this quantified estimate is not representative of all potential tax losses by Federal, State, and local governments and we make no claims this quantified estimate includes all tax losses. We continue to acknowledge the potential for additional Federal, State, and local government tax losses in the scenario where a company cannot transfer additional work onto current employees and cannot hire replacement labor for the position the H–2 worker is absent. As seen in Table 9, tax transfers could range from $0 for H–2A workers and up to $1,131 for H–2B workers over a 30-day period.

One benefit of this proposed provision is that it would make it easier for DHS, petitioners and beneficiaries to calculate when a beneficiary reaches their 3-year limit on stay, irrespective of how long the individual has been in the United States in H–2 status. As described earlier, to accurately demonstrate when an individual's limit on H–2 status will be reached, employers and workers currently need to monitor and document the accumulated time in H–2 status and calculate the total time in H–2 status across multiple time periods following interruptive absences. USCIS adjudicators must also make these same determinations in adjudicating H–2 petitions with named workers to assess whether a beneficiary is eligible for the requested period of stay. No longer needing to monitor absences from the United States of less than 60 days simplifies calculations for employers, workers, and adjudicators. Additionally, DHS expects that USCIS adjudicators may issue fewer RFEs related to the 3-year maximum period of stay to workers with absences, which would reduce the burden on employers, workers, and adjudicators and save time in processing petitions. As shown in Table 10, RFEs related to the 3-year maximum period of stay have increased since FY 2020 for H–2A workers and have generally remained stable at between 200 to 300 each year since FY 2020 for H–2B workers.

TABLE 10—RFES RELATING TO 3-YEAR MAXIMUM STAY FOR H–2 WORKERS

Fiscal year	H–2A	H–2B
2018	63	134
2019	53	649
2020	22	207
2021	272	292
2022	436	208
Total	846	1,490
5-Year Average	169	298

SOURCE: USCIS Office of Policy and Strategy—C3, ELIS USCIS Data System as of Oct. 8, 2022.

While it is not clear how many RFEs are directly related to the calculation of interruptions while in H–2 status, as opposed to RFEs for those who may be reaching the maximum 3-year period of stay generally, DHS anticipates that eliminating the calculation for interrupted stays would at least render some RFEs unnecessary.[249] This would in turn reduce the burden on employers, workers, and adjudicators associated with calculating interruptions and through subsequent RFEs and petitions could be processed more expeditiously.

Collectively, Tables 6, 7, and 10 indicate very few H–2 workers approach the 3-year limitation despite existing potential to port from certified temporary labor need for 3 years before exiting the country for 90 days. Nevertheless, USCIS has considered as an upper bound, possible additional earnings and related labor market impacts should workers already approaching the 3-year limit respond to this proposed change by working 30 additional days at the end of their 1,095 days or at the start of their subsequent 3-year period. Recall that if the worker intended to return to their home country before 3-years, as most do upon completing their temporary labor for the initial petitioner, this change has no

2B average wage for all occupations (upper bound): $246.47 × 30 days = $7,394 (rounded).

[245] *See* Quentin Fottrell, *More than 44 percent of Americans pay no federal income tax,* MarketWatch (Aug. 28, 2019), *https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16.*

[246] The various employment taxes are discussed in more detail at *https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes. See* Internal Revenue Service Publication 15, Circular E, Employer's Tax Guide (Dec. 16, 2021), *https://www.irs.gov/pub/irs-pdf/p15.pdf,* for specific information on employment tax rates.

[247] *See* Federal Income Tax and FICA Withholding for Foreign Agricultural Workers with an H–2A Visa, *https://www.irs.gov/pub/irs-pdf/p5144.pdf* (last accessed July 31, 2023).

[248] Calculation: (6.2 percent Social Security + 1.45 percent Medicare) × 2 employee and employer losses = 15.3 percent total estimated tax transfer payment to government.

[249] On July 25, 2022, USCIS extended its COVID–19-related flexibilities for responding to RFEs through October 23, 2022. This provides recipients an additional 60 calendar days after the due date on an RFE to provide a response. Ultimately, while this flexibility may prove helpful to petitioners it also adds up to an additional 2 months of time to the adjudication process. *See* USCIS, *USCIS Extends COVID–19-related Flexibilities* (July 25, 2022), *https://www.uscis.gov/newsroom/alerts/uscis-extends-covid-19-related-flexibilities.*

impact to the employer nor to wages earned by the worker. Multiplying the 169 H–2A subpopulation in Table 10 by $4,234 in additional wages for 30 days in Table 9 bounds potential additional annual earnings at $715,546. Additionally, the 298 H–2B population in Table 10 multiplied by $7,394 in Table 9 bounds additional annual H–2B earnings at $2,203,412 with estimated tax transfers of $337,122. For H–2A and H–2B workers, the total impact from this change is $2,918,958 in additional earnings and $337,122 in tax transfers ($168,561 from workers + $168,561 from employers).

d. Other Impacts of the Proposed Rule

(1) Form I–129 Updates

The costs for this form include filing costs and the opportunity costs of time to complete and file the form. The current filing fee for Form I–129 is $460 and the estimated time needed to complete and file Form I–129 is 2.34 hours.[250] There is an additional $150 fee for employers filing H–2B petitions.[251] There is also an estimated time burden of 2 hours for petitioners to complete the H classification supplement for Form I–129. The total time burden of 4.34 hours for Form I–129 also includes the time for reviewing instructions, to file and retain documents, and submit the request. In this proposed rule, the fees for Form I–129 and the H classification supplement and time burden for Form I–129 would remain unchanged, only the estimated burden to complete the H classification supplement would change. This proposed rule would increase the public reporting burden for the H Classification Supplement by 0.3 hours to a total 2.3 hours. This added time would result in a total time burden of 4.64 hours for Form I–129 H–2 petitioners. The petition must be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent. 8 CFR 214.2(h)(2). DHS was unable to obtain data on the number of Form I–129 H–2A and H–2B petitions filed directly by a petitioner and those that are filed by a lawyer on behalf of the petitioner. Therefore, DHS presents a range of estimated costs, including if only human resource (HR) specialists file Form I–129 or if only lawyers file Form I–129.[252] Further, DHS presents cost estimates for lawyers filing on behalf of petitioners based on whether all Form I–129 petitions are filed by in-house lawyers or by outsourced lawyers.[253] DHS presents an estimated range of costs assuming that only HR specialists, in-house lawyers, or outsourced lawyers file these forms, though DHS recognizes that it is likely that filing will be conducted by a combination of these different types of filers.

To estimate the total opportunity cost of time to petitioners who complete and file Form I–129, DHS uses the mean hourly wage rate of HR specialists of $35.13 as the base wage rate.[254] If applicants hire an in-house or outsourced lawyer to file Form I–129 on their behalf, DHS uses the mean hourly wage rate of $78.74 as the base wage rate.[255] DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.45 to estimate the full cost of employee wages. The total per hour wage is $50.94 for an HR specialist and $114.17 for an in-house lawyer.[256] In addition, DHS recognizes that an entity may not have in-house lawyers and therefore, seek outside counsel to complete and file Form I–129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS estimates the total per hour wage is $196.85 for an outsourced lawyer.[257] [258] If a lawyer submits Form I–129 on behalf of the petitioner, Form G–28 (Notice of Entry of Appearance as Attorney or Accredited Representative), must accompany the Form I–129 submission.[259] DHS estimates the time burden to complete and submit Form G–28 for a lawyer is 50 minutes (0.83 hours, rounded).[260]

Since only the time burden for the H Classification Supplement would change, this analysis only considers the additional opportunity cost of time for 0.3 hours as a direct cost of this rule. Therefore, the added opportunity cost of time for an HR specialist to complete and file Form I–129 for an H–2 petition is $15.28, for an in-house lawyer to complete and file is $34.25, and for an outsourced lawyer to complete and file is $59.06.[261]

DHS expects this rule would impose costs on the population of employers that currently petition for H–2 workers; an estimated 36,758 petitioners.[262] We expect filing would be performed by a HR specialist, in-house lawyer, or outsourced lawyer, and this would be done at the same rate as petitioners who file a Form G–28;

To properly account for the costs associated with filing across the entire H–2 population, DHS must calculate a weighted average rate for G–28 filing across the separate H–2A and H–2B populations. Table 11 and Table 12 show the recent G–28 filing trends for each separate H–2 population.

[250] The public reporting burden for this form is 2.34 hours for Form I–129 and an additional 2 hours for H Classification Supplement. *See* Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I–129, OMB Control Number 1615–0009 (expires Nov. 30, 2025), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

[251] *Id.*

[252] For the purposes of this analysis, DHS assumes a human resource specialist, or some similar occupation, completes and files these forms as the employer or petitioner who is requesting the H–2 worker. However, DHS understands that not all entities have human resources departments or occupations and, therefore, recognizes equivalent occupations may prepare these petitions.

[253] For the purposes of this analysis, DHS adopts the terms ''in-house'' and ''outsourced'' lawyers as they were used in ICE, *Final Small Entity Impact Analysis: Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,* at G–4 (posted Nov. 5, 2008), *http://www.regulations.gov/document/ICEB-2006-0004-0922.* The ICE analysis highlighted the variability of attorney wages and was based on information received in public comment to that rule. We believe the distinction between the varied wages among lawyers is appropriate for our analysis.

[254] *See* BLS, Occupational Employment and Wages, May 2022, Human Resources Specialist (13–1071), *https://www.bls.gov/oes/2022/may/oes131071.htm.*

[255] *See* BLS, Occupational Employment and Wages, May 2022, Lawyers (23–1011), *https://www.bls.gov/oes/2022/may/oes231011.htm.*

[256] Calculation for the total wage of an in-house lawyer: $78.74 × 1.45 = $114.17 (rounded).

[257] Calculation: Average hourly wage rate of lawyers × Benefits-to-wage multiplier for outsourced lawyer = $78.74 × 2.5 = $196.85 (rounded).

[258] The ICE ''Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'' used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis for that rule remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule, *see https://www.regulations.gov/document/ICEB-2006-0004-0922,* at page G–4 (Sept. 1, 2015).

[259] USCIS, *Filing Your Form G–28* (Aug. 10, 2020), *https://www.uscis.gov/forms/filing-your-form-g-28.*

[260] *See* USCIS, Form G–28 Instructions for Notice of Entry of Appearance as Attorney or Accredited Representative, OMB Control Number 1615–0105 (expires May 31, 2021), *https://www.uscis.gov/sites/default/files/document/forms/g-28instr.pdf.*

[261] HR specialist calculation: $50.94 × (0.3 hours) = $15.28.

In-house lawyer calculation: $114.17 × (0.3 hours) = $34.25.

Outsourced lawyer calculation: $196.85 × (0.3) = 59.06 (rounded).

[262] *Calculation:* 24,370 H–2A + 12,388 H–2B = 36,758 H–2 petitioners in FY 2022 as estimated as the population who would be most likely be affected by this rule.

TABLE 11—FORM I–129 H–2A PETITION RECEIPTS THAT WERE ACCOMPANIED BY A FORM G–28, FY 2017–2021

Fiscal year	Number of form I–129 H–2A petitions accompanied by a form G–28	Total number of form I–129 H–2A petitions received	Percent of form I–129 H–2A petitions accompanied by a form G–28
2017	1,648	11,602	14.20
2018	2,166	13,444	16.11
2019	2,617	15,509	16.87
2020	2,854	17,012	16.78
2021	3,322	20,323	16.35
2017–2021 Total	12,607	77,890	16.19

SOURCE: USCIS, Office of Policy & Strategy—C3, ELIS USCIS Data System.

TABLE 12—FORM I–129 H–2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY A FORM G–28, FY 2018–2022

Fiscal year	Number of form I–129 H–2B petitions accompanied by a form G–28	Total number of form I–129 H–2B petitions received	Percent of form I–129 H–2B petitions accompanied by a form G–28
2018	2,625	6,148	42.70%
2019	3,335	7,461	44.70
2020	2,434	5,422	44.89
2021	4,230	9,160	46.18
2022	5,978	12,388	48.26
2018—2022 Total	18,602	40,579	45.84

SOURCE: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 10/2022, TRK 10638.

Using the data from Table 11 and Table 12, DHS calculates that the weighted average rate of G–28 filing across the entire H–2 population is 26.34%.[263]

Therefore, we estimate that 9,682 lawyers would incur additional filing costs and 27,076 HR specialists would incur additional filing costs.[264]

The estimated total opportunity cost of time for 27,076 HR specialists to file petitions under this proposed rule is approximately $413,721.[265] The estimated annual opportunity cost of time for 9,682 lawyers to file petitions under this proposed rule is approximately $331,609 if they are all in-house lawyers and $571,819 if they are all outsourced lawyers.[266] The estimated annual opportunity costs of time for petitioners or their representatives to file H–2 petitions under this proposed rule ranges from $745,330 to $985,540.[267]

(2) Technical Definitional Updates

There is a technical update proposed in this rule for clarification purposes to remove the phrase ''abscond'' and the definition of ''abscondment.'' DHS expects these proposed changes would have only marginal impacts.

(3) Familiarization Costs

DHS expects this rule would impose one-time familiarization costs associated with reading and understanding this rule on the population of employers that currently petition for H–2 workers; an estimated 36,758 petitioners.[268] We expect familiarization with the rule would be performed by a HR specialist, in-house lawyer, or outsourced lawyer, and this would be done at the same rate as petitioners who file a Form G–28.An estimated 26.34 percent would be performed by lawyers and the remaining 73.66 percent by an HR specialist.. Therefore, we estimate that 9,682 lawyers would incur familiarization costs and 27,076 HR specialists would incur familiarization costs.[269]

To estimate the cost of rule familiarization, we estimate the time it would take to read and understand the rule by assuming a reading speed of 238 words per minute.[270] This rule has approximately 56,000 words.[271] Using a reading speed of 238 words per minute, DHS estimates it would take approximately 3.92 hours to read and become familiar with this rule.[272] The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are $50.94, $114.17, and $196.85 respectively. The estimated opportunity cost of time for each of these filers to familiarize themselves with the rule are $199.68, $447.55, and

[263] Calculation: Step 1. 12,607 H–2A petitions with G–28 + 18,602 H–2B petitions with G–28 = 31,209 H–2 petitions with G–28; Step 2. 77,890 total H–2A petitions + 40,579 total H–2B petitions = 118,469 total H–2 petitions; Step 3. 31,209 H–2 petitions with G–28/118,469 total H–2 petitions = .2634 (rounded).

[264] Calculation for lawyers: 36,758 H–2 petitioners × 26.34 percent represents by a lawyer = 9,682 (rounded) represented by a lawyer. Calculation for HR specialists: 36,758 H–2 petitioners—9,682 represented by a lawyer = 27,076 represented by a HR specialist.

[265] Calculation: $15.28 additional burden × 27,076 HR specialists = $413,721.

[266] Calculations: $34.25 additional burden × 9,682 in-house lawyers = $331,609; $59.06 additional burden × 9,682 outsourced lawyers = $571,819 (rounded).

[267] Calculation: HR specialists $413,721 + in-house lawyers $331,609 = $745,330; HR specialists $413,721 + outsourced lawyers $571,819 = $985,540.

[268] *Calculation:* 24,370 H–2A + 12,388 H–2B = 36,758 H–2 petitioners in FY 2022 as estimated as the population who would be most likely to read this rule.

[269] *Calculation for lawyers:* 36,758 H–2 petitioners × 44.43 percent represents by a lawyer = 9,682 (rounded) represented by a lawyer. Calculation for HR specialists: 36,758 H–2 petitioners × 9,682 represented by a lawyer = 27,076 represented by a HR specialist.

[270] Marc Brysbaert (April 12, 2019), *How many words do we read per minute? A review and meta-analysis of reading rate, https://doi.org/10.1016/j.jml.2019.104047* (accessed Dec. 15, 2022). We use the average speed for silent reading of English nonfiction by adults.

[271] Please note that the actual word count of the proposed rule may differ from the estimated length presented here.

[272] *Calculation:* 56,000 words/238 words per minute = 235 (rounded) minutes. 235 minutes/60 minutes per hour = 3.92 (rounded) hours.

$771.65 respectively.[273] The estimated total opportunity cost of time for 27,076 HR specialists to familiarize themselves with this rule is approximately $5,406,536. Additionally, the estimated total opportunity cost of time for 9,682 lawyers to familiarize themselves with this rule is approximately $4,333,179 if they are all in-house lawyers or $7,471,115 if they are all outsourced lawyers. Thus, the estimated total opportunity costs of time for petitioners or their representatives to familiarize themselves with this rule ranges from $9,739,715 to $12,877,651, incurred the first year of the period of analysis.[274]

e. Total Costs of the Rule

In the previous sections we presented the estimates of the impacts of the proposed rule. The quantifiable costs of this rule that would impact petitioners consistently and directly are the costs associated with an increased opportunity cost of time to complete Form I–129 H Classification Supplement and opportunity costs of time related to the rule's portability provision. Annual costs due to the rule range from $890,036 to $1,202,345 depending on the filer.[275] Over the 10-year period of analysis, DHS estimates the total costs of the proposed rule would be approximately $18,640,075 to $24,901,101 (undiscounted).[276] DHS estimates annualized costs of this proposed rule range from $1,998,572 to $2,668,028 at a 3-percent discount rate and $2,186,033 to $2,915,885 at a 7-percent discount rate. The midpoint of these ranges, $2,333,300 at a 3-percent discount rate and $2,550,959 at a 7-percent discount rate is presented as the primary estimate.

In addition, the rule results in transfers from consumers of goods and services to a limited number of H–2A and H–2B workers that may choose to supply additional labor. The total annualized transfer amounts to $2,918,958 in additional earnings at the 3-percent and 7-percent discount rate and related tax transfers of $337,122 ($168,561 from these workers + $168,561 from employers).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. 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. An ''individual'' is not defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform an initial regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered to be costs for RFA purposes.

This proposed rule may have direct impacts to those entities that petition on behalf of H–2 workers. Generally, petitions are filed by a sponsoring employer who would incur some additional costs from the Form I–129 H Classification Supplement burden change and familiarization of the rule. Petitioning employers may also incur costs they would not have otherwise incurred if they opt to transport and house H–2A workers earlier as well as opportunity costs of time if they are selected to participate in compliance reviews or inspections that are necessary for the approval of a petition. Therefore, DHS examines the direct impact of this proposed rule on small entities in the analysis that follows.

1. Initial Regulatory Flexibility Analysis (IRFA)

Small entities primarily impacted by this proposed rule are those that would incur additional direct costs to complete an H–2 petition. DHS conducted an analysis using a statistically valid sample of H–2 petitions to determine the number of small entities directly impacted by this proposed rule. These costs are related to the additional opportunity cost of time for a selected small entity to complete the updated Form I–129 H Classification Supplement proposed in this rule. DHS welcomes any public comment on the methodology and conclusions on the number of small entities estimated and the impacts to those small entities.

a. A Description of the Reasons Why the Action by the Agency is Being Considered

The purpose of this rulemaking is to modernize and improve the regulations relating to the H–2A temporary agricultural worker program and the H–2B temporary nonagricultural worker program.

b. A Succinct Statement of The Objectives of, and Legal Basis for, the Proposed Rule

DHS objectives and legal authority for this proposed rule are discussed in the preamble of this proposed rulemaking.

c. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Changes Would Apply

DHS conducted the analysis using a statistically valid sample of H–2 petitions to determine the maximum potential number of small entities directly impacted by this proposed rule. DHS used a subscription-based online database of U.S. entities, Hoovers Online, as well as two other open-access, free databases of public and private entities, Manta and Cortera, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity.[277] In order to determine the size of a small entity, DHS first classified each entity by its NAICS code, and then used Small Business Administration (SBA) guidelines to note the requisite revenue or employee count threshold for each entity.[278] Some entities were classified as small based on their annual revenue and some by number of employees.

[273] *Calculation:* Total respective hourly compensation HR $50.94 × 3.5 hours = $199.68, In-house Lawyer $114.17 × 3.92 = $447.55, or Outsourced Lawyer $196.85 × 3.92 hours = $771.65.

[274] *Calculation, lower bound:* $5,406,536 familiarization costs, HR Representative + $4,333,179 familiarization costs, in-house lawyer = $9,739,715. Calculation, upper bound: $5,406,536 familiarization costs, HR Representative + $7,471,115 familiarization costs, outsourced lawyer = $12,877,651.

[275] *Calculation, lower bound:* $745,330 annual costs from marginal OCT to file Forms I–129 + $144,706 in costs due to the portability provision = $890,036 annual costs in years 1 through 10. Calculation, upper bound: $985,540 annual costs from marginal OCT to file Forms I–129 + $216,805 in costs due to the portability provision = $1,202,345 annual costs in years 1 through 10.

[276] *Calculation, lower bound:* familiarization costs of $9,739,715 (year 1) + $890,036 annual costs due to the rule (year 1–10) = $18,640,075 over 10-year period of analysis. *Calculation, upper bound:* familiarization costs of $12,877,651 (year 1) + $1,202,345 annual costs due to the rule (year 1–10) = $24,901,101 over 10-year period of analysis.

[277] The Hoovers website can be found at *http://www.hoovers.com/;* the Manta website can be found at *http://www.manta.com/;* and the Cortera website can be found at *https://www.cortera.com/.* NAICS 2017 classifications were used for the purpose of this analysis as provided by these databases.

[278] The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect. SBA size standards effective August 19, 2019, *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019.pdf.*

Using FY 2018 to FY 2022 data on H–2A petitions, DHS collected internal data for each filing organization.[279] Each entity may make multiple filings. For instance, there were 90,658 H–2A petitions filed over the 5 fiscal years, but only 13,244 unique entities that filed H–2A petitions. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 13,244 entities, DHS determined that a minimum sample size of 374 entities was necessary. However, DHS drew a sample size 10 percent greater than the minimum statistically valid sample for a sample size of 411 in order to increase the likelihood that our matches would meet or exceed the minimum required sample.[280] Of the 411 entities sampled, 387 instances resulted in entities defined as small (see Table 13). Of the 387 small entities, 344 entities were classified as small by revenue or number of employees. The remaining 63 entities were classified as small because information was not found (either no petitioner name was found, or not enough information was found in the databases). A total of 24 entities were classified as not small. Therefore, of the 13,244 entities that filed at least one Form I–129 in FYs 2018 through 2022, DHS estimates that 96 percent or 15,636 entities are considered small based on SBA size standards.[281]

TABLE 13—SUMMARY AND RESULTS OF SMALL ENTITY ANALYSIS OF H–2A PETITIONS

Parameter	Quantity	Proportion of sample (percent)
Population—H–2A petitions	90,658	.....
Population—Unique H–2A Entities	13,244	.....
Minimum Required Sample	374	.....
Selected Sample	411	100
Entities Classified as "Not Small":		
by revenue	23	6
by number of employees	1	0
Entities Classified as "Small":		
by revenue	281	69
by number of employees	43	11
because not enough information found in databases	63	16
Total Number of Small Entities	387	[a] 96

Source: USCIS analysis.
[a] *Calculation:* 69 percent (Entities classified as small by revenue) + 11 percent (Entities classified as small by number of employees) + 16 percent (Entities classified as small because no information found in database) = 96 percent (total number of small entities, rounded).

As previously stated, DHS classified each entity by its NAICS code to determine the size of each entity. Table 14 shows a list of the top 10 NAICS industries that submit an H–2A petition.

TABLE 14—TOP 10 NAICS INDUSTRIES SUBMITTING FORM I–129 FOR H–2A PETITIONS, SMALL ENTITY ANALYSIS RESULTS

Rank	NAICS code	NAICS U.S. industry title	Frequency	Size standards in millions of dollars [a]	Size standards in number of employees [a]	Percent
1	111998	All Other Miscellaneous Crop Farming	79	$1.0	.....	19.2
2	N/A	Unclassified Establishments	25	8.0	.....	6.1
3	561499	All Other Business Support Services	15	16.5	.....	3.6
4	111331	Apple Orchards	12	1.0	.....	2.9
5	112111	Beef Cattle Ranching and Farming	12	1.0	.....	2.9
6	112990	All Other Animal Production	9	1.0	.....	2.2
7	111421	Nursery and Tree Production	8	1.0	.....	1.9
8	424910	Farm Supplies Merchant Wholesalers	8	.....	200	1.9
9	112112	Cattle Feedlots	7	8.0	.....	1.7
10	561990	All Other Support Services	7	12.0	.....	1.7

Source: USCIS analysis.
The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect.

DHS used the methodology developed for H–2A petitions for H–2B petitions as well. Using FY 2018 to FY 2022 data on H–2B petitions, DHS collected internal data for each filing organization.[282] Each entity may make multiple filings. For instance, there were 40,579 H–2B petitions filed over these 5 fiscal years by 8,506 unique entities. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of

[279] USCIS Office of Policy and Strategy, C3, ELIS (Oct. 19, 2022).
[280] Calculation: 368 + (368 × 10 percent) = 405.
[281] Calculation: 13,244 entities × 96 percent = 12,714 small entities (rounded).
[282] USCIS Office of Policy and Strategy, C3, ELIS (Oct. 19, 2022).

8,506 entities, DHS determined that a minimum sample size of 368 entities was necessary. DHS created a sample size 10 percent greater than the minimum statistically valid sample for a sample size of 368 in order to increase the likelihood that our matches would meet or exceed the minimum required sample.[283] Of the 405 entities sampled, 384 instances resulted in entities defined as small (see Table 15). Of the 384 small entities, 307 entities were classified as small by revenue or number of employees. The remaining 46 entities were classified as small because information was not found (either no petitioner name was found, or not enough information was found in the databases). A total of 21 entities were classified as not small. Therefore, of the 8,506 entities that filed at least one Form I–129 in FY 2018 through FY 2022, DHS estimates that 95 percent or 8,175 entities are considered small based on SBA size standards.[284]

TABLE 15—SUMMARY AND RESULTS OF SMALL ENTITY ANALYSIS OF H–2B PETITIONS

Parameter	Quantity	Proportion of sample (percent)
Population—H–2B petitions	40,579	.....
Population—Unique H–2B Entities	8,506	.....
Minimum Required Sample	368	.....
Selected Sample	405	100
Entities Classified as "Not Small":		
by revenue	20	5
by number of employees	1	0
Entities Classified as "Small":		
by revenue	307	76
by number of employees	31	8
because not enough information found in databases	46	11
Total Number of Small Entities	384	[a] 95

Source: USCIS analysis.
[a] *Calculation:* 76 percent (Entities classified as small by revenue) + 8 percent (Entities classified as small by number of employees) + 11 percent (Entities classified as small because no information found in database) = 95 percent (total number of small entities, rounded).

As previously stated, DHS classified each entity by its NAICS code to determine each business' size. Table 16 shows a list of the top 10 NAICS industries that submit an H–2B petition.

TABLE 16—TOP 10 NAICS INDUSTRIES SUBMITTING FORM I–129 FOR H–2B PETITIONS, SMALL ENTITY ANALYSIS RESULTS

Rank	NAICS code	NAICS U.S. industry title	Frequency	Size standards in millions of dollars [a]	Size standards in number of employees [a]	Percent
1	561730	Landscaping Services	56	8.0	.....	13.8
2	541320	Landscape Architectural Services	55	8.0	.....	13.6
3	721110	Hotels (except Casino Hotels) and Motels	22	35.0	.....	5.4
4	N/A	Unclassified Establishments	19	8.0	.....	4.7
5	722511	Full-Service Restaurants	12	8.0	.....	3.0
6	713910	Golf Courses and Country Clubs	12	16.5	.....	3.0
7	236115	New Single-Family Housing Construction (except For-Sale Builders).	10	39.5	.....	2.5
8	424460	Fish and Seafood Merchant Wholesalers	9	.....	100	2.2
9	238160	Roofing Contractors	6	16.5	.....	1.5
10	561990	All Other Support Services	6	12.0	.....	1.5

Source: USCIS analysis.
[a] The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect.

Because the random sample is drawn from the H–2 petitioner population at-large, it is not practical to estimate small entities' representation within this noncooperative subpopulation. Thus, the IRFA assumes 12 percent of small entities, like larger entities, may have underestimated the reasonable, existing compliance burden of site visits and thus incur some additional compliance costs.

Petitioner-employers are not expected to be impacted by proposed changes to the interrupted stay calculation. USCIS cannot determine how beneficiaries' behavior would change as a result of this simplification to the USCIS calculation. If indirectly impacted industries have evidence to the contrary, this IRFA affords the public the opportunity to comment upon this rationale before DHS would begin work on the FRFA. DHS welcomes public comments on this issue. Similarly, DHS does not expect flexibilities that allow beneficiaries to arrive in-country earlier would impose any compliance costs

[283] Calculation: 368 + (368 × 10 percent) = 405.

[284] Calculation: 8,506 entities × 95 percent = 8,175 small entities (rounded).

upon industries that choose to petition for or employ H–2 workers.

Table 3 shows that an average 13,722 H–2A petitions are received annually. Table 13 shows that 96 percent of entities that petition for H–2A workers are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 13,722 H–2A petitions received, 13,500 [285] petitions are submitted by small entities.

Table 4 shows that USCIS receives an average of 6,866 H–2B petitions annually. Table 15 shows that 95 percent of entities that petition for H–2B workers are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 6,866 H–2B petitions received, 6,523 [286] petitions are submitted by small entities.

d. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills

This proposed rule does not impose any new or additional direct ''reporting'' or ''recordkeeping'' requirements on filers of H–2 petitions. The proposed rule does not require any new professional skills for reporting. As discussed, to the extent that existing statutorily and regulatorily authorized site visits described in the current Form I–129 instructions result in neither a finding of compliance nor noncompliance (described throughout this rule as noncooperation), the proposal to revoke or deny petitions may result in unquantified additional compliance burdens to those petitioners that underestimate the reasonable burden of compliance with unannounced site visits. Under the proposed rule, a petitioner that was selected for a site visit and would not have cooperated under the baseline would face an (up to) 1.7-hour marginal time burden (on average) in order to comply with the provisions of the rule. Also, the provisions of this proposed rule regarding prohibited fees and labor law violations (see proposed 8 CFR 214.2(h)(5)(xi)(A) through (C), 8 CFR 214.2(h)(6)(i)(B) through (D) regarding prohibited fees. See proposed 8 CFR 214.2(h)(10)(iii) regarding labor law violations) would subject petitioners, including small entities, to future bars to petition approval should they engage in activities that are prohibited by the proposed rule.

Denial or revocation of petitions for noncooperation with existing site visit and verification requirements is expected to impact 12 percent of petitioners who, despite agreeing to permit the statutorily and regulatorily authorized site visits on their Form I–129 petition, yielded inconclusive (''not defined'') site visit results. Petitioners that do not cooperate with all site visit requirements may have underestimated the reasonable compliance burden they assented to, and, due to this proposed rule, would experience or expect to experience additional compliance burden associated with unchanged site visits and verification activities. DHS notes that employers who do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses such as potential lost revenue or potential lost profits due to not having access to workers.

Furthermore, the proposed rule causes direct costs to accrue to affected petitioners due to opportunity costs of time from both marginal time burden increases (for H Classification Supplement to Form I–129) and increased filing volumes (additional Forms I–129 filed due to the rule's portability provision).

The increase in cost per petition to file the H classification supplement for Form I–129 on behalf of an H–2 worker is the additional opportunity cost of time of 0.3 hours. As previously stated in Section d(1) of the regulatory impact analysis, this proposed rule will add $15.28 [287] in costs if an HR specialist files, $34.25 [288] in costs if an in-house lawyer files, and $59.06 [289] in costs if an outsourced lawyer files.

In all instances, USCIS acknowledges that several aspects of the rule impose costs on affected entities. USCIS has determined, however, that these costs are outweighed by the benefits of increased program integrity and compliance. USCIS has considered opportunities to achieve the rule's stated objectives while minimizing costs to small entities and welcomes public comment.

e. An Identification of All Relevant Federal Rules, to the Extent Practical, That May Duplicate, Overlap, or Conflict With the Proposed Rule.

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

f. Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

DHS considered alternatives to elements of the proposed rule that would minimize the impact on small entities while still accomplishing the rule's objectives, such as improving the integrity and efficiency of the H–2 program. First, USCIS acknowledges that, as discussed above, the vast majority (approximately 96% of H–2A petitioners and 95% of H–2B petitioners) of affected petitioners are small businesses. Therefore, costs due to the rule would necessarily be borne by those small businesses. Minimizing any costs due to the rule would therefore compromise the ability of this regulation to effectively address the goals stated in the preamble.

USCIS considered not proposing regulations that would revoke or deny petitioners refusing to cooperate with current statutorily and regulatorily authorized USCIS site visit and verification activities. Roughly 12 percent of current H–2 site visits are inconclusive due to noncooperation on the part of petitioners. USCIS's inability to reach a conclusion concerning compliance or noncompliance concerning petitioners that triggered a site visit is critical to oversight of the program and integrity measures. The compliance burden for a small entity is not the duration of the site visit and verification activities, but rather the discrepancy between what USCIS and the assenting petitioner estimated such reasonable compliance burdens to be. USCIS will not consider permitting any small entity to willfully violate the statutory and regulatory requirements explained in the existing Form I–129 instructions, thus the IRFA alternative considered was rejected for failing to meet the rule's objective of improving H–2 program integrity. Furthermore, 12 percent of USCIS resources dedicated toward investigating noncompliance with H–2 program requirements are sunk, resulting in no findings. USCIS investigative officers are an important tool and a scarce resource. These investigatory resources could be made

[285] Calculation: 13,722 petitions received annually × 96 percent = 13,173 submitted by small entities (rounded).

[286] Calculation: 6,866 annually selected petitions × 95 percent = 6,523 submitted by small entities (rounded).

[287] HR specialist calculation: $50.94 × (0.3 hours) = $15.28 (rounded).

[288] In-house lawyer calculation: $114.17 × (0.3 hours) = $34.25 (rounded).

[289] Outsourced lawyer calculation: $196.85 × (0.3) = $59.06 (rounded).

more effective if, at some additional compliance costs to would-be noncooperative small entities, USCIS was able to reach a finding. For this reason, USCIS rejected the IRFA alternative for failing to meet the rule's objective of improving H–2 efficiency with respect to USCIS investigative resources.

Finally, an additional objective of the rule is enhancement of worker protections. The IRFA alternative of minimizing additional compliance burdens to 12 percent of entities from site visits and verification activities was rejected because it risks undermining the impacts of other proposed provisions of this rule that are expected to achieve greater protections for workers who report violations. Furthermore, DHS considered not expanding porting to minimize those impacts to small entities, but concluded that the availability of porting is integral to accomplishing the objectives of enhancing program integrity and increasing worker protections.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.[290]

In addition, the inflation-adjusted value of $100 million in 1995 is approximately $192 million in 2022 based on the Consumer Price Index for All Urban Consumers (''CPI–U'').[291]

The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate.[292] The term ''Federal intergovernmental mandate'' means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[293] The term ''Federal private sector mandate'' means, in relevant part, a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[294]

This proposed rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.[295] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the regulatory impact analysis above.

D. Executive Order 13132 (Federalism)

E.O. 13132 was issued to ensure the appropriate division of policymaking authority between the States and the Federal Government and to further the policies of the Unfunded Mandates Act. 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. DHS does not expect that this rule would impose substantial direct compliance costs on State and local governments or preempt State law. 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.

E. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

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

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

G. National Environmental Policy Act

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act[296] (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023–01, Rev. 01 (Directive) and Instruction Manual 023–01–001–01, Rev. 01 (Instruction Manual)[297] establish the procedures DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA.[298] The CEQ regulations allow Federal agencies to establish in their NEPA implementing procedures categories of actions (''categorical exclusions'') that experience has shown normally do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS).[299] Instruction Manual, Appendix A, Table 1 lists the DHS categorical exclusions.

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that

[290] 2 U.S.C. 1532(a).

[291] *See* U.S. Department of Labor, BLS, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,'' available at *www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202212.pdf* (last visited Jan. 19, 2023). *Calculation of inflation:* (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2022 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] *100 = [(292.655 − 152.383)/152.383] *100 = (140.272/152.383) *100 = 0.92052263 *100 = 92.05 percent = 92 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars *1.92 = $192 million in 2022 dollars.

[292] *See* 2 U.S.C. 1502(1), 658(6).

[293] 2 U.S.C. 658(5).

[294] 2 U.S.C. 658(7).

[295] *See* 2 U.S.C. 1502(1), 658(6).

[296] *See* Public Law 91–190, 42 U.S.C. 4321 through 4347.

[297] *See* DHS, *Implementing the National Environmental Policy Act,* DHS Directive 023–01, Rev 01 (Oct. 31, 2014), and DHS Instruction Manual Rev. 01(Nov. 6, 2014), *https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex.*

[298] *See* 40 CFR parts 1500 through 1508.

[299] *See* 40 CFR 1501.4(a).

create the potential for a significant environmental effect.[300]

This proposed rule includes a number of proposed regulatory improvements. If finalized, it will improve program integrity while increasing flexibility, efficiency, and improving access to the H–2 programs. Specifically, DHS proposes to clarify the fees prohibited under H–2 regulations, strengthen the prohibition on collecting such fees from H–2 workers, extend grace periods for H–2 workers to give them the same amount of flexibility to come to the United States early and prepare for employment, and to remain in the U.S. after their employment ends to prepare for departure or seek new employment. The proposed rule also includes a new, longer grace period for H–2 workers whose employment terminated early. DHS also proposes to make portability permanent in the H–2 programs, and to allow H–2 workers to take steps toward becoming permanent residents of the United States while still maintaining lawful nonimmigrant status. DHS further proposes efficiencies in H–2 program administration by eliminating the H–2 eligible countries lists and the H–2 ''interrupted stay'' provisions and reducing the period of absence needed to reset a worker's 3-year maximum period of stay.

DHS is not aware of any significant impact on the environment, or any change in the environmental effect from current H–2 program rules, that will result from the proposed rule changes. DHS therefore finds this proposed rule clearly fits within categorical exclusion A3 established in the Department's implementing procedures. Instruction Manual, Appendix A.

The proposed amendments, if finalized, would be stand-alone rule changes for USCIS H–2 programs and are not a part of any larger action. In accordance with the Instruction Manual, DHS finds no extraordinary circumstances associated with the proposed rules that may give rise to significant environmental effects requiring further environmental analysis and documentation. Therefore, this action is categorically excluded and no further NEPA analysis is required.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. In preparation for the submission, all agencies are required to submit the proposed new, revised or discontinued information collections for public comment. The paragraphs below summarize the changes proposed to OMB Control Number 1615–0009, *Petition for Nonimmigrant Worker* (Form I–129).

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0009 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, 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 information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I–129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for a noncitizen to temporarily enter as a nonimmigrant worker. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the nonimmigrant worker. The form serves the purpose of standardizing requests for nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(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–129 is 294,751 and the estimated hour burden per response is 2.34 hours; the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement to Form I–129 is 4,760 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I–129 is 3,057 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection H Classification Supplement to Form I–129 is 96,291 and the estimated hour burden per response is 2.3 hours; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I–129 is 37,831 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I–129 is 22,710 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q–1 Classification Supplement to Form I–129 is 155 and the estimated hour burden per response is 0.34 hour; and the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129 is 6,635 and

[300] *See* Instruction Manual, section V.B.2 (a-c).

the estimated hour burden per response is 2.34 hours.

Form name/form No.	Number of respondents	Currently approved burden estimates	Difference (in hours)	New burden estimates
		Avg. burden per response (in hours)		Avg. burden per response (in hours)
Petition for Nonimmigrant Worker (Form I–129)	294,751	2.34	0	2.34
E–/E–2 Classification Supplement to Form I–129	4,760	0.67	0	0.67
Trade Agreement Supplement to Form I–129	3.057	0.67	0	0.67
H Classification Supplement to Form I–129	96,291	2	0.3	2.3
H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement	96,291	1	0	1
L Classification Supplement to Form I–129	37,831	1.34	0	1.34
O and P Classifications Supplement to Form I–129	22,710	1	0	1
Q–1 Classifications Supplement to Form I–129	155	0.34	0	0.34
R–1 Classifications Supplement to Form I–129	6,635	2.34	0	2.34

(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 1,101,697 hours. This is an increase from the current estimate of 1,072,810 burden hours annually. The overall change in burden estimates reflects the proposed changes in the rule related to the removal of the list of countries of citizenship section on the form and eligible countries list from the instructions, addition of question on exception to the three-year limit and requests for evidence, rewriting of questions and instructional content on prohibited fees and evidence and other H–2A and H–2B violations, addition of clarifying language to H–2A and H–2B petitioner and employer obligations questions, addition of questions and reformatting for the joint employer section, removal of E-Verify and corresponding H–2A petitions instructions, addition of instructional content in the recruitment of H–2A and H–2B workers section, removal of instructional content on interrupted stays, and addition of clarifying language to the notification requirements instructional content.

(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 $70,681,290.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

Regulatory Amendments

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1188, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Section 214.2 is amended by:
■ a. Revising paragraph (h)(2)(i)(D);
■ b. Redesignating paragraph (h)(2)(i)(I) as paragraph (h)(2)(i)(J), and adding a new paragraph (h)(2)(i)(I);
■ c. Revising paragraphs (h)(2)(ii) and (iii);
■ d. Removing paragraph (h)(5)(i)(F);
■ e. Removing and reserving paragraph (h)(5)(iii)(B);
■ f. Revising paragraphs (h)(5)(vi)(A), (B)(*1*)(*i*) and (*iii*), and removing (h)(5)(vi)(E);
■ g. Revising paragraphs (h)(5)(viii)(B) and (C) and adding (D);
■ h. Revising paragraphs (h)(5)(ix) and (xi);
■ i. Removing paragraph (h)(5)(xii);
■ j. Revising paragraphs (h)(6)(i)(B) through (D);
■ k. Removing and reserving paragraph (h)(6)(i)(E);
■ l. Revising paragraph (h)(6)(i)(F);
■ m. Revising paragraph (h)(6)(vii);
■ n. Adding paragraph (h)(10)(iii);
■ o. Adding paragraph (h)(11)(iv);
■ p. Revising paragraphs (h)(13)(i), (iv) and (v);
■ q. Revising paragraph (h)(16)(ii) and adding (h)(16)(iii);
■ r. Revising paragraph (h)(20); and
■ s. Adding paragraph (h)(30).

The revisions and additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition for a nonimmigrant worker requesting classification and an extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. Except as provided in paragraph (h)(2)(i)(I) of this section, 8 CFR 274a.12(b)(21), or section 214(n) of the Act, 8 U.S.C. 1184(n), the alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H–1C nonimmigrant alien may not change employers.

* * * * *

(I) *H–2A and H–2B portability.* An eligible H–2A or H–2B nonimmigrant is

authorized to start new employment upon the proper filing, in accordance with 8 CFR 103.2(a), of a nonfrivolous H–2A or H–2B petition on behalf of such alien requesting the same classification that the nonimmigrant alien currently holds, or as of the requested start date, whichever is later.

(*1*) *Eligible H–2A or H–2B nonimmigrant.* For H–2A and H–2B portability purposes, an eligible H–2A or H–2B nonimmigrant is defined as an alien:

(*i*) Who has been lawfully admitted into the United States in, or otherwise provided, H–2A or H–2B nonimmigrant status;

(*ii*) On whose behalf a nonfrivolous H–2A or H–2B petition for new employment has been properly filed, including a petition for new employment with the same employer, with a request to amend or extend the H–2A or H–2B nonimmigrant's stay in the same classification that the nonimmigrant currently holds, before the H–2A or H–2B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires; and

(*iii*) Who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.

(*2*) *Length of employment.* Employment authorized under this paragraph (h)(2)(i)(I) automatically ceases upon the adjudication or withdrawal of the H–2A or H–2B petition described in paragraph (h)(2)(i)(I)(*1*)(*ii*) of this section.

(*3*) *Application of H–2A or H–2B program requirements during the pendency of the petition.* The petitioner and any employer is required to comply with all H–2A or H–2B program requirements, as applicable under the relevant program, with respect to an alien who has commenced new employment with that petitioner or employer based on a properly filed nonfrivolous petition and while that petition is pending, even if the petition is subsequently denied or withdrawn. During the pendency of the petition, the alien will not be considered to have been in a period of unauthorized stay or employed in the United States without authorization solely on the basis of employment pursuant to the new petition, even if the petition is subsequently denied or withdrawn.

(*4*) *Successive H–2A or H–2B portability petitions.* (*i*) An alien maintaining authorization for employment under this paragraph (h)(2)(i)(I), whose status, as indicated on the Arrival-Departure Record (Form I–94), has expired, will be considered to be in a period of stay authorized by the Secretary of Homeland Security for purposes of paragraph (h)(2)(i)(I)(*1*)(*ii*) of this section. If otherwise eligible under this paragraph (h)(2)(i)(I), such alien may begin working in a subsequent position upon the filing of another H–2A or H–2B petition in the same classification that the nonimmigrant alien currently holds or from the requested start date, whichever is later, notwithstanding that the previous H–2A or H–2B petition upon which employment is authorized under this paragraph (h)(2)(i)(I) remains pending and regardless of whether the validity period of an approved H–2A or H–2B petition filed on the alien's behalf expired during such pendency.

(*ii*) A request to amend the petition or for an extension of stay in any successive H–2A or H–2B portability petition requesting the same classification that the nonimmigrant alien currently holds cannot be approved if a request to amend the petition or for an extension of stay in any preceding H–2A or H–2B portability petition in the succession is denied, unless the beneficiary's previously approved period of H–2A or H–2B status remains valid.

(*iii*) Denial of a successive portability petition does not affect the ability of the H–2A or H–2B beneficiary to continue or resume working in accordance with the terms of an H–2A or H–2B petition previously approved on behalf of the beneficiary if that petition approval remains valid, and the beneficiary has either maintained H–2A or H–2B status, as appropriate, or been in a period of authorized stay and has not been employed in the United States without authorization.

* * * * *

(ii) *Multiple beneficiaries.* More than one beneficiary may be included in an H–1C, H–2A, H–2B, or H–3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time, and in the same location.

(iii) *Naming beneficiaries.* H–1B, H–1C, and H–3 petitions must include the name of each beneficiary. Except as provided in this paragraph (h), all H–2A and H–2B petitions must include the name of each beneficiary who is currently in the United States, but need not name any beneficiary who is not currently in the United States. Unnamed beneficiaries must be shown on the petition by total number. USCIS may require the petitioner to name H–2B beneficiaries where the name is needed to establish eligibility for H–2B nonimmigrant status. If all of the beneficiaries covered by an H–2A or H–2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions associated with that temporary labor certification.

* * * * *

(5) * * *

(vi) * * *

(A) *Consent.* In filing an H–2A petition, a petitioner and each employer consents to allow Government access to all sites where the labor is being or will be performed and where workers are or will be housed and agrees to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by USCIS, including an on-site inspection of the employer's facilities, review of the employer's records related to the compliance with immigration laws and regulations, and interview of the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H–2A petition for H–2A workers performing services at the location or locations that are a subject of inspection or compliance review.

(B) * * *

(*1*) * * *

(*i*) An H–2A worker does not report to work within 5 workdays of the employment start date on the H–2A petition or within 5 workdays of the start date established by their employer, whichever is later;

* * * * *

(*iii*) The H–2A worker does not report for work for a period of 5 consecutive workdays without the consent of the employer or is terminated prior to the completion of agricultural labor or services for which they were hired.

* * * * *

(viii) * * *

(B) *Period of admission.* An alien admissible as an H–2A nonimmigrant will be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to 10 days before the beginning of the approved period for the purpose of travel to the worksite, and up to 30 days subject to the 3-year limitation in paragraph (h)(5)(viii)(C) of this section following the expiration of the H–2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.

(C) *Limits on an individual's stay.* Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H–2A nonimmigrant is limited by the period of time stated in an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H–2A or H–2B status for a total of 3 years may not again be granted H–2A status until such time as they remain outside the United States for an uninterrupted period of at least 60 days. Eligibility under this paragraph (h)(5)(viii)(C) will be determined during adjudication of a request for admission, change of status or extension. An alien found eligible for a shorter period of H–2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) will only be admitted for that shorter period.

(D) *Period of absence.* An absence from the United States for an uninterrupted period of at least 60 days at any time will result in the alien becoming eligible for a new 3-year maximum period of H–2 stay. To qualify, the petitioner must provide evidence documenting the alien's relevant absence(s) from the United States, such as, but not limited to, arrival and departure records, copies of tax returns, and records of employment abroad.

(ix) *Substitution of beneficiaries after admission.* An H–2A petition may be filed to replace H–2A workers whose employment was terminated earlier than the end date stated on the H–2A petition and before the completion of work; who do not report to work within 5 workdays of the employment start date on the H–2A petition or within 5 workdays of the start date established by their employer, whichever is later; or who do not report for work for a period of 5 consecutive workdays without the consent of the employer. The petition must be filed with a copy of the temporary labor certification, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving the name, date and country of birth, termination date, and the reason for termination, if applicable, for such worker and the date that USCIS was notified that the worker was terminated or did not report for work for a period of 5 consecutive workdays without the consent of the employer. A petition for a replacement will not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(*1*) of this section.

* * * * *

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries*—(A) *Denial or revocation of petition for prohibited fees.* As a condition to approval of an H–2A petition, no job placement fee, fee or penalty for breach of contract, or other fee, penalty, or compensation (either direct or indirect), related to the H–2A employment (collectively, ''prohibited fees'') may be collected at any time from a beneficiary of an H–2A petition by a petitioner, a petitioner's employee, agent, attorney, facilitator, recruiter, or similar employment service, or by any employer (if different from the petitioner) or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers. The passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, constitutes the collection of a prohibited fee. This provision does not prohibit petitioners (including its employees), employers or any joint employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(*1*) If USCIS determines that the petitioner or any of its employees, whether before or after the filing of the H–2A petition, has collected, or entered into an agreement to collect, a prohibited fee related to the H–2A employment, the H–2A petition will be denied or revoked on notice unless the petitioner demonstrates through clear and convincing evidence that extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees, and that it has fully reimbursed all affected beneficiaries or the beneficiaries' designees. To qualify for this exception, a petitioner must first establish the circumstances were rare and unforeseeable, and that it had made significant efforts to prevent prohibited fees prior to the collection of or agreement to collect such fees. Further, a petitioner must establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee. Moreover, a petitioner must establish that it has fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, that it has fully reimbursed their designees. A designee must be an individual or entity for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement, as long as the petitioner or its successor in interest, or its agent, employer (if different from the petitioner), or any joint employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement.

(*2*) If USCIS determines that the beneficiary has paid or agreed to pay a prohibited fee related to the H–2A employment, whether before or after the filing of the H–2A petition, to any agent, attorney, employer, facilitator, recruiter, or similar employment service, or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers, the H–2A petition will be denied or revoked on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement and that all affected beneficiaries or their designees have been fully reimbursed. A written contract between the petitioner and the agent, attorney, facilitator, recruiter, similar employment service, or member employer stating that such fees were prohibited will not, by itself, be sufficient to meet this standard of proof.

(B) *1-year bar on approval of subsequent H–2A petitions.* USCIS will deny any H–2A petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H–2A or H–2B petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B), respectively, of this section. In addition, USCIS will deny any H–2A petition filed by the same petitioner or successor

in interest within 1 year after withdrawal of an H–2A or H–2B petition that was withdrawn following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B), respectively, of this section.

(C) *Reimbursement as condition to approval of future H–2A petitions*—(*1*) *Additional 3-year bar on approval of subsequent H–2A petitions.* For an additional 3 years after the 1-year period described in paragraph (h)(5)(xi)(B) of this section, USCIS will deny any H–2A petition filed by the same petitioner or successor in interest, unless the petitioner or successor in interest demonstrates to USCIS that the petitioner, successor in interest, or the petitioner's or successor in interest's agent, facilitator, recruiter, or similar employment service, or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers, reimbursed in full each beneficiary, or the beneficiary's designee, of the denied or revoked petition from whom a prohibited fee was collected.

(*2*) *Successor in interest.* For the purposes of paragraphs (h)(5)(xi)(B) and (C) of this section, successor in interest means an employer that is controlling and carrying on the business of a previous employer regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity. The following factors may be considered by USCIS in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(*i*) Substantial continuity of the same business operations;

(*ii*) Use of the same facilities;

(*iii*) Substantial continuity of the work force;

(*iv*) Similarity of jobs and working conditions;

(*v*) Similarity of supervisory personnel;

(*vi*) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(*vii*) Similarity in machinery, equipment, production methods, or assets required to conduct business;

(*viii*) Similarity of products and services;

(*ix*) Familial or close personal relationships between predecessor and successor owners of the entity; and

(*x*) Use of the same or related remittance sources for business payments.

(6) * * *

(i) * * *

(B) *Denial or revocation of petition for prohibited fees.* As a condition of approval of an H–2B petition, no job placement fee, fee or penalty for breach of contract, or other fee, penalty, or compensation (either direct or indirect), related to the H–2B employment (collectively, ''prohibited fees'') may be collected at any time from a beneficiary of an H–2B petition by a petitioner, a petitioner's employee, agent, attorney, facilitator, recruiter, or similar employment service, or any employer (if different from the petitioner). The passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, constitutes the collection of a prohibited fee. This provision does not prohibit petitioners (including its employees), employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(*1*) If USCIS determines that the petitioner or any of its employees, whether before or after the filing of the H–2B petition, has collected or entered into an agreement to collect a prohibited fee related to the H–2B employment, the H–2B petition will be denied or revoked on notice unless the petitioner demonstrates through clear and convincing evidence that extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees, and that it has fully reimbursed all affected beneficiaries or the beneficiaries' designees. To qualify for this exception, a petitioner must first establish that the circumstances were rare and unforeseeable, and that it had made significant efforts to prevent prohibited fees prior to the collection of or agreement to collect such fees. Further, a petitioner must establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee. Moreover, a petitioner must establish that it has fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, that it has fully reimbursed their designees. A designee must be an individual or entity for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement, as long as the petitioner or its successor in interest, or its agent, employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement.

(*2*) If USCIS determines that the beneficiary has paid or agreed to pay any employer, agent, attorney, facilitator, recruiter, or similar employment service a prohibited fee related to the H–2B employment, whether before or after the filing of the H–2B petition, the H–2B petition will be denied or revoked on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement and that all affected beneficiaries or their designees have been fully reimbursed. A written contract between the petitioner and the facilitator, recruiter, or similar employment service stating that such fees were prohibited will not, by itself, be sufficient to meet this standard of proof.

(C) *1-year bar on approval of subsequent H–2B petitions.* USCIS will deny any H–2B petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H–2B or H–2A petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section. In addition, USCIS will deny any H–2B petition filed by the same petitioner or successor in interest within 1 year after withdrawal of an H–2B or H–2A petition that was withdrawn following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section.

(D) *Reimbursement as condition to approval of future H–2B petitions* —(*1*) *Additional 3-year bar on approval of subsequent H–2B petitions.* For an additional 3 years after the 1-year period described in paragraph (h)(6)(i)(C) of this section, USCIS will deny any H–2B petition filed by the same petitioner or successor in interest, unless the petitioner or successor in interest demonstrates to USCIS that the petitioner or successor in interest, or the petitioner's or successor in interest's agent, facilitator, recruiter, or similar employment service, reimbursed in full each beneficiary, or the beneficiary's designee, of the denied or revoked petition from whom a prohibited fee was collected.

(*2*) *Successor in interest.* For the purposes of paragraphs (h)(6)(i)(C) and (D) of this section, successor in interest means an employer that is controlling and carrying on the business of a previous employer regardless of

whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity. The following factors may be considered by USCIS in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(*i*) Substantial continuity of the same business operations;

(*ii*) Use of the same facilities;

(*iii*) Substantial continuity of the work force;

(*iv*) Similarity of jobs and working conditions;

(*v*) Similarity of supervisory personnel;

(*vi*) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(*vii*) Similarity in machinery, equipment, production methods, or assets required to conduct business;

(*viii*) Similarity of products and services;

(*ix*) Familial or close personal relationships between predecessor and successor owners of the entity; and

(*x*) Use of the same or related remittance sources for business payments.

* * * * *

(F) *Petitioner agreements and notification requirements*—(*1*) *Agreements.* The petitioner must notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if: An H–2B worker does not report for work within 5 workdays after the employment start date stated on the petition; the nonagricultural labor or services for which H–2B workers were hired were completed more than 30 days early; or an H–2B worker does not report for work for a period of 5 consecutive workdays without the consent of the employer or is terminated prior to the completion of the nonagricultural labor or services for which they were hired. The petitioner must also retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification.

(*2*) *Consent.* In filing an H–2B petition, the petitioner and each employer (if different from the petitioner) consent to allow Government access to all sites where the labor is being or will be performed and agrees to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by USCIS, including an on-site inspection of the employer's facilities, review of the employer's records related to the compliance with immigration laws and regulations, and interview of the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H–2B petition for H–2B workers performing services at the location or locations that are a subject of inspection or compliance review.

* * * * *

(vii) *Admission*—(A) *Period of admission.* An alien admissible as an H–2B nonimmigrant will be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to 10 days before the beginning of the approved period for the purpose of travel to the worksite, and up to 30 days subject to the 3-year limitation in paragraph (h)(6)(vii)(B) of this section following the expiration of the H–2B petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.

(B) *Limits on an individual's stay.* Except as provided in paragraph (h)(6)(vii)(A) of this section, an alien's stay as an H–2B nonimmigrant is limited by the period of time stated in an approved petition. An alien may remain longer to engage in other qualifying temporary nonagricultural employment by obtaining an extension of stay. However, an individual who has held H–2A or H–2B status for a total of 3 years may not again be granted H–2B status until such time as they remain outside the United States for an uninterrupted period of at least 60 days. Eligibility under this paragraph (h)(6)(vii)(B) will be determined during adjudication of a request for admission, change of status or extension of stay. An alien found eligible for a shorter period of H–2B status than that indicated by the petition due to the application of this paragraph (h)(6)(vii)(B) will only be admitted for that shorter period.

(C) *Period of absence.* An absence from the United States for an uninterrupted period of at least 60 days at any time will result in the alien becoming eligible for a new 3-year maximum period of H–2 stay. The limitation in paragraph (h)(6)(vii)(B) of this section will not apply to H–2B aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitation in paragraph (h)(6)(vii)(B) of this section will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify, the petitioner must provide evidence documenting the alien's relevant absence(s) from the United States, such as, but not limited to, arrival and departure records, copies of tax returns, and records of employment abroad.

(D) *Traded professional H–2B athletes.* In the case of a professional H–2B athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the player's acquisition by the new organization, within which time the new organization is expected to file a new application or petition for H–2B nonimmigrant classification. If a new application or petition is not filed within 30 days, employment authorization will cease. If a new application or petition is filed within 30 days, the professional athlete will be deemed to be in valid H–2B status, and employment will continue to be authorized, until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

* * * * *

(10) * * *

(iii) *H–2A and H–2B violators*—(A) USCIS will deny any H–2A or H–2B petition filed by a petitioner, or the successor in interest of a petitioner as defined in paragraphs (h)(5)(xi)(C)(*2*) and (h)(6)(i)(D)(*2*) of this section, that has been the subject of one or more of the following actions:

(*1*) A final administrative determination by the Secretary of Labor under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503 debarring the petitioner from filing or receiving a future labor certification, or a final administrative determination by the Governor of Guam debarring the petitioner from issuance of future labor certifications under applicable Guam regulations and rules, if the petition is

filed during the debarment period, or if the debarment occurs during the pendency of the petition; or

(*2*) A final USCIS denial or revocation decision with respect to a prior H–2A or H–2B petition that includes a finding of fraud or willful misrepresentation of a material fact during the pendency of the petition or within 3 years prior to filing the petition; or

(*3*) A final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition.

(B) Except as provided in paragraph (h)(10)(iii)(A) of this section, USCIS may deny any H–2A or H–2B petition filed by a petitioner, or the successor in interest of a petitioner as defined in paragraphs (h)(5)(xi)(C)(*2*) and (h)(6)(i)(D)(*2*) of this section, that has been the subject of one or more of the following actions during the pendency of the petition or within 3 years prior to filing the petition. USCIS may deny such a petition if it determines that the petitioner or successor has not established its intention or the ability to comply with H–2A or H–2B program requirements. The violation(s) underlying the following actions may call into question a petitioner's or successor's intention or ability to comply:

(*1*) A final administrative determination by the Secretary of Labor or the Governor of Guam with respect to a prior H–2A or H–2B temporary labor certification that includes:

(*i*) Revocation of an approved temporary labor certification under 20 CFR part 655, subpart A or B, or applicable Guam regulations and rules;

(*ii*) Debarment under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503, or applicable Guam regulations and rules, if the debarment period has concluded prior to filing the petition; or

(*iii*) Any other administrative sanction or remedy under 29 CFR part 501 or 503, or applicable Guam regulations and rules, including assessment of civil money penalties as described in those parts.

(*2*) A USCIS decision revoking the approval of a prior petition that includes one or more of the following findings: the beneficiary was not employed by the petitioner in the capacity specified in the petition; the statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, or was inaccurate; the petitioner violated terms and conditions of the approved petition; or the petitioner violated requirements of section 101(a)(15)(H) of the Act or this paragraph (h); or

(*3*) Any final administrative or judicial determination (other than one described in paragraph (h)(10)(iii)(A) of this section) that the petitioner violated any applicable employment-related laws or regulations, including health and safety laws or regulations.

(C) In determining whether the underlying violation(s) in paragraph (h)(10)(iii)(B) of this section calls into question the ability or intention of the petitioner or its successor in interest to comply with H–2A or H–2B program requirements, USCIS will consider all relevant factors, including, but not limited to:

(*1*) The recency and number of violations;

(*2*) The egregiousness of the violation(s), including how many workers were affected, and whether it involved a risk to the health or safety of workers;

(*3*) Overall history or pattern of prior violations;

(*4*) The severity or monetary amount of any penalties imposed;

(*5*) Whether the final determination, decision, or conviction included a finding of willfulness;

(*6*) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential financial injury to the workers;

(*7*) Timely compliance with all penalties and remedies ordered under the final determination(s), decision(s), or conviction(s); and

(*8*) Other corrective actions taken by the petitioner or its successor in interest to cure its violation(s) or prevent future violations.

(D) For purposes of paragraph (h)(10)(iii) of this section, a criminal conviction or final administrative or judicial determination against any one of the following individuals will be treated as a conviction or final administrative or judicial determination against the petitioner or successor in interest:

(*1*) An individual acting on behalf of the petitioning entity, which could include, among others, the petitioner's owner, employee, or contractor; or

(*2*) With respect to paragraph (h)(10)(iii)(B) of this section, an employee of the petitioning entity who a reasonable person in the H–2A or H–2B worker's position would believe is acting on behalf of the petitioning entity.

(E)(*1*) With respect to denials under paragraph (h)(10)(iii)(A) of this section, USCIS will inform the petitioner of the right to appeal the denial under 8 CFR 103.3, and indicate in the denial notice that the mandatory ground of denial will also apply in the adjudication of any other pending or future H–2 petition filed by the petitioner or a successor in interest during the applicable time period.

(*2*) With respect to denials under paragraph (h)(10)(iii)(B) of this section, USCIS will inform the petitioner of the right to appeal the denial under 8 CFR 103.3, and indicate in the denial notice that the discretionary ground of denial may also apply in the adjudication of any other pending or future H–2 petition filed by the petitioner or a successor in interest during the applicable time period.

(11) * * *

(iv) Effect of H–2A or H–2B petition revocation. Upon revocation of the approval of an employer's H–2A or H–2B petition, the beneficiary and their dependents will not be considered to have failed to maintain nonimmigrant status, and will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of the petition revocation for a 60-day period following the date of the revocation, or until the end of the authorized period of admission, whichever is shorter. During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12. The employer will be liable for the alien beneficiary's reasonable costs of return transportation to their last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved petition in the same classification filed by a different employer.

* * * * *

(13) * * *

(i) *General.* (A) An H–3 beneficiary will be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under section 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count toward fulfillment of the required time abroad.

A certain period of absence from the United States of H–2A and H–2B aliens, as set forth in 8 CFR 214.2(h)(5)(viii)(D) and 8 CFR 214.2(h)(6)(vii)(C), respectively, will provide a new total of 3 years that H–2A or H–2B status may be granted. The petitioner must provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to reside abroad.

(C) An alien admitted or otherwise provided status in H–2A or H–2B classification and their dependents will not be considered to have failed to maintain nonimmigrant status, and will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of a cessation of the employment on which the alien's classification was based, for 60 consecutive days or until the end of the authorized period of admission, whichever is shorter, once during each authorized period of admission. During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12.

(D) An alien in any authorized period described in paragraph (C) of this section may apply for and be granted an extension of stay under 8 CFR 214.1(c)(4) or change of status under 8 CFR 248.1, if otherwise eligible.

* * * * *

(iv) *H–3 limitation on admission.* An H–3 alien participant in a special education program who has spent 18 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act; and an H–3 alien trainee who has spent 24 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

(v) *Exceptions.* The limitations in paragraphs (h)(13)(iii) and (iv) of this section will not apply to H–1B and H–3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

* * * * *

(16) * * *

(ii) *H–2A or H–2B classification.* The approval of a permanent labor certification, the filing of a preference petition for an alien, or an application by an alien to seek lawful permanent residence or an immigrant visa, will not, standing alone, be the basis for denying an H–2 petition, a request to extend such a petition, or an application for admission in, change of status to, or extension of stay in H–2 status. The approval of a permanent labor certification, filing of a preference petition, or filing of an application for adjustment of status or an immigrant visa will be considered, together with all other facts presented, in determining whether the H–2 nonimmigrant is maintaining his or her H–2 status and whether the alien has a residence in a foreign country which he or she has no intention of abandoning.

(iii) *H–3 classification.* The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner, will be a reason, by itself, to deny the alien's extension of stay.

* * * * *

(20) *Retaliatory action claims.* (i) If credible documentary evidence is provided in support of a petition seeking an extension of H–1B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from their employer based on a report regarding a violation of that employer's labor condition application obligations under section 212(n)(2)(C)(iv) of the Act, USCIS may consider a loss or failure to maintain H–1B status by the beneficiary related to such violation as due to, and commensurate with, ''extraordinary circumstances'' as defined by § 214.1(c)(4) and 8 CFR 248.1(b).

(ii) If credible documentary evidence is provided in support of a petition seeking an extension of H–2A or H–2B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from their employer based on a reasonable claim of a violation or potential violation of any applicable program requirements or based on engagement in another protected activity, USCIS may consider a loss or failure to maintain H–2A or H–2B status by the beneficiary related to such violation as due to, and commensurate with, ''extraordinary circumstances'' as defined by § 214.1(c)(4) and 8 CFR 248.1(b).

* * * * *

(30) *Severability.* The Department intends that should any of the [amendments made by ''Modernizing H–2 Program Requirements, Oversight, and Worker Protections''], be held to be invalid or unenforceable by their terms or as applied to any person or circumstance they should nevertheless be construed so as to continue to give the maximum effect to the provision(s) permitted by law. If, however, such holding is that the provision(s) is wholly invalid and unenforceable, the [amendments to those provision(s)] should be severed from the remainder of [the rule], and the holding should not affect the remainder of the sections amended [by the rule] or the application of the provision(s) to persons not similarly situated or to dissimilar circumstances

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 3. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599; Title VII of Pub. L. 110–229, 122 Stat. 754; Pub. L. 115–218, 132 Stat. 1547; 8 CFR part 2.

■ 4. Section 274a.12 is amended by revising paragraph (b)(21) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) or 8 CFR 214.2(h)(1)(ii)(D) for whom a nonfrivolous petition requesting an extension of stay is properly filed pursuant to 8 CFR 214.2 and 8 CFR 103.2(a) requesting the same classification that the nonimmigrant alien currently holds. Pursuant to 8 CFR 214.2(h)(2)(i)(I), such alien is authorized to start new employment upon the proper filing of the nonfrivolous petition requesting an extension of stay in the same classification, or as of the requested start date, whichever is later. The employment authorization under this paragraph (b)(21) automatically ceases upon the adjudication or withdrawal of the H–2A or H–2B petition;

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2023–20123 Filed 9–18–23; 8:45 am]

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