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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2023–0131]

RIN 3150–AL03

List of Approved Spent Fuel Storage Casks: TN Americas LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel, Certificate of Compliance No. 1004, Renewed Amendment No. 18

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its spent fuel storage regulations by revising the TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel listing within the ''List of approved spent fuel storage casks'' to include Renewed Amendment No. 18 to Certificate of Compliance No. 1004. Because this amendment was submitted subsequent to the renewal of the TN Americas, LLC Standardized NUHOMS Horizontal Modular Storage System for Irradiated Nuclear Fuel Certificate of Compliance No. 1004 and, therefore, subject to the Aging Management Program requirements of the renewed certificate, NRC is referring to it as ''Renewed Amendment No. 18.'' Renewed Amendment No. 18 amends the certificate of compliance to provide an improved basket design, revise technical specifications, and incorporate administrative controls during short duration independent spent fuel storage installation handling operations. The amendment also includes a change to the horizontal storage module concrete to allow use of a blended Portland cement that meets the requirements of American Society for Testing and Materials standards.

DATES: This direct final rule is effective December 18, 2023, unless significant adverse comments are received by November 2, 2023. If this direct final rule is withdrawn as a result of such comments, timely notice of the withdrawal will be published in the **Federal Register**. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Comments received on this direct final rule will also be considered to be comments on a companion proposed rule published in the Proposed Rules section of this issue of the **Federal Register**.

ADDRESSES: Submit your comments, identified by Docket ID NRC–2023–0131, at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

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

FOR FURTHER INFORMATION CONTACT: Rodnika Murphy, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–7153, email: *Rodnika.Murphy@nrc.gov;* and Christian Jacobs, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–6825, email: *Christian.Jacobs@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0131 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0131. Address questions about NRC dockets to Dawn Forder, telephone: 301–415–3407, email: *Dawn.Forder@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.

B. Submitting Comments

Please include Docket ID NRC–2023–0131 in your comment submission. The NRC requests that you submit comments through the Federal rulemaking website at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission.

The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

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

II. Rulemaking Procedure

This direct final rule is limited to the changes contained in Renewed Amendment No. 18 to Certificate of Compliance No. 1004 and does not include other aspects of the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel Cask System design. The NRC is using the ''direct final rule procedure'' to issue this amendment because it represents a limited and routine change to an existing certificate of compliance that is expected to be non-controversial. Adequate protection of public health and safety continues to be reasonably assured. The amendment to the rule will become effective on December 18, 2023. However, if the NRC receives any significant adverse comment on this direct final rule by November 2, 2023, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published in the Proposed Rules section of this issue of the **Federal Register** or as otherwise appropriate. In general, absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC to make a change (other than editorial) to the rule, certificate of compliance, or technical specifications.

III. Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended, requires that ''[t]he Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the Nuclear Waste Policy Act states, in part, that ''[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) [sic: 218(a)] for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule that added a new subpart K in part 72 of title 10 of the *Code of Federal Regulations* (10 CFR) entitled ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new subpart L in 10 CFR part 72 entitled ''Approval of Spent Fuel Storage Casks,'' which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on December 22, 1994 (59 FR 65897) that approved the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel System design and added it to the list of NRC-approved cask designs in § 72.214 as Certificate of Compliance No. 1004.

IV. Discussion of Changes

On May 20, 2022, and as supplemented on August 12, 2022, January 20, 2023, January 27, 2023, February 16, 2023, March 8, 2023, and April 5, 2023, TN Americas, LLC submitted a request to amend Certificate of Compliance No. 1004 for the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel. Renewed Amendment No. 18 revises the certificate and technical specifications as follows:

- provide a 24PTH improved basket design (Type 3) using staggered plates similar to EOS–37PTH to simplify construction, reduce weight, and improve fabricability;
- delete Technical Specification (TS) Appendix A inspections, tests, and evaluations requirement for initial horizontal storage module delta temperature measurement with a loaded dry shielded canister (DSC);
- clarify Appendix B technical specification Section 4.3.2 language related to transfer casks with liquid neutron shields regarding the OS197L transfer cask (TC), which is significantly different than other TC models;
- update TS Appendix C American Society of Mechanical Engineers (ASME) Code Alternatives Table C–12 to add code alternative NG–4231.1;
- clarify in Appendix B TS LCO 3.1.3 that there is no transfer time limit associated with the 24PTH–S–LC DSC, consistent with existing updated final safety analysis report analysis;
- incorporate administrative controls during short duration independent spent fuel storage installation handling operations that are unanalyzed for tornado hazards in accordance with the guidance contained in NRC EGM 22–001, ''Enforcement Discretion for Noncompliance of Tornado Hazards Protection Requirements at Independent Spent Fuel Storage Installations'';
- and change the horizontal storage module concrete to allow use of different cement, which is a blended Portland cement meeting the requirements of the American Society for Testing and Materials (ASTM) C595 standard.

This amendment also includes an editorial correction to the certificate of compliance name/address information by adding a missing space between 7160 and Riverwood Drive. The changes to the aforementioned documents are identified with revisions bars in the margin of each document.

As documented in the preliminary safety evaluation report, the NRC performed a safety evaluation of the proposed certificate of compliance

amendment request. The NRC determined that this amendment does not reflect a significant change in design or fabrication of the cask. Specifically, the NRC determined that the design of the cask would continue to maintain confinement, shielding, and criticality control in the event of each evaluated accident condition. In addition, any resulting occupational exposure or offsite dose rates from the implementation of Renewed Amendment No. 18 would remain well within the limits specified by 10 CFR part 20, ''Standards for Protection Against Radiation.'' Thus, the NRC found there will be no significant change in the types or amounts of any effluent released, no significant increase in the individual or cumulative radiation exposure, and no significant increase in the potential for or consequences from radiological accidents.

The NRC determined that the amended Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel cask design, when used under the conditions specified in the certificate of compliance, the technical specifications, and the NRC's regulations, will meet the requirements of 10 CFR part 72; therefore, adequate protection of public health and safety will continue to be reasonably assured. When this direct final rule becomes effective, persons who hold a general license under § 72.210 may, consistent with the license conditions under § 72.212, load spent nuclear fuel into Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel casks that meet the criteria of Renewed Amendment No. 18 to Certificate of Compliance No. 1004.

V. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this direct final rule, the NRC revises the listing for the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel Cask System in § 72.214, ''List of approved spent fuel storage casks.'' This action does not constitute the establishment of a standard that contains generally applicable requirements.

VI. Agreement State Compatibility

Under the ''Agreement State Program Policy Statement'' approved by the Commission on October 2, 2017, and published in the **Federal Register** on October 18, 2017 (82 FR 48535), this rule is classified as Compatibility Category NRC—Areas of Exclusive NRC Regulatory Authority. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended, or the provisions of 10 CFR chapter I. Therefore, compatibility is not required for program elements in this category.

VII. Plain Writing

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

VIII. Environmental Assessment and Finding of No Significant Impact

Under the National Environmental Policy Act of 1969, as amended, and the NRC's regulations in 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' the NRC has determined that this direct final rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The NRC has made a finding of no significant impact on the basis of this environmental assessment.

A. The Action

The action is to amend § 72.214 to revise the TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel listing within the ''List of approved spent fuel storage casks'' to include Renewed Amendment No. 18 to Certificate of Compliance No. 1004.

B. The Need for the Action

This direct final rule amends the certificate of compliance for the TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel design within the list of approved spent fuel storage casks to allow power reactor licensees to store spent fuel at reactor sites in casks with the approved modifications under a general license. Specifically, Renewed Amendment No. 18 amends the certificate of compliance as describes in section IV, ''Discussion of Changes,'' of this document, for the use of the Standardized NUHOMS® Horizontal Modular Storage System.

C. Environmental Impacts of the Action

On July 18,1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent fuel under a general license in cask designs approved by the NRC. The potential environmental impact of using NRC-approved storage casks was analyzed in the environmental assessment for the 1990 final rule. The environmental assessment for this Renewed Amendment No. 18 tiers off the environmental assessment for the July 18, 1990, final rule. Tiering on past environmental assessments is a standard process under the National Environmental Policy Act of 1969, as amended.

The TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel is designed to mitigate the effects of design basis accidents that could occur during storage. Design basis accidents account for human-induced events and the most severe natural phenomena reported for the site and surrounding area. Postulated accidents analyzed for an independent spent fuel storage installation, the type of facility at which a holder of a power reactor operating license would store spent fuel in casks in accordance with 10 CFR part 72, can include tornado winds and tornado-generated missiles, a design basis earthquake, a design basis flood, an accidental cask drop, lightning effects, fire, explosions, and other incidents.

This amendment does not reflect a significant change in design or fabrication of the cask. Because there are no significant design or process changes, any resulting occupational exposure or offsite dose rates from the implementation of Renewed Amendment No. 18 would remain well within the 10 CFR part 20 limits. The NRC has also determined that the design of the cask as modified by this rule would maintain confinement, shielding, and criticality control in the event of an accident. Therefore, the proposed changes will not result in any radiological or non-radiological environmental impacts that significantly differ from the environmental impacts evaluated in the environmental assessment supporting the July 18, 1990, final rule. There will be no significant change in the types or significant revisions in the amounts of any effluent released, no significant increase in the individual or cumulative radiation exposures, and no significant increase

in the potential for, or consequences from, radiological accidents. The NRC documented its safety findings in the preliminary safety evaluation report.

D. Alternative to the Action

The alternative to this action is to deny approval of Renewed Amendment No. 18 and not issue the direct final rule. Consequently, any 10 CFR part 72 general licensee that seeks to load spent nuclear fuel into the TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel in accordance with the changes described in proposed Renewed Amendment No. 18 would have to request an exemption from the requirements of §§ 72.212 and 72.214. Under this alternative, interested licensees would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee. The environmental impacts would be the same as the proposed action.

E. Alternative Use of Resources

Approval of Renewed Amendment No. 18 to Certificate of Compliance No. 1004 would result in no irreversible commitment of resources.

F. Agencies and Persons Contacted

No agencies or persons outside the NRC were contacted in connection with the preparation of this environmental assessment.

G. Finding of No Significant Impact

The environmental impacts of the action have been reviewed under the requirements in the National Environmental Policy Act of 1969, as amended, and the NRC's regulations in subpart A of 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.'' Based on the foregoing environmental assessment, the NRC concludes that this direct final rule, ''TN Americas LLC Standardized NUHOMS® Horizontal Modular Storage System, Certificate of Compliance No. 1004, Renewed Amendment No. 18,'' will not have a significant effect on the human environment. Therefore, the NRC has determined that an environmental impact statement is not necessary for this direct final rule.

IX. Paperwork Reduction Act Statement

This direct final rule does not contain any new or amended collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing collections of information were approved by the Office of Management and Budget, approval number 3150–0132.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid Office of Management and Budget control number.

X. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this direct final rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only nuclear power plant licensees and Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel. These entities do not fall within the scope of the definition of small entities set forth in the Regulatory Flexibility Act or the size standards established by the NRC (§ 2.810).

XI. Regulatory Analysis

On July 18, 1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. Any nuclear power reactor licensee can use NRC-approved cask designs to store spent nuclear fuel if (1) it notifies the NRC in advance; (2) the spent fuel is stored under the conditions specified in the cask's certificate of compliance; and (3) the conditions of the general license are met. A list of NRC-approved cask designs is contained in § 72.214. On December 22, 1994 (59 FR 65898), the NRC issued an amendment to 10 CFR part 72 that approved Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel by adding it to the list of NRC-approved cask designs in § 72.214.

On May 20, 2022, and as supplemented on August 12, 2022, January 20, 2023, January 27, 2023, February 16, 2023, March 8, 2023, and April 5, 2023, TN Americas, LLC submitted a request to amend the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel as described in section IV, ''Discussion of Changes,'' of this document.

The alternative to this action is to withhold approval of Renewed Amendment No. 18 and to require any 10 CFR part 72 general licensee seeking to load spent nuclear fuel into the TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel under the changes described in Renewed Amendment No. 18 to request an exemption from the requirements of §§ 72.212 and 72.214. Under this alternative, each interested 10 CFR part 72 licensee would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee.

Approval of this direct final rule is consistent with previous NRC actions. Further, as documented in the preliminary safety evaluation report and environmental assessment, this direct final rule will have no adverse effect on public health and safety or the environment. This direct final rule has no significant identifiable impact or benefit on other government agencies. Based on this regulatory analysis, the NRC concludes that the requirements of this direct final rule are commensurate with the NRC's responsibilities for public health and safety and the common defense and security. No other available alternative is believed to be as satisfactory; therefore, this action is recommended.

XII. Backfitting and Issue Finality

The NRC has determined that the backfit rule (§ 72.62) does not apply to this direct final rule. Therefore, a backfit analysis is not required. This direct final rule amends Certificate of Compliance No. 1004 for the TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel, as currently listed in § 72.214. The amendment consists of the changes in Renewed Amendment No. 18 previously described, as set forth in the proposed certificate of compliance and technical specifications.

Renewed Amendment No. 18 to Certificate of Compliance No. 1004 for the TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel was initiated by TN Americas, LLC and was not submitted in response to new NRC requirements, or an NRC request for amendment. Renewed Amendment No. 18 applies only to new casks fabricated and used under Renewed Amendment No. 18. These changes do not affect existing users of the TN Americas, LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel, and the current Renewed Amendment No. 17 continues to be effective for existing users. While

current users of this storage system may comply with the new requirements in Renewed Amendment No. 18, this would be a voluntary decision on the part of current users.

For these reasons, Renewed Amendment No. 18 to Certificate of Compliance No. 1004 does not constitute backfitting under § 72.62 or § 50.109(a)(1), or otherwise represent an inconsistency with the issue finality provisions applicable to combined licenses in 10 CFR part 52. Accordingly, the NRC has not prepared a backfit analysis for this rulemaking.

XIII. Congressional Review Act

This direct final rule is not a rule as defined in the Congressional Review Act.

XIV. Availability of Documents

The documents identified in the following table are available to interested persons as indicated.

Document	ADAMS Accession No./ web link/**Federal Register** citation
Proposed Certificate of Compliance and Proposed Technical Specifications	
Proposed NUHOMS 1004 Amendment No. 18 Certificate of Compliance	ML23058A330
Proposed NUHOMS 1004 Amendment No. 18 Technical Specification Appendix A	ML23058A332
Proposed NUHOMS 1004 Amendment No. 18 Technical Specification Appendix B	ML23058A334
Proposed NUHOMS 1004 Amendment No. 18 Technical Specification Appendix C	ML23058A336
Proposed NUHOMS 1004 Amendment No. 18 Safety Evaluation Report	ML23058A328
Environmental Documents	
Environmental Assessment for Proposed Rule Entitled, ''Storage of Spent Nuclear Fuel in NRC-Approved Storage Casks at Nuclear Power Reactor Sites.'' (1989).	ML051230231
''Environmental Assessment and Finding of No Significant Impact for the Final Rule Amending 10 CFR Part 72 License and Certificate of Compliance Terms'' (2010).	ML100710441
Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report (NUREG–2157, Volumes 1 and 2) (2014).	ML14198A440 (package).
TN Americas, LLC Standardized NUHOMS HMS, Renewed Amendment 18 Application Document	
TN America, LLC, Application for Amendment 18 to Standardized NUHOMS Certificate of Compliance No. 1004 for Spent Fuel Storage Casks, Revision 0, May 20, 2022.	ML22140A025, ML22213A161
TN Americas, LLC, Submittal of Response to Request for Supplemental Information—Application for Amendment 18 to Standardized NUHOMS Certificate of Compliance No. 1004 for Spent Fuel Storage Casks, Revision 1, August 12, 2022.	ML22224A041
Response to Request for Additional Information—Application for Amendment 18 to Standardized NUHOMS Certificate of Compliance No. 1004 for Spent Fuel Storage Casks, Revision 2, January 20, 2023.	ML23020A920
Response to Request for Additional Information—Application for Amendment 18 to Standardized NUHOMS Certificate of Compliance No. 1004 for Spent Fuel Storage Casks, Revision 3, January 27, 2023.	ML23027A056
Supplemental Response to Request for Additional Information—Application for Amendment 18 to Standardized NUHOMS Certificate of Compliance No. 1004 for Spent Fuel Storage Casks, Revision 4, February 16, 2023.	ML23047A028
TN Americas LLC, Second Supplemental Response to Request for Additional Information—Application for Amendment 18 to Standardized NUHOMS Certificate of Compliance No. 1004 for Spent Fuel Storage Casks, Revision 5, March 8, 2023.	ML23191A075
TN Americas LLC, Third Supplemental Response to Request for Additional Information—Application for Amendment 18 to Standardized NUHOMS Certificate of Compliance No. 1004 for Spent Fuel Storage Casks, Revision 6, April 5, 2023.	ML23095A100
Other Documents	
Plain Language in Government Writing, dated June 10, 1998	63 FR 31885
Storage of Spent Fuel In NRC-Approved Storage Casks at Power Reactor Sites: Final Rule, dated July 18, 1990.	55 FR 29181
List of Approved Spent Fuel Storage Casks: TN Americas LLC, NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel, Certificate of Compliance No. 1004: Direct Final Rule, dated December 22, 1994.	59 FR 65897

The NRC may post materials related to this document, including public comments, on the Federal rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2023–0131. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) navigate to the docket folder (NRC–2023–0131); (2) click the ''Subscribe'' link; and (3) enter an email address and click on the ''Subscribe'' link.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Hazardous waste, Indians, Intergovernmental relations, Nuclear energy, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the

following amendments to 10 CFR part 72:

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for part 72 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2210e, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 117(a), 132, 133, 134, 135, 137, 141, 145(g), 148, 218(a) (42 U.S.C. 10137(a), 10152, 10153, 10154, 10155, 10157, 10161, 10165(g), 10168, 10198(a)); 44 U.S.C. 3504 note.

■ 2. In § 72.214, Certificate of Compliance No. 1004 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1004.

Initial Certificate Effective Date: January 23, 1995, superseded by Initial Certificate, Revision 1, on April 25, 2017, superseded by Renewed Initial Certificate, Revision 1, on December 11, 2017.

Renewed Initial Certificate, Revision 1, Effective Date: December 11, 2017.

Amendment Number 1 Effective Date: April 27, 2000, superseded by Amendment Number 1, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 1, Revision 1, on December 11, 2017.

Renewed Amendment Number 1, Revision 1, Effective Date: December 11, 2017.

Amendment Number 2 Effective Date: September 5, 2000, superseded by Amendment Number 2, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 2, Revision 1, on December 11, 2017.

Renewed Amendment Number 2, Revision 1, Effective Date: December 11, 2017.

Amendment Number 3 Effective Date: September 12, 2001, superseded by Amendment Number 3, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 3, Revision 1, on December 11, 2017.

Renewed Amendment Number 3, Revision 1, Effective Date: December 11, 2017.

Amendment Number 4 Effective Date: February 12, 2002, superseded by Amendment Number 4, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 4, Revision 1, on December 11, 2017.

Renewed Amendment Number 4, Revision 1, Effective Date: December 11, 2017.

Amendment Number 5 Effective Date: January 7, 2004, superseded by Amendment Number 5, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 5, Revision 1, on December 11, 2017.

Renewed Amendment Number 5, Revision 1, Effective Date: December 11, 2017.

Amendment Number 6 Effective Date: December 22, 2003, superseded by Amendment Number 6, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 6, Revision 1, on December 11, 2017.

Renewed Amendment Number 6, Revision 1, Effective Date: December 11, 2017.

Amendment Number 7 Effective Date: March 2, 2004, superseded by Amendment Number 7, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 7, Revision 1, on December 11, 2017.

Renewed Amendment Number 7, Revision 1, Effective Date: December 11, 2017.

Amendment Number 8 Effective Date: December 5, 2005, superseded by Amendment Number 8, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 8, Revision 1, on December 11, 2017.

Renewed Amendment Number 8, Revision 1, Effective Date: December 11, 2017.

Amendment Number 9 Effective Date: April 17, 2007, superseded by Amendment Number 9, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 9, Revision 1, on December 11, 2017.

Renewed Amendment Number 9, Revision 1, Effective Date: December 11, 2017.

Amendment Number 10 Effective Date: August 24, 2009, superseded by Amendment Number 10, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 10, Revision 1, on December 11, 2017.

Renewed Amendment Number 10, Revision 1, Effective Date: December 11, 2017.

Amendment Number 11 Effective Date: January 7, 2014, superseded by Amendment Number 11, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 11, Revision 1, on December 11, 2017.

Renewed Amendment Number 11, Revision 1, Effective Date: December 11, 2017, as corrected (ADAMS Accession No. ML18018A043).

Amendment Number 12 Effective Date: Amendment not issued by the NRC.

Amendment Number 13 Effective Date: May 24, 2014, superseded by Amendment Number 13, Revision 1, on April 25, 2017, superseded by Renewed Amendment Number 13, Revision 1, on December 11, 2017.

Renewed Amendment Number 13, Revision 1, Effective Date: December 11, 2017, as corrected (ADAMS Accession No. ML18018A100).

Amendment Number 14 Effective Date: April 25, 2017, superseded by Renewed Amendment Number 14, on December 11, 2017.

Renewed Amendment Number 14 Effective Date: December 11, 2017.

Renewed Amendment Number 15 Effective Date: January 22, 2019.

Renewed Amendment Number 16 Effective Date: September 14, 2020.

Renewed Amendment Number 17 Effective Date: June 7, 2021.

Renewed Amendment Number 18 Effective Date: December 18, 2023.

SAR Submitted by: TN Americas LLC.

SAR Title: Final Safety Analysis Report for the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel.

Docket Number: 72–1004.

Certificate Expiration Date: January 23, 2015.

Renewed Certificate Expiration Date: January 23, 2055.

Model Number: NUHOMS®–24P, –24PHB, –24PTH, –32PT, –32PTH1, –37PTH, –52B, –61BT, –61BTH, and –69BTH.

* * * * *

Dated: September 26, 2023.

For the Nuclear Regulatory Commission.

Scott A. Morris,

Acting Executive Director for Operations.

[FR Doc. 2023–21827 Filed 10–2–23; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1222; Project Identifier AD–2023–00574–T; Amendment 39–22547; AD 2023–18–06]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2021–02–15, which applied to certain The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, and 747SR series airplanes. AD 2021–02–15 required repetitive replacement of certain parts; an inspection to determine production configuration for certain parts; repetitive lubrication of certain parts and a repetitive inspection of certain parts for any exuding grease; repetitive inspections of certain parts for loose or missing attachment bolts, cracks or bushing migration, cracks or gouges, or broken, binding, or missing rollers; repetitive inspections of certain parts for cracks or corrosion; repetitive lubrication; and on-condition actions if necessary. This AD was prompted by the FAA's determination that certain compliance times must be reduced in order to address the unsafe condition. This AD continues to require the actions specified in AD 2021–02–15 with certain reduced compliance times. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 7, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 7, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1222; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2023–1222.

FOR FURTHER INFORMATION CONTACT: Stefanie Roesli, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3964; email: *Stefanie.N.Roesli@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2021–02–15, Amendment 39–21398 (86 FR 10750, February 23, 2021) (AD 2021–02–15). AD 2021–02–15 applied to certain The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, and 747SR series airplanes. The NPRM published in the **Federal Register** on July 10, 2023 (88 FR 43479). The NPRM was prompted by the FAA's determination that certain compliance times must be reduced in order to address the unsafe condition. In the NPRM, the FAA proposed to continue to require the actions specified in AD 2021–02–15 with certain reduced compliance times. The FAA is issuing this AD to address departures of the inboard foreflap assembly from the airplane, which could result in damage to the airplane and adversely affect the airplane's continued safe flight and landing.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from Air Line Pilots Association, International (ALPA) and Boeing, who supported the NPRM without change.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023. This service information specifies procedures for repetitive replacement of certain parts; a general visual inspection to determine production configuration for certain parts; a repetitive lubrication of certain parts and a repetitive general visual inspection of certain parts for any exuding grease; repetitive detailed inspections of certain parts for loose or missing attachment bolts, cracks or bushing migration, cracks or gouges, or broken, binding, or missing rollers; repetitive detailed inspections of certain parts for cracks or corrosion; repetitive lubrication; and on-condition actions if necessary. On-condition actions include replacements and repair.

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

Costs of Compliance

The FAA estimates that this AD affects 134 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Repetitive replacement (retained actions from AD 2021–02–15).	Up to 10 work-hours × $85 per hour = Up to $850 per replacement cycle.	$35,719	Up to $36,569 per replacement cycle.	Up to $4,900,246 per replacement cycle.
General visual inspection for parts production configuration (retained actions from AD 2021–02–15).	1 work-hour × $85 per hour = $85	0	$85	$11,390.
Repetitive detailed inspections (retained actions from AD 2021–02–15).	4 work-hours × $85 per hour = $340 per inspection cycle.	0	$340 per inspection cycle.	$45,560 per inspection cycle.
Repetitive inspection for lubrication and repetitive lubrication (retained actions from AD 2021–02–15).	1 work-hour × $85 per hour = $85 per lubrication.	0	$85 per lubrication	$11,390 per lubrication.

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

ESTIMATED COSTS OF ON-CONDITION REPLACEMENTS

Labor cost	Parts cost	Cost per product
Up to 8 work-hour × $85 per hour = $680	Up to $17,720	Up to $18,400.

The FAA has received no definitive data that would enable the FAA to provide cost estimates for the on-condition repairs specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2021–02–15, Amendment 39–21398 (86 FR 10750, February 23, 2021); and

■ b. Adding the following new AD:

2023–18–06 The Boeing Company: Amendment 39–22547; Docket No. FAA–2023–1222; Project Identifier AD–2023–00574–T.

(a) Effective Date

This airworthiness directive (AD) is effective November 7, 2023.

(b) Affected ADs

This AD replaces AD 2021–02–15, Amendment 39–21398 (86 FR 10750, February 23, 2021) (AD 2021–02–15).

(c) Applicability

This AD applies to The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, and 747SR series airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of partial and full inboard foreflap departures from the airplane. The FAA is issuing this AD to address departures of the inboard foreflap assembly from the airplane, which could result in damage to the airplane and adversely affect the airplane's continued safe flight and landing.

(f) Compliance

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

(g) Retained Actions, With Revised Compliance Times and Service Information

This paragraph restates the requirements of paragraph (g) of AD 2021–02–15, with revised compliance times and service information. Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance''

paragraph of Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 747–57A2367, Revision 1, dated March 20, 2023, which is referred to in Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023.

(h) Exceptions to Service Information Specifications

(1) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023, use the phrase ''the original issue date of Requirements Bulletin 747–57A2367 RB,'' this AD requires using March 30, 2021 (the effective date of AD 2021–02–15).

(2) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023, use the phrase ''the Revision 1 date of Requirements Bulletin 747–57A2367 RB,'' this AD requires using ''the effective date of this AD.''

(i) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Requirements Bulletin 747–57A2367 RB, dated November 15, 2019.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520 Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520 Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved for AD 2021–02–15 are approved as AMOCs for the corresponding provisions of Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023, that are required by paragraph (g) of this AD.

(k) Related Information

(1) For more information about this AD, contact Stefanie Roesli, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3964; email: *Stefanie.N.Roesli@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(3) and (4) of this AD.

(l) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 747–57A2367 RB, Revision 1, dated March 20, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*

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

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

Issued on September 7, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–21718 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1402; Project Identifier MCAI–2023–00324–T; Amendment 39–22549; AD 2023–18–08]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Dassault Aviation Model MYSTERE–FALCON 900, FALCON 900EX, FALCON 2000, and FALCON 2000EX airplanes. This AD was prompted by reports of the wing anti-icing (WAI) system leaking in the wing leading edge. This AD requires a one-time inspection of the WAI system, and corrective actions if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 7, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 7, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1402; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website *ad.easa.europa.eu.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For

information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2023–1402.

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

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Dassault Aviation Model MYSTERE–FALCON 900, FALCON 900EX, FALCON 2000, and FALCON 2000EX airplanes. The NPRM published in the **Federal Register** on July 10, 2023 (88 FR 43477). The NPRM was prompted by AD 2023–0041, dated February 21, 2023, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2023–0041) (also referred to as the MCAI). The MCAI states the WAI system was reported leaking in the wing leading edge. The leaks were either from an incorrect installation of the Wiggins coupling on the WAI system, or detachment of the pressure switch line from the WAI pipe (only found on the Falcon 2000 and Falcon 2000EX airplanes). This condition, if not detected and corrected, could lead to a loss of performance of WAI protection system, possibly resulting in reduced control of the airplane.

In the NPRM, the FAA proposed to require a one-time inspection of the WAI system, and corrective actions if necessary, as specified in EASA AD 2023–0041. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1402.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0041 specifies procedures for a one-time general visual inspection of the WAI system for discrepancies, including incorrect installation, deformation, leakage or signs of overheating, and lack of free rotation of the clamp around the two ferrules, and, depending on findings, corrective actions. Corrective actions include replacement or re-installation of the affected WAI Wiggins coupling with new seals and couplings. For the Falcon 2000 and Falcon 2000EX airplanes, there is an additional one-time general visual inspection of the WAI pipes for traces of abnormal leakage, overheating, or degradation of the thermal lagging, and depending on findings, corrective actions. Corrective actions are for replacement of the affected WAI pipes. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 820 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
7 work-hours × $85 per hour = $595	$0	$595	$487,900

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 2 work-hours × $85 per hour = Up to $170	$517	Up to $687.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a

substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–18–08 Dassault Aviation: Amendment 39–22549; Docket No. FAA–2023–1402; Project Identifier MCAI–2023–00324–T.

(a) Effective Date

This airworthiness directive (AD) is effective November 7, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Dassault Aviation Model MYSTERE–FALCON 900, FALCON 900EX, FALCON 2000, and FALCON 2000EX airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2023–0041, dated February 21, 2023 (EASA AD 2023–0041).

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice and Rain Protection.

(e) Unsafe Condition

This AD was prompted by reports of the wing anti-icing (WAI) system leaking in the wing leading edge. The FAA is issuing this AD to address leaks in the WAI system. The unsafe condition, if not addressed, could lead to a loss of performance of the WAI protection system, possibly resulting in reduced control of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0041.

(h) Exceptions to EASA AD 2023–0041

(1) Where EASA AD 2023–0041 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where paragraph (2) of EASA AD 2023–0041 specifies actions if ''any discrepancy [as defined in the applicable inspection SB] is found,'' for this AD, discrepancies are defined as incorrect installation, deformation, leakage, signs of overheating, and lack of free rotation of the clamp around the two ferrules.

(3) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0041.

(i) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(j) Additional Information

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

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0041, dated February 21, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0041, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website *ad.easa.europa.eu.*

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

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

Issued on September 8, 2023.

Ross Landes,

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

[FR Doc. 2023–21717 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0940; Project Identifier AD–2022–01521–E; Amendment 39–22552; AD 2023–19–02]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney Division Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2018–21–11, which applied to all Pratt & Whitney Division (PW) Model PW4074D, PW4077D, PW4084D, PW4090, and PW4090–3 engines with a low-pressure compressor (LPC) fan hub, part number (P/N) 51B821 or P/N 52B521, installed. AD 2018–21–11 required performing repetitive eddy current inspections (ECIs) and fluorescent penetrant inspections (FPIs) for cracks in certain LPC fan hubs and removing LPC fan hubs from service that fail any inspection. Since the FAA issued AD 2018–21–11, the FAA determined that affected LPC fan hub assemblies can meet the published certificated life limit without the need for the required repetitive FPI inspections in AD 2018–21–11, and the repetitive ECI

inspections require shortened intervals. Based on a report of another incident, the FAA determined that the unsafe condition is likely to exist or develop on additional LPC fan hub assemblies and PW model engines. This AD expands the applicability to include Model PW4074, PW4074D, PW4077, PW4077D, PW4084D, PW4090, and PW4090–3 engines with any part number LPC fan hub assembly installed and requires performing repetitive ECIs of the LPC fan hub assembly and, depending on the results of the inspections, removing the LPC fan hub assembly from service. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 7, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 7, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0940; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For Pratt & Whitney Division service information identified in this final rule, contact Pratt & Whitney Division, 400 Main Street, East Hartford, CT 06118; phone: (860) 565–0140; email: *help24@prattwhitney.com;* website: *connect.prattwhitney.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2023–0940.

FOR FURTHER INFORMATION CONTACT: Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: *carol.nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2018–21–11, Amendment 39–19469 (83 FR 54663, October 31, 2018) (''AD 2018–21–11''). AD 2018–21–11 applied to all PW Model PW4074, PW4074D, PW4077, PW4077D, PW4084D, PW4090, and PW4090–3 engines. The NPRM published in the **Federal Register** on May 23, 2023 (88 FR 32978), which proposed to supersede AD 2018–21–11. The NPRM was prompted by an updated analysis by the engine manufacturer, which indicated certain LPC fan hubs could crack before their published life limit. However, the FAA determined that affected LPC fan hub assemblies can meet the published certificated life limit without the need for the required repetitive FPI inspections in AD 2018–21–11, and the repetitive ECI inspections require shortened intervals. Additionally, the FAA also received a report of an uncontained failure of the fan hub assembly on an Engine Alliance GP7270 engine on an Air France flight. Investigation of this uncontained failure revealed that, due to the similarity of design and material processing for the LPC fan hub assembly, the ECI inspections should be done on all LPC fan hub assembly part numbers installed on PW Model PW4074, PW4074D, PW4077, PW4077D, PW4084D, PW4090, and PW4090–3 engines. In the NPRM, the FAA proposed to expand the applicability to include Model PW4074, PW4074D, PW4077, PW4077D, PW4084D, PW4090, and PW4090–3 engines with any P/N LPC fan hub assembly installed. In the NPRM, the FAA also proposed to require performing repetitive ECIs of the LPC fan hub assembly and, depending on the results of the inspections, removing the LPC fan hub assembly from service. The FAA is issuing this AD to prevent failure of the LPC fan hub assembly. This condition, if not addressed, could result in uncontained debris release, damage to the engine, and damage to the aircraft.

Actions Since the NPRM Was Issued

Since the FAA published the NPRM, PW revised Alert Service Bulletin (ASB) PW4G–112–A72–362, Revision No. 1, dated January 20, 2022, to ASB PW4G–112–A72–362, Revision No. 2, dated August 2, 2023. This service bulletin revision does not include the specification to remove LPC fan hub assemblies with reportable indications from service. PW also added instructions pertaining to reporting inspection results.

As a result, the FAA changed paragraph (g)(2) from ''If a reportable or rejectable indication is found'' to ''If a rejectable indication is found,'' added paragraph (j), Credit for Previous Actions, to give full credit for anyone already accomplishing this action before the effective date using Revision No. 1, and re-designated subsequent paragraphs accordingly. This AD does not require reporting inspection results.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from two commenters. Commenters included The Boeing Company and The Air Line Pilots Association, International. Both commenters support the NPRM without change.

Conclusion

The FAA reviewed the relevant data, considered the comments received, and determined that air safety requires adopting the AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, which include updating the service information and removing the requirement for removing LPC fan hub assemblies with reportable indications from service, this AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Pratt & Whitney ASB PW4G–112–A72–362, Revision No. 2, dated August 2, 2023. This service information specifies procedures for ECIs of the LPC fan hub assembly for cracks. This service information also specifies reporting inspection results to PW.

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

Costs of Compliance

The FAA estimates that this AD affects 65 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Perform ECI of LPC fan hub assembly	14 work-hours × $85 per hour = $1,190	$0	$1,190	$77,350

The FAA estimates the following costs to do any necessary replacements that would be required based on the results of the inspection. The agency has no way of determining the number of engines that might need this replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace LPC fan hub assembly	65 work-hours × $85 per hour = $5,525	$1,194,000	$1,199,525

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:
■ a. Removing Airworthiness Directive 2018–21–11, Amendment 39–19469 (83 FR 54663, October 31, 2018); and
■ b. Adding the following new airworthiness directive:

2023–19–02 Pratt & Whitney Division: Amendment 39–22552; Docket No. FAA–2023–0940; Project Identifier AD–2022–01521–E.

(a) Effective Date

This airworthiness directive (AD) is effective November 7, 2023.

(b) Affected ADs

This AD replaces AD 2018–21–11, Amendment 39–19469 (83 FR 54663, October 31, 2018).

(c) Applicability

This AD applies to all Pratt & Whitney Division Model PW4074, PW4074D, PW4077, PW4077D, PW4084D, PW4090, and PW4090–3 engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by an updated analysis by the engine manufacturer, which indicated certain low-pressure compressor (LPC) fan hubs could crack before their published life limit. We are issuing this AD to prevent failure of the LPC fan hub. The unsafe condition, if not addressed, could result in uncontained hub release, damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) Before accumulating 550 flight cycles (FC) after the effective date of this AD, and thereafter at intervals not to exceed 550 FC since the last eddy current inspection (ECI), perform an ECI of the LPC fan hub assembly, in accordance with the Accomplishment Instructions, For Engines Installed on Aircraft, paragraph 2., or For Engines Not Installed on Aircraft, paragraph 3; of Pratt & Whitney Alert Service Bulletin (ASB) PW4G–112–A72–362, Revision No. 2, dated August 2, 2023 (ASB PW4G–112–A72–362, Revision 2).

(2) If a rejectable indication is found during the inspections required by paragraph (g)(1) of this AD, before further flight, replace the LPC fan hub assembly with a part eligible for installation.

(h) Installation Prohibition

After the effective date of this AD, do not install an LPC fan hub assembly on any engine, unless it is a part eligible for installation as defined in paragraph (k) of this AD.

(i) No Reporting Requirement

This AD does not require reporting certain information to the manufacturer as specified in ASB PW4G–112–A72–362, Revision 2.

(j) Credit for Previous Actions

Inspections and corrective actions on an engine, accomplished before the effective date of this AD in accordance with the instructions of Pratt & Whitney ASB PW4G–112–A72–362, Revision No. 1, dated January 20, 2022, are acceptable to comply with the requirements of paragraph (g)(1) of this AD.

(k) Definitions

For the purposes of this AD, a ''part eligible for installation'' is an affected LPC fan hub assembly that has been inspected as required by paragraph (g)(1) of this AD and does not have a rejectable or reportable indication or a LPC fan hub assembly with zero cycles since new.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (m)(1) of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(m) Additional Information

(1) For more information about this AD, contact Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: *carol.nguyen@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (n)(3) and (4) of this AD.

(n) Material Incorporated by Reference

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

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

(i) Pratt & Whitney Alert Service Bulletin PW4G–112–A72–362, Revision No. 2, dated August 2, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact Pratt & Whitney Division, 400 Main Street, East Hartford, CT 06118; phone: (860) 565–0140; email: *help24@prattwhitney.com;* website: *connect.prattwhitney.com.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on September 15, 2023.

Victor Wicklund,

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

[FR Doc. 2023–21739 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31511; Amdt. No. 4082]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 3, 2023. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 3, 2023.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA).

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

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

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 rule amends 14 CFR part 97 by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary. This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff

Minimums and ODPs as identified in the amendatory language for Part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

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 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on September 26, 2023.

Wade E.K. Terrell,

Manager, Flight Procedures & Airspace Group.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

Effective Upon Publication

AIRAC date	State	City	Airport name	FDC No.	FDC date	Procedure name
2–Nov–23	IA	Clarinda	Schenck Fld	3/0220	9/5/23	This NOTAM, published in Docket No. 31509, Amdt No. 4080, TL 23–23, (88 FR 65597, September 25, 2023) is hereby rescinded in its entirety.
2–Nov–23	IA	Clarinda	Schenck Fld	3/0224	9/5/23	This NOTAM, published in Docket No. 31509, Amdt No. 4080, TL 23–23, (88 FR 65597, September 25, 2023) is hereby rescinded in its entirety.
2–Nov–23	AZ	Willcox	Cochise County	3/0824	9/18/23	RNAV (GPS) RWY 3, Amdt 1C.
2–Nov–23	AZ	Willcox	Cochise County	3/0825	9/18/23	RNAV (GPS) RWY 21, Amdt 1B.
2–Nov–23	WI	Middleton	Middleton Muni/Morey Fld	3/3577	9/22/23	VOR RWY 28, Orig-C.
2–Nov–23	OH	Hamilton	Butler County Rgnl/Hogan Fld	3/6340	9/21/23	RNAV (GPS) RWY 11, Amdt 1A.

[FR Doc. 2023–21803 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31510; Amdt. No. 4081]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPS) and associated Takeoff Minimums and Obstacle Departure procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational

facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 3, 2023. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 3, 2023.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30. 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fr.inspection@nara.gov* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

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 rule amends 14 CFR part 97 by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, 8260–15B, when required by an entry on 8260–15A, and 8260–15C.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers or aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the typed of SIAPS, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flights safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

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.

Lists of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on September 26, 2023.

Wade E.K. Terrell,

Manager, Flight Procedures & Airspace Group.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

Part 97—Standard Instrument Approach Procedures

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 2 November 2023

Cross Keys, NJ, 17N, RNAV (GPS) RWY 9, Orig
Cross Keys, NJ, 17N, VOR OR GPS RWY 9, Amdt 6B, CANCELED
Hamilton, OH, KHAO, ILS OR LOC RWY 29, Amdt 3
Hamilton, OH, KHAO, RNAV (GPS) RWY 29, Amdt 2
Corpus Christi, TX, KCRP, ILS OR LOC RWY 13, Amdt 28B
Corpus Christi, TX, KCRP, ILS OR LOC RWY 36, Amdt 14B
Corpus Christi, TX, KCRP, LOC RWY 31, Amdt 9A
Corpus Christi, TX, KCRP, RNAV (GPS) RWY 18, Amdt 2A
Corpus Christi, TX, KCRP, RNAV (GPS) X RWY 31, Orig-A
Corpus Christi, TX, KCRP, RNAV (GPS) Y RWY 13, Amdt 2B
Corpus Christi, TX, KCRP, RNAV (GPS) Y RWY 31, Amdt 4A
Corpus Christi, TX, KCRP, RNAV (GPS) Y RWY 36, Amdt 3A
Corpus Christi, TX, KCRP, VOR OR TACAN RWY 18, Amdt 29

[FR Doc. 2023–21802 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33–11235; 34–98419; 39–2552; IC–34998]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to Volume II of the Electronic Data Gathering, Analysis, and Retrieval system Filer Manual (''EDGAR Filer Manual'' or ''Filer Manual'') and related rules and forms. EDGAR Release 23.3 will be deployed in the EDGAR system on September 18, 2023.

DATES: *Effective date:* October 3, 2023. The incorporation by reference of the revised Filer Manual is approved by the Director of the Federal Register as of October 3, 2023.

FOR FURTHER INFORMATION CONTACT: For questions regarding the amendments to Volume II of the Filer Manual, please contact Rosemary Filou, Deputy Director and Chief Counsel, Dan Chang, Senior Special Counsel, or Lidian Pereia, Senior Special Counsel, in the EDGAR Business Office at (202) 551–3900. For questions regarding Form N–CR, the new submission types for Form N–MFP, or Form N–CEN, please contact Heather Fernandez, Financial Analyst, in the Division of Investment Management at (202) 551–6708. For questions regarding new Form F–SR or the new Inline XBRL exhibit (EX–26), please contact Robert Errett, in the Division of Corporation Finance at (202) 551–3419. For questions concerning taxonomies or schemas, please contact the Office of Structured Disclosure in the Division of Economic and Risk Analysis at (202) 551–5494.

SUPPLEMENTARY INFORMATION: We are adopting an updated Filer Manual, Volume II: ''EDGAR Filing,'' Version 67 (September 2023) and amendments to 17 CFR 232.301 (''Rule 301''). The updated Filer Manual is incorporated by reference into the Code of Federal Regulations.

I. Background

The Filer Manual contains information needed for filers to make submissions on EDGAR. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[1] Filers must consult the Filer Manual in conjunction with our rules governing mandated electronic filings when preparing documents for electronic submission.

II. Edgar System Changes and Associated Modifications to Volume II of the Filer Manual

EDGAR is being updated in EDGAR Release 23.3, and corresponding amendments to Volume II of the Filer Manual are being made to reflect these changes, as described below.[2]

Money Market Fund Reform

On July 12, 2023, the Commission adopted amendments to certain rules that govern money market funds under the Investment Company Act of 1940.[3] Among other things, the amendments required Form N–CR to be filed as a structured XML filing and introduced new submission types for Form N–MFP: N–MFP3 and N–MFP3/A.

EDGAR Release 23.3 introduces a pilot phase for filing the structured XML Form N–CR and the new submission types for Form N–MFP as follows:

- Filers may submit submission types N–CR and N–CR/A (a) using the new online form available on the EDGAR Filing website (see Chapter 8 of the EDGAR Filer Manual, Volume II), or (b) by constructing them in accord with the ''EDGAR Form N–CR XML Technical Specification'' document that will be updated and posted on *https://www.sec.gov/edgar/filerinformation/current-edgar-technical-specifications.*
- Filers must construct submission types N–MFP3 and N–MFP3/A according to the new ''EDGAR Form N–MFP3 XML Technical Specification'' document available on *https://www.sec.gov/edgar/filerinformation/current-edgar-technical-specifications.*
- Until June 11, 2024, new submission types N–MFP3 and N–MFP3/A and the XML version of Form N–CR will be available as test filings only, and, as with all test filings, testers are strongly encouraged to create and submit fictional data.
- Starting June 11, 2024, new submission types N–MFP3 and N–MFP3/A and the XML version of Form N–CR will be available as both test and live filings. In addition, Form N–CR filers will no longer be able to file using EDGARLink Online and Form N–MFP filers will no longer be able to submit N–MFP2. N–MFP2/A will continue to be available for amendments to prior filings.

Share Repurchase Disclosure Modernization

On May 3, 2023, the Commission adopted amendments to modernize and improve disclosure about repurchases of an issuer's equity securities that are registered under the Securities Exchange Act of 1934.[4] To implement this rulemaking's requirements, EDGAR will be updated to support a new taxonomy, SHR/2023, and EDGAR will accept a new Form F–SR (submission types F–SR and F–SR/A) and a new Inline XBRL exhibit (EX–26).

Data Field Updates

EDGAR is being updated to make the ''DocumentPeriodEndDate'' data field optional for the following submission types, because in some cases this data field may not be relevant, and corresponding changes are being made in the Filer Manual:

- DEF 14A, DEF 14C, PRE 14A, PRE 14C, PREM14A, PREM14C.

Errata Correction in Item E.3 of Form N–CEN

The wording displayed on EDGAR for Item E.3.e of Form N–CEN is being

[1] *See* Rule 301 of Regulation S–T.

[2] EDGAR Release 23.3 will be deployed on September 18, 2023.

[3] Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N–CSR and Form N–1A, Release 33–11211 (July 12, 2023) [88 FR 51404 (Aug. 3, 2023)].

[4] Share Repurchase Disclosure Modernization, Release 34–97424 (May 3, 2023) [88 FR 36002 (June 2, 2023)].

corrected to match the language adopted by the Commission.[5] The wording is being corrected on the online application used to submit filings on Form N–CEN, on disseminated filings on *SEC.gov,* and in relevant portions of the Filer Manual. Additionally, Item E.3.a of Form N–CEN is being updated to provide filers space to report a second value, if necessary, for the number of shares needed to form a creation unit.

Additional Revisions To Remove Non-Procedural Rule Content From Volume II

Appendix C (''EDGAR Submission Types'') is being removed from Volume II of the Filer Manual, because it consists only of examples, sample templates, and lists of information, and not instruction in the nature of a procedural rule. This content may have originally been included in the Filer Manual when EDGAR and similar technology were novel and it was thought necessary to include elementary technical information. Removing the content reduces the size of the Filer Manual by approximately 20 pages. The content will be placed on the EDGAR—Information for Filers web page on *www.SEC.gov,* where it may be consulted by interested filers.

III. Amendments to Rule 301 of Regulation S–T

Along with the adoption of the updated Filer Manual, we are amending Rule 301 of Regulation S–T to provide for the incorporation by reference into the Code of Federal Regulations of the current revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

The updated EDGAR Filer Manual is available at *https://www.sec.gov/edgar/filerinformation/current-edgar-filer-manual.*

IV. Administrative Law Matters

Because the Filer Manual and rule amendments relate solely to agency procedures or practice and do not substantially alter the rights and obligations of non-agency parties, publication for notice and comment is not required under the Administrative Procedure Act (''APA'').[6] It follows that the amendments do not require analysis under requirements of the Regulatory Flexibility Act[7] or a report to Congress under the Small Business Regulatory Enforcement Fairness Act of 1996.[8]

The effective date for the updated Filer Manual and related rule amendments is October 3, 2023. In accordance with the APA,[9] we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the related system upgrades.

V. Statutory Basis

We are adopting the amendments to Regulation S–T under the authority in Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[10] Sections 3, 12, 13, 14, 15, 15B, 23 and 35A of the Securities Exchange Act of 1934,[11] Section 319 of the Trust Indenture Act of 1939,[12] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[13]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

Text of the Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78*o*(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 80b–4, 80b–6a, 80b–10, 80b–11, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 232.301 is revised to read as follows:

§ 232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets forth the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the EDGAR Filer Manual, Volume I: ''General Information,'' Version 41 (December 2022). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: ''EDGAR Filing,'' Version 67 (September 2023). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You must comply with these requirements in order for documents to be timely received and accepted. The EDGAR Filer Manual is available for inspection at the Commission and at the National Archives and Records Administration (NARA). The EDGAR Filer Manual is 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. Operating conditions may limit access to the Commission's Public Reference Room. For information on the availability of the EDGAR Filer Manual at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The EDGAR Filer Manual may also be obtained from *https://www.sec.gov/edgar/filerinformation/current-edgar-filer-manual.*

By the Commission.

Dated: September 18, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–21806 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

[5] Item E.3.e of Form N–CEN, as adopted by the Commission, requires filers to report ''Dollars for one or more creation units *redeemed* on the same day, if charged on that basis'' (emphasis added). However, Form N–CEN, as displayed in EDGAR and depicted in the Filer Manual, requires filers to report: ''Dollars for one or more creation units *purchased* on the same day, if charged on that basis'' (emphasis added).

[6] 5 U.S.C. 553(b)(A).

[7] 5 U.S.C. 601 through 612.

[8] 5 U.S.C. 804(3)(c).

[9] 5 U.S.C. 553(d)(3).

[10] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[11] 15 U.S.C. 78c, 78l, 78m, 78n, 78o, 78o–4, 78w, and 78ll.

[12] 15 U.S.C. 77sss.

[13] 15 U.S.C. 80a–8, 80a–29, 80a–30, and 80a–37.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2023–0510]

RIN 1625–AA08

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

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a special local regulation

(SLR) for certain navigable waters of the Atlantic Intracoastal Waterway (AICW) and Beaufort Inlet in Morehead City, North Carolina. This SLR, will be enforced annually for one weekend each September, and will restrict vessel traffic on the AICW and Beaufort Inlet during high-speed boat races. The restriction of vessel traffic movement in the SLR is for the purpose of protecting participants and spectators from the hazards posed by these events. Entry of vessels or persons into this regulated area will be prohibited unless specifically authorized by the Captain of the Port (COTP), North Carolina or a designated representative.

DATES: This rule is effective without actual notice October 3, 2023. For the purposes of enforcement this year, actual notice will be used from September 30, 2023 until October 3, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0510 in the search box, and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

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

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

On March 13, 2023, NC East Sports, Inc. notified the Coast Guard that it will be hosting the Crystal Coast Grand Prix powerboat race in Morehead City, NC. This high-speed boat race will take place from 10 a.m. to 6 p.m. on the waters of the Atlantic Intracoastal Waterway (AICW) and Beaufort Inlet each year on one consecutive Friday, Saturday, and/or Sunday in September. It is anticipated that approximately 60 high speed vessels will be participating each year. The racecourse encompasses approximately 1.5 square miles and will include all navigable waters of the AICW and Beaufort Inlet, North Carolina from approximate positions more particularly described in the discussion (paragraph III of this preamble), below. The Captain of the Port, Sector North Carolina (COTP) has determined that the presence of vessels not associated with the race, and anyone else in or transiting the designated area of the AICW and Beaufort Inlet in Morehead City, NC during the high-speed vessel race would pose a safety concern to the participating vessels, and to spectators of the event, as well as to others within the designated area. In response, on August 23, 2023, the Coast Guard published a notice of proposed rulemaking (NPRM) titled ''Special Local Regulation; Atlantic Intracoastal Waterway, Morehead City, NC.'' There we stated why we had issued the NPRM and invited comments on our proposed regulatory action related to this high-speed boat race. During the comment period that ended September 22, 2023, we received no comments.]

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 protect non-participating persons, vessels, and participants against the hazards associated with restricted waterway during this high-speed boat race.

III. Legal Authority and Need for the Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70041. The Captain of the Port, Sector North Carolina (COTP) has determined that the presence of vessels not associated with the race, and anyone else in or transiting the designated area of the AICW and Beaufort Inlet in Morehead City, NC during the high-speed vessel race would pose a safety concern to the participating vessels, and to spectators of the event, as well as to others within the designated area. The purpose of this rulemaking is to ensure the safety of vessels, participants, and other persons from the hazards associated with the event.

This rule will modify 33 CFR 100.501 by listing a new, recurring marine event in Table 4 to Paragraph (i)(4), which covers the Coast Guard Sector North Caroline—COTP Zone.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM. There are no changes in the regulatory text of this rule from that in the NPRM.

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

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

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

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

Except for Crystal Coast Grand Prix race participants and vessels already at berth, a vessel or person would have to get permission from the COTP or Event PATCOM to remain in the regulated area during an enforcement period or to enter the regulated area. Vessel operators will be required to request permission to enter and transit through the regulated area by contacting the Event PATCOM on VHF–FM channel 16. Vessel traffic will be able to safely

transit the regulated area once the Event PATCOM deemed it safe to do so. A vessel within the regulated area will have to operate at safe speed that minimizes wake. A person or vessel not registered with the event sponsor as a participant or assigned as official patrols would be considered a spectator. Official Patrols will include any vessel assigned or approved by the Commander, Coast Guard Sector North Carolina with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign. Official Patrols enforcing this regulated area can be contacted on VHF–FM channel 16 and channel 22A.

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

The proposed duration of this SLR is intended to protect participants and spectators on the navigable waters of the AICW and Beaufort Inlet during the high-speed boat race. Vessels can request permission to pass through the SLR between race heats. No vessel or person will be permitted to enter the SLR without obtaining permission from the COTP North Carolina or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

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

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. 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 an SLR to be enforced during active race events on the Atlantic Intracoastal Waterway and Beaufort Inlet in Morehead City,

NC. It is categorically excluded from further review under paragraph L61of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration Memorandum for the Record supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 100

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

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

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

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

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

■ 2. In § 100.501, amend Table 4 to Paragraph (i)(4) by adding the following event after the last entry to read as follows.

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

* * * * *

TABLE 4 TO PARAGRAPH (i)(4)

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

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

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

[FR Doc. 2023–21751 Filed 10–2–23; 8:45 am]
BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0466]

RIN 1625–AA00

Safety Zone; Wilmington River, Savannah, GA

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule and request for comments.

SUMMARY: The Coast Guard is revising a temporary safety zone encompassing the Causton Bluff Bridge, on the Wilmington River, Savannah, GA. This action is necessary to provide for the safety of life on these navigable waters for the planned demolition and removal of structural components of the original bridge, in preparation of the construction of a new span. This rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port Savannah or a designated representative.

DATES: This temporary interim rule is effective without actual notice from October 3, 2023 through November 30, 2023. For the purposes of enforcement, actual notice will be used from October 2, 2023, until October 3, 2023.

Comments and related material must reach the Coast Guard on or before October 18, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0466 using the Federal Decision-Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LTJG Anthony Harris, Office of Waterways Management, Marine Safety Unit Savannah, U.S. Coast Guard; telephone 912–652–4353 ext. 240, *Anthony.E.Harris@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
ESA Endangered Species Act
FR Federal Register
GA DOT Georgia Department of Transportation
NPRM Notice of proposed rulemaking
TIR Temporary Interim Rule
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On September 15, 2023, the Coast Guard published a temporary interim rule (TIR) [1] with requests for comment. The TIR established a temporary safety zone encompassing the Causton Bluff Bridge, on the Wilmington River, Savannah, GA. When the rule was published, the Coast Guard immediately began receiving comments on the safety zone posted on the docket and emails sent directly to the Coast Guard.[2] In order to address the concerns raised by the commenters, the Coast Guard made the determination not to enforce the original TIR until an updated enforcement schedule could be published through a new TIR. This new TIR takes into consideration the 23 comments received thus far and revises the existing safety zone to provide the public with a schedule that equitably balances the needs of the Georgia Department of Transportation (GA DOT) and the waterway users.

The Coast Guard is issuing this TIR 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 TIR because doing so would be impracticable. This revised safety zone must be established by October 2, 2023, in order to protect vessels and waterway users from the potential hazards associated with demolition operations on the Causton Bluff Bridge. We lack sufficient time to provide a reasonable comment period and then to consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this TIR effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this TIR would be contrary to the public's interest because we must ensure the protection of vessels and waterway users during the demolition operations.

We are soliciting comments on this rulemaking. If we determine that changes to this rulemaking action are necessary, the Coast Guard will consider comments received in a subsequent TIR or temporary final rule.

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 Savannah (COTP) has determined that potential hazards associated with the demolition operations of the Causton Bluff Bridge. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the demolition project continues.

IV. Discussion of Comments, Changes and the Rule

As noted above, we received 23 comment submissions on our TIR that published in the **Federal Register** on September 15, 2023. The commenters expressed concerns regarding the timing and duration of the demolition operations, the restrictions on daylight hour transit for recreational and commercial vessel traffic and related economic impacts, potential dangers to recreational vessels in the designated anchorage area during tropical storms and hurricanes, and the Coast Guard's notification process. These concerns are discussed below.

Several commenters expressed concerns about the timing of the demolition project, particularly about scheduling the work during peak ''snowbird'' season, when seasonal recreational boaters transit from northern states to warmer southern states, and the economic impact on recreational vessel owners, along with other economic impacts to shoreside docks and marinas.

The project sponsor and the Coast Guard are unable to further delay the project, as proposed by the commenters because of restrictions related to the Federal Endangered Species Act (ESA) [3] and related Georgia State regulations. The project location coincides with the habitat of the Atlantic sturgeon and shortnose sturgeon, which are protected as an Endangered species by the Federal ESA. The National Oceanic and Atmospheric Administration (NOAA)

[1] 88 FR 63527.

[2] The emailed comments have been posted to the docket folder. These comments are accessible at: *www.regulations.gov/docket/USCG-2023-0466/comments.*

[3] 15 U.S.C. 1531 *et seq.*

and Georgia State regulations prevent in-water work, which would be required for this project, from December 1 through April 30, which is the combined spawning migration season for the Atlantic sturgeon and the shortnose sturgeon. Therefore, the bridge project must occur before that date.

Several commenters expressed concerns about restrictions on daylight hour transit for recreational and commercial vessel traffic through the safety zone, and where particularly concerned with congestion and delays transiting the waterway, limits of designated anchorage areas where vessels may safely wait for vessel traffic to clear, and challenges of navigating the safety zone at night. The Coast Guard is taking significant actions to minimize, to the extent possible, the impact on commercial and recreational waterway use. The restrictions on vessel traffic through the safety zone is intended to facilitate the performance of the demolition project, mitigate the dangers associated with the project, and to protect personnel, vessels, and the marine environment in these navigable waters while the demolition project continues. To address this concern, the Coast Guard has modified the enforcement period to allow three hours a day for vessels to transit during daylight.

Two commenters inquired about the dangers tropical storms and hurricanes would pose to the temporary safety zone. The COTP Savannah has the authority to enact swift and detailed requirements during tropical storms and hurricanes to safeguard the safety of all vessel traffic and ensure the safe transit of the waterway.

Several commenters expressed concerns about prior notice. In section II. Background Information and Regulatory History, the Coast Guard explains its legal basis for issuing this TIR without prior notice and opportunity to comment pursuant to authority under section 4(a) of the APA (5 U.S.C. 553(b)). The Coast Guard has the authority to publish TIRs to address situations like this. At all times we were acting within the scope of authority and are making the changes here to address this concern.

Demolition operations will take place Monday through Sunday during daylight hours. Periodically while the safety zone is implemented, all vessel traffic will be permitted as reflected in Table 1 below. Notwithstanding the below table, all commercial traffic, with width clearances greater than 40 feet will be permitted passage outside the prescribed windows listed in Table 1 below with prior coordination with the demolition project contractor.

TABLE 1

Open times	Width clearance limitations
10:00 a.m. to 10:30 a.m	Vessels 40 feet or less.
12:00 p.m. to 2:00 p.m ...	No limitations.
4:30 p.m. to 5:00 p.m	Vessels 40 feet or less.
7:00 p.m. to 7:00 a.m	No limitations.

The existing safety zone in 33 CFR 165.T07–0466 is being revised to include Table 1 in the regulatory text. No further changes are being made to the safety zone regulations.

The duration of the revised safety zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the demolition project continues. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, and duration of the safety zone. The duration of the zone is intended to ensure the safety of vessels through the duration of the vessel's inbound and outbound transit and offload. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting several hours daily that would prohibit entry within 300 yards of the Causton Bluff Bridge. The zone will prohibit entry while in effect. It is categorically excluded from further review under paragraph L60(a)of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

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

VI. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0466 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this rule for alternate instructions.

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

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

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

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR 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; 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. Revise § 165.T07–0466 to read as follows:

§ 165.T07–0466 Safety Zone; Wilmington River, Savannah, GA.

(a) *Location.* All navigable waters, from surface to bottom, of the Wilmington River within a 300-yard radius of position: 32°3.73′ N, 81°1.78′ W in the vicinity of the Causton Bluff Bridge, Savannah, GA.

(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 Savannah (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 calling (912) 247–0073. 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 periods.* The safety zone in paragraph (a) of this section is in effect from 12:01 a.m. on October 2, 2023, through 11:59 p.m. on November 30, 2023. This section will be subject to enforcement periodically during daylight hours as needed by the project manager to safely remove all remaining bridge structural components. The approximate enforcement schedule is reflected in Table 1 to § 165.T07–0466. Mariners will be informed of enforced zone and enforcement periods by Broadcast Notice to Mariners and the presence of Myrick Marine's safety boat on scene during working hours.

TABLE 1 TO § 165.T07–0466

Open times	Width clearance limitations
10:00 a.m. to 10:30 a.m	Vessels 40 feet or less.
12:00 p.m. to 2:00 p.m ...	No limitations.
4:30 p.m. to 5:00 p.m	Vessels 40 feet or less.
7:00 p.m. to 7:00 a.m	No limitations.

Dated: September 27, 2023.

Nathaniel L. Robinson,

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

[FR Doc. 2023–21730 Filed 10–2–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

[ED–2023–OSERS–0175]

Proposed Waiver and Extension of the Project Period with Funding for Rehabilitation Long-Term Training Grants

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

ACTION: Proposed waiver and extension of project period with funding.

SUMMARY: The Secretary proposes to waive the requirements in the Education Department General Administrative Regulations that generally prohibit project periods exceeding five years and project period extensions involving the obligation of additional Federal funds. The proposed waiver and extension would enable 51 projects under Assistance Listing Numbers (ALN) 84.129B, 84.129H, 84.129P, and 84.129Q to receive funding for an additional period, not to exceed September 30, 2025.

DATES: We must receive your comments on or before November 2, 2023.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at *www.regulations.gov*. However, if you require an accommodation or cannot otherwise submit your comments via *www.regulations.gov,* please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''FAQ.''

Privacy Note: OSERS's policy is generally to make comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov*. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Karen Holliday Young, U.S. Department of Education, 400 Maryland Avenue SW, room 4A111, Washington, DC 20202. Telephone: 202–245–7318. Email: *Karen.Holliday@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this proposed waiver and extension. To ensure that your comments have maximum effect in developing the notice of final waiver and extension, we urge you to identify clearly the specific grantee or grantees (listed in the table under the *Background* section) that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 14094 and their overall requirement of reducing regulatory burden that might result from these proposed waivers and extensions. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect public comments about this proposed waiver and extension of the project period by accessing *Regulations.gov*.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this proposed waiver and extension. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background:

On July 5, 2019, the Department of Education (Department) published in the **Federal Register** (84 FR 32144) a notice inviting applications in four specialty areas of the Rehabilitation Long-Term Training program. Applications specifically were sought under Assistance Listing Number (ALN) 84.129B (Rehabilitation Counseling), 84.129H (Rehabilitation of Individuals Who Are Mentally Ill), 84.129P (Rehabilitation of Individuals Who Are Blind or Have Vision Impairments), and 84.129Q (Rehabilitation of Individuals Who Are Deaf or Hard of Hearing). In the notice inviting applications, the Rehabilitation Services Administration included two absolute priorities and one invitational priority. The first absolute priority addressed programs leading to a master's degree in rehabilitation counseling. The goal of this priority is to increase the skills of vocational rehabilitation counseling scholars so that upon successful completion they are prepared to effectively meet the needs and demands of consumers with disabilities and employers. The second absolute priority addressed programs leading to a master's degree or certificate in one of three specialty areas: (1) Rehabilitation of Individuals Who Are Mentally Ill; (2) Specialized Personnel for Rehabilitation of Individuals Who Are Blind or Have Vision Impairments; and (3) Rehabilitation of Individuals Who Are Deaf or Hard of Hearing. The goal of this priority is to increase the skills of scholars in these rehabilitation specialty areas so that upon successful completion of their master's degree or certificate programs they are prepared to effectively meet the needs and demands of consumers with disabilities. The invitational priority noted the Department's interest in applications that demonstrate that the training to VR counselors includes information related to providing VR services to individuals with disabilities pursuing self-employment, business ownership, and telecommuting. The funds were awarded to colleges and universities that in turn award scholarships to students enrolled in rehabilitation training programs.

A table listing the FY 2019 grantees follows along with their geographical location.

	Grantee name
FY 2019 Awards under ANL 84.129B	
H129B190001	South Dakota State University, Brookings, SD.
H129B190003	The Board of Regents of the University of Wisconsin System, Madison, WI.
H129B190004	Springfield College, Springfield, MA.
H129B190005	Georgia State University Research Foundation, Inc., Atlanta, GA.
H129B190007	The University of Texas Rio Grande Valley, Edinburg, TX.
H129B190008	San Diego State University Foundation, San Diego, CA.
H129B190009	Utah State University, Logan, UT.
H129B190011	The Corporation of Mercer University, Atlanta, GA.
H129B190012	St. Cloud State University, St. Cloud, MN.
H129B190013	University of Iowa, Iowa City, IA.
H129B190014	University of Memphis, Memphis, TN.
H129B190015	University of Massachusetts Boston, Boston, MA.
H129B190019	Western Washington University, Everett, WA.
H129B190021	The Florida International Board of Trustees, Miami, FL.
H129B190022	Portland State University, Portland, OR.
H129B190023	University of Hawaii, Honolulu, HI.
H129B190026	Western Oregon University, Monmouth, OR.
H129B190028	Virginia Commonwealth University, Richmond, VA.
H129B190032	Drake University, Des Moines, IA.
H129B190034	Winston Salem State University, Winston-Salem, NC.
H129B190035	The University of Texas at El Paso, El Paso, TX.
H129B190036	The Pennsylvania State University, University Park, PA.
H129B190039	The University of North Carolina at Chapel Hill, Chapel Hill, NC.
H129B190041	Rutgers, The State University of New Jersey, RBHS–SHP, Piscataway, NJ.
H129B190045	University of Puerto Rico-Rio Piedras, San Juan, PR.
H129B190046	Michigan State University, East Lansing, MI.
H129B190047	The Research Foundation for SUNY on behalf of U. at Buffalo, Buffalo, NY.
H129B190051	University of North Texas, Denton, TX.
H129B190052	Hofstra University, Hempstead, NY.
FY 2019 Awards under ANL 84.129H	
H129H190001	Thomas University, Thomasville, GA.
H129H190002	Georgia State University Research Foundation, Inc., Atlanta, GA.
H129H190003	Arizona Board of Regents, University of Arizona, Tucson, AZ.
H129H190004	San Diego State University Foundation, San Diego, CA.
H129H190005	Virginia Commonwealth University, Richmond, VA.
H129H190006	The George Washington University, Washington, DC.
H129H190008	The University of North Carolina at Chapel Hill ,Chapel Hill, NC.
H129H190012	University of Massachusetts, Boston, MA.
H129H190015	University of Arkansas, Fayetteville, AR.
H129H190016	San Francisco State University, San Francisco, CA.
H129H190018	Marquette University, Milwaukee, WI.
H129H190019	Illinois Institute of Technology, Chicago, IL.
FY 2019 Awards under ANL 84.129P	
H129P190002	Louisiana Tech University, Ruston, LA.
H129P190005	Mississippi State University, Mississippi State, MS.
H129P190012	Northern Illinois University, DeKalb, IL.
H129P190009	Salus University, Elkins Park, PA.
H129P190011	San Francisco State University, San Francisco, CA.
H129P190004	University of Massachusetts Boston, Boston, MA.
H129P190001	Western Michigan University, Kalamazoo, MI.
H129P190007	Western Michigan University, Kalamazoo, MI.
FY 2019 Awards under ANL 84.129Q	
H129Q190001	Emporia State University, Emporia, KS.
H129Q190003	Winston-Salem State University, Winston-Salem, NC.

Waivers and Extensions:

The Department proposes to extend these 51 projects to align with the 33 ALN 84.129B grant projects funded in FY 2020. Like the FY 2019 84.129 grant projects, the FY 2020 84.129B projects were funded to provide academic training in areas of personnel shortages as identified by the Secretary to increase the number of personnel trained in providing Vocational Rehabilitation (VR) services to individuals with disabilities. The FY 2020 84.129B grantees will receive their final year of funding in FY 2024 with a September 30, 2025 performance period ending date. The Department does not believe that it would be in the public interest to run a competition for ALNs 84.129B, 84.129H, 84.129P and 84.129Q in FY 2024. Rather, aligning the projects' period of performance end dates for all four ALNs would allow the Department to reduce the financial and

administrative burden by conducting a single competition for 84.129B, 84.129H, 84.129P and 84.129Q grants in FY 2025, with a five-year performance period that would run from October 1, 2025, through September 30, 2030.

For this reason, the Secretary proposes to waive the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, as well as the requirements in 34 CFR 75.261(a) and (c)(2), which allow the extension of a project period only if the extension does not involve the obligation of additional Federal funds. This waiver would allow the Department to issue a one-year FY 2024 continuation award to each of the 51 currently funded FY 2019 84.129B, 84.129H, 84.129P and 84.129Q projects up to the amount awarded to the projects in FY 2023 and subject to the ability of the projects to use the funds.

Any activities carried out during the year of this continuation award must be consistent with, or a logical extension of, the scope, goals, and objectives of the grantees' applications as approved in the FY 2019 competition. The requirements for continuation awards are set forth in 34 CFR 75.253.

Intergovernmental Review

These programs are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Regulatory Flexibility Act Certification

The Secretary certifies that the proposed waiver and extension of the project period would not have a significant economic impact on a substantial number of small entities. The only entities that would be affected by the proposed waiver and extension of the project period are the 51 grants that were awarded in FY 2019 under ALN 84.129B, 84.129H, 84,129P, and 84.129Q.

The Secretary certifies that the proposed waiver and extension would not have a significant economic impact on these entities, because the extension of an existing project period imposes minimal compliance costs, and the activities required to support the additional year of funding would not impose additional regulatory burdens or require unnecessary Federal supervision.

Paperwork Reduction Act of 1995

This notice of proposed waiver and extension of the project period does not contain any information collection requirements.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2023–21853 Filed 9–29–23; 11:15 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

[ED–2023–OSERS–0177]

Proposed Waiver and Extension of the Project Period With Funding for Innovative Rehabilitation Training Grants

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

ACTION: Proposed waiver and extension of project period with funding.

SUMMARY: The Secretary proposes to waive the requirements in the Education Department General Administrative Regulations that generally prohibit project periods exceeding five years and project period extensions involving the obligation of additional Federal funds. The proposed waiver and extension would enable seven projects under Assistance Listing Number (ALN) 84.263C to receive funding for an additional period, not to exceed September 30, 2025.

DATES: We must receive your comments on or before November 2, 2023.

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at *www.regulations.gov.* However, if you require an accommodation or cannot otherwise submit your comments via *www.regulations.gov,* please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will not accept comments submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov,* including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''FAQ.''

Privacy Note: OSERS's policy is generally to make comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should include in their comments only information about themselves that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Kristen Rhinehart-Fernandez, U.S. Department of Education, 400 Maryland Avenue SW, Room 4A111, Washington, DC 20202–5076. Telephone: (202) 245–6103. *Email: Kristen.Rhinehart@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this proposed waiver and extension. To ensure that your comments have maximum effect in developing the notice of final waiver and extension, we urge you to identify clearly the specific grantee or grantees (listed in the table under the *Background* section) that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 14094 and their

overall requirement of reducing regulatory burden that might result from the proposed waiver and extension. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect public comments about the proposed priority and definition by accessing *Regulations.gov*.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the proposed waiver and extension. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

On July 5, 2019, the Department of Education (Department) published in the **Federal Register** (84 FR 32135) a notice inviting applications for the Innovative Rehabilitation Training Program under ALN 84.263C to develop (a) new types of training programs for rehabilitation personnel and to demonstrate the effectiveness of these new types of training programs for rehabilitation personnel in providing rehabilitation services to individuals with disabilities; (b) new and improved methods of training rehabilitation personnel so that there may be a more effective delivery of rehabilitation services to individuals with disabilities by designated State rehabilitation agencies and designated State rehabilitation units or other public or non-profit rehabilitation service agencies or organizations; and (c) new innovative training programs for vocational rehabilitation (VR) professionals and paraprofessionals to have a 21st-century understanding of the evolving labor force and the needs of individuals with disabilities so they can more effectively provide VR services to individuals with disabilities.

The Innovative Rehabilitation Training Program funded in 2019 included six topic areas: (1) VR counseling, (2) VR services to individuals with Autism Spectrum Disorders, (3) VR services to individuals with intellectual disabilities, (4) career assessment for VR service recipients, (5) employer engagement in the VR process, and (6) a field-initiated project in an area related to VR. The project periods started on October 1, 2019, and will conclude on September 30, 2024. A table listing the FY 2019 projects and topic areas follows.

FY 2019 awards under ALN 84.263C	Grantee project name/topic area
H263C190004	Emporia State University: Enhancing VR Professionals' Services to Consumers on the Spectrum/VR Services to Individuals with Autism Spectrum Disorder.
H263C190006	South Carolina State University: Innovative Career and Assessment Project (ICAP)/Career Assessment for VR Service Recipients.
H263C190007	The George Washington University Center for Rehabilitation Counseling Research and Education: Center for Innovative Training in Vocational Rehabilitation (CIT–VR)/VR Counseling.
H263C190011	Institute for Community Inclusion, University of Massachusetts Boston: It's Employment/VR Services to Individuals with Intellectual Disabilities.
H263C190012	Institute for Community Inclusion, University of Massachusetts Boston: Program on Innovative Rehabilitation Training on Employer Engagement (PIRTEE)/Employer Engagement.
H263C190013	West Virginia University Research Corporation: AIR4VR/Field-Initiated.
H263C190015	University of Memphis Institute on Disability: Finding Innovative Rehabilitation Services Training (FIRST)/VR Services to Individuals with Intellectual Disabilities.

In FY 2020, the Department funded two projects under the Innovative Rehabilitation Training program (ALN 84.263E and 84.263F) to develop a new or substantially improved and, to the extent possible, evidence-based training program, including stand-alone modules and instructional materials to be incorporated into an existing academic degree program for educating VR counselors or other VR professionals and VR paraprofessionals or into short-term training for VR professionals, or both. Topics addressed by these projects are assisting and supporting individuals with disabilities pursuing self-employment, business ownership, and telecommuting and forensic rehabilitation and vocational evaluation. The project periods started on October 1, 2020, and will conclude on September 30, 2025.

Waivers and Extensions

The Department proposes to extend the project end dates of the seven currently 84.263C Innovative Rehabilitation Training projects by one year to align those dates with that of the awards funded under ALN 84.263E and 84.263F, which will each receive their final year of funding in FY 2024, and end on September 30, 2025. Due to the overlapping goals of these three programs, the Department does not believe that it would be in the public interest to run a competition for ALN 84.263C in FY 2024. Rather, aligning the projects' periods of performance end dates for ALN 84.263C, 84.263E, and 84.263F would reduce financial and administrative burden by allowing the Department to conduct a single competition for all 84.263C, 84.263E, and 84.263F grants in FY 2025, with a five-year performance period that would run from October 1, 2025, through September 30, 2030.

As a result, for these projects, the Secretary proposes to waive the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, as well as the requirements in 34 CFR 75.261(a) and (c)(2), which allow the extension of a project period only if the extension does not involve the obligation of additional Federal funds. The waiver would allow the Department to issue a one-time one-year FY 2024 continuation award to the seven currently funded 84.263C projects up to the amount awarded to the projects in FY 2023 and subject to the ability of the projects to use the funds.

Any activities carried out during the year of this continuation award must be consistent with, or a logical extension of, the scope, goals, and objectives of the grantees' applications as approved in the FY 2019 competition. The requirements for continuation awards are set forth in 34 CFR 75.253.

Intergovernmental Review

These programs are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies

on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Regulatory Flexibility Act Certification

The Secretary certifies that the proposed waiver and extension of the project period would not have a significant economic impact on a substantial number of small entities. The only entities that would be affected by the proposed waiver and extension of the project period are the seven current ALN 84.263C grantees.

The Secretary certifies that the proposed waiver and extension would not have a significant economic impact on these entities, because the extension of an existing project period imposes minimal compliance costs, and the activities required to support the additional year of funding would not impose additional regulatory burdens or require unnecessary Federal supervision.

Paperwork Reduction Act of 1995

This notice of proposed waiver and extension of the project period does not contain any information collection requirements.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2023–21852 Filed 9–29–23; 11:15 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2022–0309; FRL–10903–02–R6]

Air Plan Disapproval; Texas; Contingency Measures for the Dallas–Fort Worth and Houston–Galveston–Brazoria Ozone Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is disapproving revisions to the Texas State Implementation Plan (SIP) for the Dallas–Fort Worth (DFW) and Houston–Galveston–Brazoria (HGB) Serious ozone nonattainment areas for the 2008 ozone National Ambient Air Quality Standard (NAAQS). Specifically, EPA is disapproving the portion of these SIP revisions that the state intended to address contingency measure requirements. Contingency measures are control requirements in a nonattainment area SIP that would take effect should the area fail to meet Reasonable Further Progress (RFP) emissions reductions requirements or fail to attain the NAAQS by the applicable attainment date.

DATES: This rule is effective on November 2, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2022–0309. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jeff Riley, EPA Region 6 Office, Infrastructure & Ozone Section, 214–665–8542, *riley.jeffrey@epa.gov.* Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

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

I. Background

The background for this action is discussed in detail in our April 21, 2023, proposal (88 FR 24522).[1] In the April 2023 document, we proposed to disapprove portions of the May 13, 2020, Texas SIP revisions addressing requirements for the 2008 8-hour ozone NAAQS for the two Serious ozone nonattainment areas in Texas—the DFW and HGB areas. As Serious ozone nonattainment areas, the DFW Area (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise counties) and the HGB Area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties) were both subject to CAA section 172(c)(9) for contingency measures as well as CAA 182(c)(9) for the Serious ozone nonattainment area requirements. As such, the state must adopt and submit contingency measures for implementation should the area fail to meet RFP requirements or fail to attain the 2008 ozone NAAQS by the applicable attainment date. The May 13, 2020, SIP submissions included provisions intended to satisfy the contingency measures requirement for both the DFW and HGB areas. For each area, the Texas Commission on Environmental Quality (TCEQ or State) identified the emission reductions from already-implemented mobile source measures resulting from the incremental turnover of the motor vehicle fleet each year to meet the contingency measures requirements.

As explained in the April 2023 proposal, the U.S. Court of Appeals for the District of Columbia Circuit (''D.C. Circuit'') issued a relevant decision in response to challenges to EPA's rule implementing the 2015 ozone NAAQS (83 FR 62998 (December 6, 2018)). *Sierra Club, et al.* v. *EPA,* 985 F.3d 1055 (D.C. Cir. 2021).[2] Among the rulings in this decision, the D.C. Circuit vacated EPA's interpretation of the CAA that had previously allowed states to rely on already-implemented control measures to meet the statutory requirements of CAA section 172(c)(9) or 182(c)(9) for

[1] Henceforth, we refer to this proposal as ''the April 2023 document'' or ''the April 2023 proposal''. This proposal is provided in the docket for this action.

[2] See *Bahr* v. *EPA,* 836 F.3d 1218 (9th Cir. 2016) and *Sierra Club* v. *EPA,* 985 F.3d 1055 (D.C. Cir. 2021) (applying the *Bahr* reasoning nationwide).

contingency measures in nonattainment plans for the ozone NAAQS (see 83 FR 62998, 63026–27). The Court's interpretation of the statute in the *Sierra Club* decision, which requires contingency measures be prospective and conditional, applies across the U.S.[3] EPA acknowledges that it had previously interpreted the requirement differently, but now agrees that the plain language of section 172(c)(9) and section 182(c)(9) require that contingency measures be both conditional and prospective. EPA's prior interpretation was premised on the theory that the statutory language is ambiguous, and that it was reasonable to interpret it to allow for other approaches.

Our April 2023 document proposed disapproval of the contingency measure element of the May 13, 2020 SIP submissions for the DFW and HGB areas for purposes of the 2008 ozone NAAQS because the contingency measures identified by the State consisted entirely of emission reductions from measures that would occur regardless of whether the nonattainment area would fail to meet RFP or to attain by the applicable attainment date. As such, these measures do not satisfy the requirements of CAA sections 172(c)(9) and 182(c)(9) that contingency measures be both prospective and conditional, and thus go into effect only upon one of the statutory triggering events.

The comment period on our April 2023 proposal closed on May 22, 2023. We received one relevant supportive comment from the Harris County Attorney's Office (HCAO), and one set of relevant adverse comments from the TCEQ.[4] HCAO supported EPA's proposed disapproval of the HGB area contingency measures and emphasized the need for additional emissions reductions in the face of the area's continuing ozone pollution challenges. TCEQ disagreed with EPA's interpretation of the CAA contingency measure requirement and Federal case law, arguing that our proposed disapproval was inconsistent with past Agency decisions on Texas nonattainment SIP elements. Our responses to the comments follow.

[3] Citing previous caselaw, the Court stated that contingency measures that are to take effect upon failure to satisfy standards are likewise not measures that have been implemented before such failure occurs (internal quotations omitted). *Sierra Club, et al.* v. *EPA,* 985 F.3d 1055, 1067–68 (D.C. Cir. 2021).

[4] Henceforth, we refer to the HCAO and the TCEQ as ''the commenter(s)''. These comments are provided in the docket at *https://www.regulations.gov* under docket ID: EPA–R06–OAR–2022–0309.

II. Response to Comments

Comment: The commenter supports EPA's proposal to disapprove the contingency measures element of the May 13, 2020 Texas SIP revisions for the HGB 2008 8-hour ozone NAAQS Serious nonattainment area, claiming that the SIP submission fails to protect the public's health and welfare by failing to provide emission reductions from contingency measures that would have been triggered by EPA's October 7, 2022, determination that the HGB Serious nonattainment area failed to attain the 2008 ozone NAAQS by the applicable attainment date.[5] The commenter states that emissions reductions from Texas sources would assist in mitigating the public health impacts caused by ozone in the HGB area, and describes the health effects of exposure to ozone, including the effects on children and disadvantaged communities in the HGB area. The commenter includes numerous health studies in support of these statements.

Response: The EPA acknowledges the commenter's views and submission of the studies regarding exposure to ground level ozone. We agree with the commenter that the HGB area faces significant challenges in attaining the applicable ozone standards, and that additional control measures, including contingency measures, would provide meaningful emission reductions towards improving local air quality. EPA agrees that the purpose of contingency measures is to provide for additional emission reductions that will go into effect in areas in the event of a failure to meet RFP or failure to attain, to help to mitigate the problem during the period that the state is developing a new SIP submission to impose additional requirements as required by the applicable nonattainment classification.

Comment: The commenter states that the EPA should withdraw its proposed disapproval of the DFW and HGB 2008 ozone NAAQS contingency measures because the action is inconsistent with EPA's past practice of taking no action on SIP elements for Texas nonattainment areas that have already been reclassified.

Response: To support the idea that EPA's April 2023 proposal is inconsistent with past practice, and that the contingency measures SIP element for the DFW and HGB 2008 eight-hour ozone NAAQS nonattainment areas under the Serious classification are now moot, the commenter cites a single memo dated August 23, 2019.[6] EPA has included the 2019 memo in the docket for this rulemaking action. Upon review, this memo is incorrect, and should not have been understood to be an official agency policy statement or interpretation of the statute concerning the contingency measures requirement. The EPA employee who signed this memo did not have the authority to speak on behalf of the Agency regarding these matters. Furthermore, because the 2019 memo does not accurately reflect the views of the EPA and is not evidence of any previous position, EPA has never relied on the 2019 memo to support any action. EPA is accordingly taking this opportunity to officially retract the 2019 memo.

Second, to the extent that the 2019 memo may have inadvertently suggested that Texas' contingency measures SIP submittal from May 13, 2020, is somehow moot upon reclassification of these areas to Severe ozone nonattainment, that does not represent EPA's position. EPA does not agree with such an interpretation of section 172(c)(9) and section 182(c)(9). EPA does not agree that the contingency measures SIP element is moot in this situation, because one of the specific events that requires the triggering of such provisions has in fact occurred (*i.e.,* failure to attain by the applicable attainment date). It is simply not logical to conclude that a reclassification to the next higher classification that is required by a failure to attain by the attainment date (see CAA 181(b)(2)) would moot the contingency measure requirement that is required to be triggered by the same failure to attain (see CAA 172(c)(9)). Such an approach would lead to absurd results that would effectively render the contingency measure requirement meaningless. Lastly, the commenter did not cite any other past EPA actions to support the claim that the April 2023 proposal conflicts with past EPA actions. EPA does not find this isolated, incorrect, and erroneously issued 2019 memo compelling evidence of precedent or practice on the matter of contingency measures.

A reclassification occurs upon an EPA determination that an area failed to attain by its attainment date. That determination similarly triggers the requirement to implement contingency measures. Because the DFW and HGB areas did not attain by the applicable

[5] Note EPA's recent final determination that the DFW and HGB Serious nonattainment areas failed to attain the 2008 ozone NAAQS by the areas' attainment date. 87 FR 60926 (October 7, 2022).

[6] Memorandum to file with subject ''No EPA Action to be Taken on 3 Outstanding Texas Moderate Area Ozone State Implementation Plan Revisions (SIPs)'', dated August 23, 2019 (2019 memo).

Serious area attainment date, contingency measures should have already gone into effect, and should still go into effect as soon as reasonably possible. As discussed further below, the contingency measures submitted by the State for purposes of the Serious area attainment plan are not approvable, and the State should take action promptly to replace them.

As detailed in our April 2023 proposed action, the D.C. Circuit vacated EPA's prior interpretation of the CAA that allowed states to rely on already-implemented control measures to meet the statutory requirements of CAA section 172(c)(9) and 182(c)(9) for contingency measures in nonattainment plans for the ozone NAAQS. The effect of this decision is that the statutory requirement that contingency measures must be prospective and conditional applies across the U.S. Continued adherence to the now-invalidated prior interpretation, including agency policy statements to justify past practice, does not harmonize with the D.C. Circuit decision and is therefore not correct. In arguing that EPA's proposed disapproval is inconsistent with past practice, the commenter acknowledges the reclassification of the DFW and HGB areas to Severe nonattainment areas on the effective date of EPA's October 7, 2022, final action finding that these areas failed to attain the 2008 ozone NAAQS by the applicable attainment date for Serious areas (87 FR 60926, October 7, 2022). Such failure to attain by the applicable attainment date is explicitly identified in the language of CAA section 172(c)(9) as one of the events triggering implementation of contingency measures. The May 13, 2020, Texas SIP revisions did not establish prospective and conditional DFW and HGB area contingency measures whose implementation would be triggered by EPA's finding that the areas had failed to attain.

Per the statute and relevant court decisions, EPA must disapprove the contingency measures element of Texas' May 13, 2020, submittal for the DFW area because these measures are based upon emissions reductions from already-implemented measures that would occur regardless of whether there was a triggering event, and therefore they are not prospective and conditional as required by statute.[7]

On May 10, 2021 (86 FR 24717), EPA finalized its approval of the HGB area RFP demonstration and associated motor vehicle emissions budgets (budgets), and a revised 2011 base year emissions inventory. In that final rulemaking, we did not take final action on our October 29, 2020, proposed approval of the contingency measures submitted by the State in the May 13, 2020, SIP revision submission for the HGB area. EPA explained that it was reexamining the contingency measures element of the TCEQ submission for the HGB area in light of the D.C. Circuit decision, and that it would address those contingency measures in a separate future action. Consistent with our interpretation of the CAA contingency measures requirement for the DFW area subsequent to the D.C. Circuit decision, EPA must also disapprove the contingency measures element of Texas' May 13, 2020, submittal for the HGB area. Our April 2023 document proposed disapproval of the contingency measure element of the May 13, 2020 SIP submissions for the DFW and HGB areas for purposes of the 2008 ozone NAAQS.

Comment: The commenter disagrees that EPA's disapproval of the DFW and HGB 2008 ozone NAAQS Serious area contingency measures would provide the basis for imposition of a transportation conformity freeze in these areas upon the effective date of EPA's final action and therefore states it was not necessary for EPA to discuss the possibility of a protective finding.[8]

Response: EPA agrees with TCEQ on the limited ground that it was not necessary to discuss the possibility of a transportation conformity freeze or the eligibility of the Dallas-Fort Worth and Houston-Galveston-Brazoria areas for protective findings (as defined in 40 CFR 93.101) under the transportation conformity regulations in the action proposing the disapproval of contingency measures for these areas for the 2008 ozone NAAQS. Thus, EPA is not taking final action on the protective finding discussed in the proposal and a transportation conformity freeze will not occur. A transportation conformity freeze would not occur in either of these areas under these circumstances because EPA is only disapproving contingency measures. Moreover, the State did not submit the contingency measures to provide emission reductions included in the areas' approved RFP plans and the associated motor vehicle emissions budgets.[9] As such EPA's disapproval of the contingency measures would not impact the approval of the RFP plans and motor vehicle emissions budgets. Therefore, the approved motor vehicle emissions budgets would continue to be used in transportation conformity determinations by the metropolitan planning organizations for the Dallas and Houston areas after the effective date of the disapproval of the contingency measures.

Comment: The commenter asserts that EPA's prior allowance of already-implemented control measures that obtain future emission reductions was an appropriate interpretation of the CAA contingency measure requirement, and one that states are capable of achieving.

Response: We disagree with the commenter's assertion that EPA's prior interpretation of the CAA contingency measure requirement remains valid. Courts have now ruled, and EPA now acknowledges, that the prior interpretation was invalid. *Sierra Club, et al.* v. *EPA,* 985 F.3d 1055 (D.C. Cir. 2021). The express statutory language of CAA section 172(c)(9) requires that contingency measures be both prospective and conditional. Thus, reliance on emission reductions from existing implemented measures, that will occur regardless of whether there is a triggering event, simply does not meet this requirement for contingency measures. TCEQ appears to disagree with the D.C. Circuit's decision and reasoning in *Sierra Club.* EPA cannot disregard this decision. The Agency's actions, including this rulemaking, must comport with applicable caselaw, which in this situation includes the D.C. Circuit's decision in *Sierra Club.* EPA Region 6 recognizes the DFW and HGB areas face significant challenges in attaining the applicable ozone standards. We are available to assist the State with case-by-case questions regarding situations specific to each nonattainment area in the development of approvable contingency measures for ozone reductions, consistent with the statute and relevant court decisions.

Comment: The commenter contends that because Texas developed and submitted the DFW and HGB 2008 ozone NAAQS Serious area contingency measures in accordance with the requirements and statutory interpretation applicable at the time of

[7] See *Bahr* v. *EPA,* 836 F.3d 1218 (9th Cir. 2016) and *Sierra Club* v. *EPA,* 985 F.3d 1055 (D.C. Cir. 2021) (applying the *Bahr* reasoning nationwide).

[8] The transportation conformity regulation defines a ''protective finding'' as a determination by EPA that a submitted control strategy implementation plan revision contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment. (See 40 CFR 93.101.)

[9] See, 86 FR 24717 (May 10, 2021) (final rule approving Reasonable Further Progress Plan for the Houston-Galveston-Brazoria Ozone Nonattainment Area); 88 FR 24693 (April 24, 2023) (final rule approving Reasonable Further Progress Plan for the Dallas-Fort Worth Ozone Nonattainment Area).

submittal, EPA should have finalized its proposed approvals of the contingency measures.

Response: We acknowledge TCEQ's development and timely May 13, 2020 submittal of the DFW and HGB contingency plans to meet EPA's August 3, 2020, submittal deadline for the 2008 ozone Serious SIP revisions, and that these submissions were consistent with past EPA approvals of already-implemented contingency measures.[10] EPA must act upon SIP submissions in full consideration of the established requirements and statutory interpretations, including court rulings, that apply at the time of EPA's action. In this situation, the D.C. Circuit has made clear that EPA and Texas' prior statutory interpretation concerning contingency measures is not consistent with the CAA, and approval of contingency measures that are not prospective and conditional would be inconsistent with the CAA. Therefore, it was not possible for EPA to proceed with an approval after the D.C. Circuit's decision in *Sierra Club.* The SIP submissions at issue in this action were still pending before the Agency when the D.C. Circuit issued the relevant court decision, and EPA must now take action consistent with that decision.

The DFW RFP proposal comment period ended on November 9, 2020, and relevant adverse comments were received on EPA's proposed approval.[11] As a required part of the Agency's rulemaking process, EPA must review, evaluate, and respond to all relevant comments in the issuance of a final action. EPA was timely in conducting the review and evaluation of such comments in the development of our final action. EPA did not complete this process, and did not take final action, in advance of the January 2021 D.C. Circuit decision. Had it done so more quickly, however, this could potentially have led to a need for EPA to exercise its authority under section 110(k)(6) or section 110(k)(5) after such approval. But in this rulemaking, EPA must adhere to its obligations under section 110(k)(2), (3), and (4) to approve, disapprove, conditionally approve, in whole or in part, the contingency measures in the SIP submissions at issue. EPA may only approve those SIP provisions that actually meet applicable legal requirements, such as the requirement that contingency measures must be conditional and prospective. Similarly, EPA must also adhere to its obligations under section 110(l) which directs, inter alia, that the agency shall not approve a revision to a SIP unless it meets applicable requirements of the CAA.

Comment: The commenter argues that because the DFW and HGB areas have met the applicable Serious area RFP requirements for the 2008 ozone NAAQS, there is no need for contingency measures for failure to meet RFP. Therefore, the commenter argues that EPA should not have disapproved the contingency measures with respect to RFP requirements.

Response: We agree with the commenter that the DFW and HGB 2008 8-hour ozone NAAQS Serious nonattainment areas did meet RFP requirements, as was recognized by EPA's July 1, 2021 determination that the 2008 ozone NAAQS Milestone Compliance Demonstration for the 2020 Calendar Year adequately established that the January 1, 2021 RFP milestone emission reductions were met.[12] However, although the RFP contingency measures were not triggered by a failure of either area to meet RFP emission reductions requirements, the State relied on those same already-implemented mobile source fleet turnover reductions as contingency measures for purposes of a failure to attain the NAAQS. Thus, even if contingency measures were not needed for purposes of a failure to meet RFP, such measures were still needed in the event of a failure to attain. As previously noted, on October 7, 2022, EPA issued a final determination that the DFW and HGB Serious nonattainment areas failed to attain the 2008 8-hour ozone NAAQS by the applicable attainment dates. CAA section 172(c)(9) requires contingency measures to be implemented upon an area's failure to meet RFP requirements or failure to attain the NAAQS by the applicable attainment date.

The May 13, 2020, Texas SIP submissions did not include prospective and conditional contingency measures for the DFW or HGB areas that would be triggered by EPA's finding that the areas had failed to attain, as required by section 172(c)(9). Although the RFP contingency measures would not have been triggered by a failure to meet RFP emission reductions, those same measures would have been required for failure to attain and therefore triggered for implementation by EPA's October 7, 2022 final determination. Put another way, and assuming that the state had separate contingency measures triggered by failure to meet RFP and contingency measures triggered by failure to attain, EPA agrees with TCEQ that there is no longer a need for contingency measures triggered by failure to meet RFP for the DFW and HGB Serious nonattainment plan for purposes of the 2008 8-hour ozone NAAQS, because these areas met RFP for this specific classification. However, contingency measures are still required for the failure to attain (and indeed, noting the fact that areas failed to attain, should already have taken effect). The SIP submissions containing the deficient contingency measures are the basis for this disapproval. Even though the triggering event has occurred (the areas failed to attain), and even though these areas met RFP, the State must still meet the statutory requirement for contingency measures for these areas' Serious classification. This means the State must now adopt additional measures beyond those required under the Serious area plan.

Lastly, it is worth noting that both DFW and HGB continue to be in violation of the 2008 ozone standards with 2022 Design values of 77 ppb and 78 ppb respectively. Preliminary 2023 data (not a full year of data and not certified for quality assurance/quality control) indicates these areas continue to violate the standard.

Comment: The commenter asserts that if the EPA's proposed disapproval is not withdrawn, EPA should provide actionable guidance on how to implement contingency measures for an RFP milestone and attainment year that has already passed.

Response: While EPA acknowledges the request to provide actionable guidance in this rulemaking, we do not agree that it is relevant to the question of whether to disapprove the present SIP submissions. The fact that the State did not provide approvable contingency measures in these SIP submissions, and thus cannot now adopt and implement new contingency measures in the original timeframe envisioned in the Act, does not excuse the State from meeting the requirement, even if late. Nevertheless, EPA's general advice on this matter following the *Sierra Club* decision is that the State should move expeditiously to adopt and implement contingency measures that meet the Act's requirements as interpreted in that decision. The contingency measures in the SIP submissions at issue in this action are inconsistent with statutory requirements, as reflected in that decision.

[10] *See* 84 FR 44238, August 23, 2019.

[11] Comments received on our October 9, 2020 proposed approval are provided in the docket for that action at *https://www.regulations.gov* under docket ID: EPA–R06–OAR–2020–0161.

[12] EPA's July 1, 2021, determination that TCEQ's 2020 Milestone Compliance Demonstration adequately established that the 2008 ozone NAAQS Serious RFP milestone emission reductions were met for the DFW and HGB nonattainment areas is provided in the docket for this action.

We recognize that the court decision requiring that contingency measures must be prospective and contingent measures, and thus cannot be (or cannot rely on emission reductions from) already implemented measures, came after Texas made this SIP submission but it is worth noting, if Texas had developed approvable contingency measures any time before EPA's October 2022 determination that the areas failed to attain, those measures could have been implemented timely. It is only because the attainment date has passed and the State's SIP submission is not approvable in light of the court decision, that timely adoption and implementation of other appropriate contingency measures is no longer possible. Situations in which a state and EPA would have to address deficient contingency measures after the state had already failed to meet RFP or failed to attain should generally not occur.

While EPA acknowledges the unusual circumstances of the *Sierra Club* decision having occurred after TCEQ's submittal, the appropriate course of action at this point is to address the deficiency by providing approvable contingency measures for the Serious area classifications as quickly as reasonably possible. Further, the state should implement the new measures as soon as reasonably possible because the statutory requirement for implementation of those contingency measures has already arisen as a result of the failure to attain in the DFW and HGB areas. Contrary to commenter's assertion, this is not retroactive implementation. EPA is not asking the State to accomplish an impossible task. The State should follow the applicable SIP-development process to develop and submit approvable contingency measures and should implement these measures as soon as reasonably possible. The measures would not apply in the past or be applied retroactively. The measures would apply prospectively in that they would achieve emissions reductions after being developed and implemented, and the State should develop and implement them as soon as possible because the failures to attain have already occurred (and thus the need for the measures has already been triggered).

EPA is not requiring the state to comply with the contingency measure requirement for the Serious area plan retrospectively. EPA does not expect the state to go back in time and impose such measures in the past. EPA does, however, expect the state to develop and submit additional measures now to get the emission reductions that the contingency measures should be achieving now, even if belatedly, to continue progress toward meeting the NAAQS. EPA emphasizes that requiring a state to meet a requirement in the present, even if late, does not equate to requiring a state to comply in the past. Moreover, to allow the passage of time due to delays in a state's SIP submission, or as in this case the submission being unapprovable, to obviate the need to submit contingency measures because implementation timeframes have passed, would be a clear circumvention of the Clean Air Act's requirements.

EPA Region 6 is available to assist Texas with case-by-case questions regarding situations specific to each nonattainment area in the development and implementation of approvable contingency plans for ozone reductions, consistent with the statute and relevant court decisions.

III. Final Action

Based upon the statutory requirements of section 172(c)(9), the EPA is disapproving the contingency measures element of the May 13, 2020, Texas SIP revisions for Serious nonattainment areas under the 2008 8-hour ozone NAAQS. EPA is finalizing this disapproval with respect to the contingency measure requirements under CAA section 172(c)(9) for the reasons discussed above.

As a consequence of the disapproval of the contingency measure element, within 24 months of the effective date of this action, the EPA must promulgate a Federal implementation plan under CAA section 110(c) unless we approve subsequent SIP submissions that correct the plan deficiencies. In addition, under 40 CFR 52.31, the offset sanction in CAA section 179(b)(2) will be imposed 18 months after the effective date of this action, and the highway funding sanction in CAA section 179(b)(1) will be imposed six months after the offset sanction is imposed. A sanction will not be imposed if the EPA determines that a subsequent SIP submission corrects the identified deficiencies before the applicable deadline.

IV. Environmental Justice Considerations

As stated in our April 2023 proposal and for informational purposes only, EPA conducted screening analyses of the 10-county DFW and 8-county HGB Serious ozone nonattainment areas using EPA's EJScreen (Version 2.1) EJ screening and mapping tool.[13] The results of this analysis are provided for informational and transparency purposes, not as a basis of our proposed action. The EJScreen analysis reports are available in the docket for this rulemaking. The EPA found, based on the EJScreen analyses, that this final action will not have disproportionately high or adverse human health or environmental effects on a particular group of people, as EPA's disapproval of these contingency measures will require ongoing reductions of ozone precursor emissions, as required by the CAA. Specifically, this final rule would require that Texas submit plans for each area containing prospective and conditional contingency measures consistent with the D.C. Circuit decision, which would help to improve air quality in the affected nonattainment area. Information on ozone and its relationship to negative health impacts can be found at *https://www.epa.gov/ground-level-ozone-pollution*.[14]

V. Statutory and Executive Order Reviews

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

Additional information about these statutes and Executive orders can be found at *https://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This final action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA, because this final SIP disapproval will not in-and-of itself create any new information collection burdens, but will simply disapprove certain State requirements for inclusion in the SIP.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities

[13] See *https://www.epa.gov/ejscreen.*

[14] See, also, 80 FR 65292 (October 26, 2015).

under the RFA. This action will not impose any requirements on small entities. This final SIP disapproval will not in-and-of itself create any new requirements but will simply disapprove certain State requirements for inclusion in the SIP.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action finalizes disapproval of certain pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132: Federalism

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

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

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP revision that EPA is disapproving would not apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because this final SIP disapproval will not in-and-of itself create any new regulations, but will simply disapprove certain State requirements for inclusion in the SIP.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.'' [15]

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

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

K. Congressional Review Act (CRA)

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

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 4, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: September 25, 2023.

Earthea Nance,

Regional Administrator, Region 6.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart SS—Texas

■ 2. Section 52.2273 is amended by adding paragraph (f) to read as follows:

§ 52.2273 Approval status.

* * * * *

(f) The contingency measure element of the following Texas SIP revisions

submittals is disapproved, effective on November 2, 2023:

(1) The ''Dallas-Fort Worth and Houston-Galveston-Brazoria Serious Classification Reasonable Further Progress State Implementation Plan Revision for the 2008 Eight-Hour Ozone National Ambient Air Quality Standard'' adopted March 4, 2020, and submitted May 13, 2020.

(2) The ''Dallas-Fort Worth Serious Classification Attainment Demonstration State Implementation Plan Revision for the 2008 Eight-Hour Ozone National Ambient Air Quality Standard'' adopted March 4, 2020, and submitted May 13, 2020.

(3) The ''Houston-Galveston-Brazoria Serious Classification Attainment Demonstration State Implementation Plan Revision for the 2008 Eight-Hour Ozone National Ambient Air Quality Standard'' adopted March 4, 2020, and submitted May 13, 2020.

[FR Doc. 2023–21757 Filed 10–2–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52

[EPA–R04–OAR–2022–0608; FRL–10387–02–R4]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

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

DATES: This rule is effective November 2, 2023.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2022–0608. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

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

SUPPLEMENTARY INFORMATION:

I. Background

On April 1, 2022, FDEP submitted a SIP revision to remove Rules 62–296.470, Florida Administrative Code (F.A.C.), *Implementation of Federal Clean Air Interstate Rule,* 62–296.701, F.A.C., *Portland Cement Plants,* 62–296.703, F.A.C., *Carbonaceous Fuel Burners,* 62–296.706, F.A.C., *Glass Manufacturing Process,* 62–296.709, F.A.C., *Lime Kilns,* and 62–296.710, F.A.C., *Smelt Dissolving Tanks* from the SIP.[1] Florida repealed Rule 62–296.470 on August 14, 2019, through a State regulatory action because CAIR has sunset and, under CSAPR, EPA determined that sources in Florida do not contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to the covered NAAQS. Because the Cross-State Air Pollution Rule (CSAPR) replaced CAIR, and EPA previously determined that CSAPR does not apply to Florida, neither of these rules have any applicability in Florida today. Similarly, Florida's PM RACT rules only apply to emission units that have been issued an air permit on or before May 30, 1988. There are no longer any units in the State still in operation covered by Rules 62–296.701, 62–296.703, 62–296.706, 62–296.709, and 62–296.710. Therefore, removal of these rules from the SIP will not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA. *See* CAA section 110(l).

Through a notice of proposed rulemaking (NPRM) published on August 11, 2023 (88 FR 54534), EPA proposed to approve the portion of Florida's April 1, 2022, SIP submittal seeking removal of Florida Rules 62–296.470, 62–296.701, 62–296.703, 62–296.706, 62–296.709, and 62–296.710 from the SIP. The details of Florida's submission, as well as EPA's rational for removing these rules, are described in more detail in EPA's August 11, 2023, NPRM. Comments on the August 11, 2023, NPRM were due on or before September 11, 2023. No adverse comments were received on the August 11, 2023, NPRM.

II. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. EPA is finalizing the removal of Rules 62–296.470, F.A.C., *Implementation of Federal Clean Air Interstate Rule,* 62–296.701, F.A.C., *Portland Cement Plants,* 62–296.703, F.A.C., *Carbonaceous Fuel Burners,* 62–296.706, F.A.C., *Glass Manufacturing Process,* 62–296.709, F.A.C., *Lime Kilns,* and 62–296.710, F.A.C., *Smelt Dissolving Tanks* from the Florida SIP, which is incorporated by reference in accordance with the requirements of 1 CFR part 51, as discussed in Section I of this preamble. EPA has made and will continue to make the SIP generally available at the EPA Region 4 Office (please contact the person identified in the ''For Further Information Contact'' section of this preamble for more information).

III. Final Action

EPA is approving the portion of the April 1, 2022, Florida SIP revision that consists of the removal of Rules 62–296.470, 62–296.701, 62–296.703, 62–296.706, 62–296.709, and 62–296.710 from the Florida SIP.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission

[1] In FDEP's April 1, 2022, submission, the State requested several other approvals from EPA, and EPA is addressing those rules in a separate action.

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

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

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

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

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 4, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: September 27, 2023.

Jeaneanne Gettle,

Acting Regional Administrator, Region 4.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart K—Florida

§ 52.520 [Amended]

■ 2. In § 52.520 in paragraph (c) amend the table under the heading ''Chapter 62–296 Stationary Sources-Emission Standards'' by removing the entries for ''Rules 62–296.470, *Implementation of Federal Clean Air Interstate Rule,*'' ''62–296.701, *Portland Cement Plants,*'' ''62–296.703, *Carbonaceous Fuel Burners,*'' ''62–296.706, *Glass Manufacturing Process,*'' ''62–296.709, *Lime Kilns,*'' and ''62–296.710, *Smelt Dissolving Tanks.*''

[FR Doc. 2023–21723 Filed 10–2–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3195

[BLM_HQ_FRN_MO4500172196]

RIN 1004–AE93

Helium Contracts

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Helium Stewardship Act of 2013 (HSA) required the Bureau of Land Management (BLM) to sell the Federal Helium System (FHS) and end the Federal Helium In-Kind Program. Accordingly, on September 24, 2021, the BLM declared the FHS as excess to the General Services Administration (GSA), and on September 30, 2022, ceased operation of the Federal Helium In-Kind Program. This final rule removes the Federal Helium In-Kind Program's associated provisions from the BLM's regulations.

DATES: This final rule is effective on October 3, 2023.

ADDRESSES: You may send inquiries or suggestions to Director (630), Bureau of Land Management, 1849 C St. NW, Room 5646, Washington, DC 20240; Attention: RIN 1004–AE93.

FOR FURTHER INFORMATION CONTACT: Amy Hay, Division Chief, Division of Business Resources, 303–236–6629, *ahay@blm.gov;* or Faith Bremner, Regulatory Analyst, Division of Regulatory Affairs, *fbremner@blm.gov.* Individuals in the United States who are deaf, blind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services for contacting Ms. Hay. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Background

The BLM operates and maintains the FHS, which includes a helium storage reservoir, enrichment plant, pipeline system, and related infrastructure near Amarillo, Texas. The BLM will continue to operate the system until the sale is completed. Crude helium is extracted from the storage reservoir and transported to private helium refineries in Oklahoma and Kansas through the Federal Helium Pipeline. These refiners process the crude helium gas into refined liquid helium that is transported via tanker truck for use by private industry and Federal users. Helium is important for scientific research and medical imaging devices and is used by the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA), and the Department of Homeland Security, among others. Over the past 3 years, the FHS provided roughly 14 percent of the domestic helium supply.

The BLM's regulations at 43 CFR part 3195, entitled ''Helium Contracts,'' implemented the requirements of the Helium Privatization Act of 1996 to establish the BLM's Federal Helium In-Kind Program (Pub. L. 104–273, amended by the HSA, codified at 50 U.S.C. 167 (2013)). The BLM issued the regulations on July 28, 1998, establishing procedures for the BLM's Federal Helium In-Kind Program and defining the obligations of Federal helium suppliers and users. See 63 FR 40175. Under the BLM's Federal Helium In-Kind Program, Federal agencies were required to purchase all of their refined helium from private suppliers who, in turn, were required to purchase an equivalent amount of crude helium from the FHS.

Congress later enacted the HSA (Pub. L. 113–40), which amended the Helium Privatization Act and required the Secretary of the Interior to dispose of the FHS. The Act continued the Federal Helium In-Kind Program until the disposal of the FHS.

The Department of the Interior and the BLM have complied with the requirements of the HSA. In April 2020, the BLM announced the disposal process for the FHS and explained that the Federal Helium In-Kind Program would end on September 30, 2022. The BLM has turned the FHS over to the GSA so that the GSA can sell the FHS. The BLM ended the Federal Helium In-Kind Program on September 30, 2022, in preparation for the sale. Since that time, Federal users have been procuring helium on the open market.

The GSA has modified the Federal Acquisition Regulation to comply with the HSA. On September 19, 2022, the GSA, DoD, and NASA published a proposed rule that would remove the requirements for government contractors to purchase helium from the Federal Government through the Federal Helium In-Kind Program. See 87 FR 57166. On April 26, 2023, the GSA, DoD, and NASA published the final rule. See 88 FR 25474.

II. Discussion of Final Rule

This final rule is an administrative action that simply removes 43 CFR part 3195 from the BLM's regulations in its entirety. These regulations are no longer in effect due to the pending sale of the FHS as required by the HSA. This action will implement Federal law. The BLM does not have the discretion to continue operating the in-kind program. Therefore, the Department of the Interior for good cause finds under 5 U.S.C. 533(b)(B) and (d)(3) that notice and public comment procedures are unnecessary.

Procedural Matters

Regulatory Planning and Review (E.O. 12866, E.O. 14094, E.O. 13563)

This document is not a significant rule, and the Office of Management and Budget (OMB) has not reviewed this final rule under Executive Order (E.O.) 12866. The BLM has determined that this final rule will not have an annual effect on the economy of $200 million or more. It will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. This final rule simply removes the Federal Helium In-Kind Program regulations from the Code of Federal Regulations (CFR). These regulations are no longer in effect, due to the pending sale of the FHS, as required by the HSA.

This final rule will not create inconsistencies or otherwise interfere with an action taken or planned by another agency. In addition, this final rule does not materially affect the budgetary impact of entitlements, grants, or loan programs, or the rights and obligations of their recipients. Finally, this final rule does not raise novel legal or policy issues. As explained earlier, the final rule removes regulations from the CFR that are no longer in effect.

Regulatory Flexibility Act

This final rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). As a result, a Regulatory Flexibility Analysis is not required. The final rule will not affect small entities in any material way, because this final rule simply removes regulations from the CFR that are no longer in effect.

Congressional Review Act

This final rule is not a ''major rule'' as defined at 5 U.S.C. 804(2). The final rule will not have an annual effect on the economy greater than $100 million; it will not result in major cost or price increases for consumers, industries, government agencies, or regions; and it will 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. Accordingly, a Small Entity Compliance Guide is not required.

Federalism (E.O. 13132)

This final rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. In accordance with E.O. 13132, the BLM therefore finds that the final rule does not have federalism implications, and a federalism assessment is not required.

The Paperwork Reduction Act of 1995

The Paperwork Reduction Act (44 U.S.C. 3501–3521) generally provides that an agency may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number. Collections of information include any request or requirement that persons obtain, maintain, retain, or report information to an agency, or disclose information to a third party or to the

public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)).

OMB has generally approved the information collection requirements contained in 43 CFR part 3195 under OMB control number 1004–0179. Since this final rule removes 43 CFR part 3195 in its entirety, including all information collection requirements contained therein, the BLM has requested that OMB discontinue that OMB control number, along with the associated public paperwork burdens. This action also results in discontinuing the following BLM form numbers: 3195–1; 3195–2; 3195–3; and 3195–4. Discontinuing OMB control number 1004–0179 results in reducing the BLM's information collection burdens by 94 annual responses and 642 annual burden hours.

Takings Implication Assessment (E.O. 12630)

As required by E.O. 12630, the BLM has determined that this final rule will not cause a taking of private property. The BLM therefore certifies that this final rule does not represent a governmental action capable of interference with constitutionally protected property rights.

Civil Justice Reform (E.O. 12988)

In accordance with E.O. 12988, the BLM finds that this final rule will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

The National Environmental Policy Act (NEPA)

The BLM has determined that this final rule qualifies as an administrative, housekeeping action that is categorically excluded from environmental review under NEPA pursuant to 43 CFR 46.205 and 46.210(i). The final rule does not meet any of the 12 criteria for exceptions to categorical exclusions listed at 43 CFR 46.215. Therefore, neither an environmental assessment nor an environmental impact statement is required in connection with the rule (40 CFR 1501.3).

The Unfunded Mandates Reform Act of 1995

The BLM has determined that this final rule is not significant under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.,* because it will not result in State, local, private sector, or Tribal government expenditures of $100 million or more in any one year, 2 U.S.C. 1532. This rule will not significantly or uniquely affect small governments. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act.

Consultation and Coordination With Indian Tribal Governments (E.O. 13175)

In accordance with E.O. 13175, the BLM has determined that this final rule does not include policies that have Tribal implications. Specifically, the rule will not have substantial direct effects on one or more Indian Tribes. Consequently, the BLM did not use the consultation process set forth in section 5 of the Executive Order.

Information Quality Act

In developing this final rule, the BLM did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

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

In accordance with E.O. 13211, the BLM has determined that this final rule will not have a significant adverse effect on the supply, distribution, or use of energy. The final rule removes regulations from the CFR that are no longer in effect.

Delegation of Signing Authority

The action taken herein is pursuant to an existing delegation of authority.

List of Subjects

Government contracts, Helium, Mineral royalties, Oil and gas exploration, Public lands—mineral resources, Reporting and recordkeeping requirements, and Surety bonds.

Laura Daniel-Davis,

Principal Deputy Assistant Secretary, Land and Minerals Management.

Under the authority of 5 U.S.C. 301, 50 U.S.C. 167, and for the reasons stated in the preamble, 43 CFR Chapter II is amended as follows:

PART 3195—[REMOVED]

■ 1. Remove part 3195.

[FR Doc. 2023–21711 Filed 10–2–23; 8:45 am]

BILLING CODE 4331–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 11

[Docket No. USCG–2020–0492]

RIN 1625–AC64

Towing Vessel Firefighting Training

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is issuing this final rule to revise the training requirements for national Merchant Mariner Credential endorsements as master of towing vessels (limited) or mate (pilot) of towing vessels on inland waters or Western Rivers routes. Consistent with recommendations from two Federal advisory committees, this rule gives mariners seeking these endorsements the option of taking a modified basic firefighting course. That course excludes training on equipment that is not required to be carried on towing vessels operating on inland waters or the Western Rivers. Applicants who take the modified basic firefighting course will reduce their costs because it is shorter and less expensive than the basic firefighting course.

DATES: This final rule is effective April 1, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *www.regulations.gov,* type USCG–2020–0492 in the search box, and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email Mr. James Cavo, Coast Guard; telephone 202–372–1205, email *James.D.Cavo@uscg.mil.*

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Abbreviations

BLS Bureau of Labor Statistics
CFR Code of Federal Regulations
CG–MMC Coast Guard Office of Merchant Mariner Credentialing
DHS Department of Homeland Security
FR Federal Register
GS General Schedule
GRT Gross register tons
MERPAC Merchant Marine Personnel Advisory Committee
MMC Merchant Mariner Credential
MMLD Merchant Mariner Licensing and Documentation
NAICS North American Industry Classification System
NMC National Maritime Center
NPRM Notice of proposed rulemaking
NVIC Navigation and Vessel Inspection Circular
OMB Office of Management and Budget
OPM Office of Personnel Management
RA Regulatory analysis
SMS Safety management system
§ Section
SME Subject matter expert
STCW Convention International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as Amended
STCW Code Seafarer's Training, Certification and Watchkeeping Code, as Amended
TSAC Towing Safety Advisory Committee
U.S.C. United States Code

II. Basis and Purpose, and Regulatory History

The legal basis of this rule is Title 46 of the United States Code (U.S.C.) Section 7101, which authorizes the Secretary of the Department of Homeland Security (DHS) to establish the experience and professional qualifications required for the issuance of Merchant Mariner Credentials (MMCs) with officer endorsements. The DHS Secretary has delegated the rulemaking authority under 46 U.S.C. 7101 to the Coast Guard through DHS Delegation No. 00170.1(II)(92)(e), Revision No. 01.3. Additionally, 14 U.S.C. 102(3) grants the Coast Guard broad authority to promulgate and enforce regulations for the promotion of safety of life and property on waters subject to the jurisdiction of the United States, which includes establishing the experience and professional qualifications required for the issuance of credentials.

The purpose of this rule is to amend title 46 of the Code of Federal Regulations (CFR), section 11.201, paragraph (h)(3) by providing mariners seeking a national officer endorsement as master of towing vessels (limited) [1] or mate (pilot) [2] of towing vessels on inland waters or Western Rivers routes the option of taking a modified basic firefighting course instead of a basic firefighting course. The modified basic firefighting course eliminates training on equipment that is not required to be carried on towing vessels operating on inland waters or Western Rivers.[3] Applicants who take the modified basic firefighting course would reduce their costs due to the course being shorter and less expensive than the basic firefighting course. Mariners who will not be working solely on Western Rivers or inland waters other than the Great Lakes will still be required to complete a basic firefighting course. The Coast Guard anticipates this modified basic firefighting course will have a total of 12 hours of classroom and practical training instead of a total of 16 hours for the basic firefighting course.

On September 1, 2021, the Coast Guard published a notice of proposed rulemaking (NPRM) titled ''Towing Vessel Firefighting Training'' (86 FR 48925), requesting comments on the proposal to revise the training requirements for national MMC endorsements as master of towing vessels (limited) or mate (pilot) of towing vessels on inland waters or Western Rivers routes. A detailed description of the background and discussion of the proposed changes can be found in the NPRM.

III. Background

Coast Guard regulations in 46 CFR part 11, subpart B, contain merchant mariner credentialing requirements for national and International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as Amended (STCW Convention) officer endorsements. Currently, the regulations in 46 CFR 11.201(h)(3)(ii) require mariners seeking national officer endorsements as master or mate (pilot) of towing vessels on routes other than oceans [4] to complete a Coast Guard-approved firefighting course that meets the basic firefighting training requirements in Regulation VI/1 of the STCW Convention and Table A–VI/1–2 [5] of the Seafarer's Training, Certification and Watchkeeping Code, as Amended (STCW Code). Basic firefighting training ensures that mariners have the skills to contain small fires before they can spread, leading to injury, death, property damage, or becoming a larger marine hazard.

Federal Advisory Committee Recommendations

The Coast Guard received requests from industry to review the appropriateness of the basic firefighting training requirement for towing vessel endorsements. As a result, the Coast Guard tasked two Federal Advisory Committees, the Merchant Marine Personnel Advisory Committee (MERPAC) [6] and the Towing Safety Advisory Committee (TSAC) [7] with reviewing the basic firefighting training requirements, while taking into consideration the equipment carried on towing vessels operating on inland waters and Western Rivers routes.

In their recommendations to the Coast Guard, both MERPAC and TSAC commented that the basic firefighting requirements in § 11.201(h)(3)(ii) are based on equipment found on deep-sea vessels and not on vessels operating on inland waters or Western Rivers. In addition, TSAC identified equipment covered in the basic firefighting training requirements, contained in Table A–VI/1–2 of the STCW Code, that is not required to be carried on towing vessels operating on inland waters or Western Rivers.[8] They noted that nowhere in 46

[1] An endorsement as a master of towing vessels (limited) authorizes service as a master (the person in command of the vessel) to work on a towing vessel in a limited local area within inland waters or Western Rivers (*e.g.,* master of towing vessels (limited) restricted to the Lower Mississippi River mile marker 775.0 to mile marker 850.0).

[2] ''Mate'' means a qualified deck officer other than the master. On towing vessels on inland waters or Western Rivers, ''pilot'' also refers to a qualified deck officer other than the master. The terms ''mate'' and ''pilot'' refer to the same position on the vessel and usage varies based on company and regional preference.

[3] Throughout this rule, the term modified basic firefighting course describes the basic firefighting course required by 46 CFR 11.201(h)(3), modified to eliminate training on equipment that is not required to be carried on towing vessels operating on inland waters or Western Rivers routes.

[4] For the purposes of this final rule, we refer to ''routes other than oceans'' as near-coastal, Great Lakes, inland waters, and Western Rivers.

[5] Regulation VI/1 of the STCW Convention and Table A–VI/1–2 of the STCW Code provides the competence requirements for basic firefighting.

[6] See ''Merchant Marine Personnel Advisory Committee (MERPAC) Task Statement #95, Inland Firefighting, Draft Report,'' September 14, 2016. This report is available at: *https://homeport.uscg.mil/Lists/Content/Attachments/709/Enclosure%207%20Task%20Statement%2095%20%20Inland%20Firefighting.pdf.* This report was last accessed on April 24, 2023.

[7] See ''Towing Safety Advisory Committee, Task 16–02, Recommendations Regarding Firefighting Training Requirements for Officer Endorsements for Master, Mate (Pilot) of Towing Vessels, Except Assistance Towing and Apprentice Mate (Steersman) of Towing Vessels, Inland Service Final Report,'' March 21, 2018. This report is available at: *https://homeport.uscg.mil/Lists/Content/Attachments/799/TSAC%20Task%2016-02%20Inland%20Firefighting%20Final-03212018.pdf.* This report was last accessed on April 24, 2023.

[8] *Id.* at 7.

CFR subchapter M, ''Towing Vessels,'' part 142, ''Fire Protection,'' is there a requirement for towing vessels operating on inland waters or Western Rivers to be equipped with firefighters' outfits or self-contained breathing apparatus (SCBA). Because the basic firefighting training in § 11.201(h)(3)(ii) requires mariners seeking national officer endorsements for master or mate (pilot) of towing vessels to become proficient with equipment that is not required to be carried onboard the vessels they intend to operate, MERPAC and TSAC both recommended that the content of firefighting training be modified for these mariners.

Public Input

In 2017, the Coast Guard sought comments on regulations, guidance documents, and interpretative documents that the public believed should be repealed, replaced, or modified.[9] The Coast Guard received public input from a trade association representing the towing industry regarding the basic firefighting training for endorsements as master or mate (pilot) of towing vessels. The trade association suggested that the training requirement is excessive because the current towing vessel regulations in §§ 27.209 and 142.245 require company provided firefighting instruction and drills. The trade association recommended that the Coast Guard eliminate the basic firefighting training requirement in § 11.201(h)(3)(ii) for national officer endorsements as master or mate (pilot) of towing vessels on inland waters and Western Rivers. The Coast Guard agrees in part with the recommendation from this trade association. Approved firefighting training is necessary, but we agree that these mariners should not have to train using equipment that is not required to be carried aboard the towing vessels on which they will serve.

With this final rule, applicants seeking national officer endorsements as master of towing vessels (limited) or mate (pilot) of towing vessels on inland waters or Western Rivers will have the option of taking a modified basic firefighting course that excludes training on equipment that is not required to be carried on their vessels.

This change applies to applicants for national MMC endorsements as master of towing vessels (limited) and mate (pilot) of towing vessels on inland waters or Western Rivers routes. Applicants seeking an endorsement as master of towing vessels must have completed firefighting training when they obtain one of the endorsements that are a prerequisite to qualifying for master of towing vessels. The modified basic firefighting training required by § 11.201(h)(3) will have to be approved by the Coast Guard in accordance with the requirements of §§ 10.402 and 10.403. This change will provide an opportunity for training providers to develop a Coast Guard-approved modified basic firefighting course for applicants for national MMC endorsements as master of towing vessels (limited) and mate (pilot) of towing vessels on inland waters or Western Rivers routes.

Delayed Effective Date

The Coast Guard is delaying the effective date of this rule by 180 days. This delay will allow time for training providers to develop a modified basic firefighting course, and for the Coast Guard to evaluate and approve the course.[10] Training providers wishing to obtain approval for a modified basic firefighting course may develop and submit their course for approval before the effective date of this final rule.

This rule will result in a one-time cost to training providers for developing and submitting requests for original approval of a modified basic firefighting course, and a one-time cost to the Coast Guard for reviewing and approving these courses. Under existing § 10.402(d) and (f), there will be ongoing costs to both the training providers and the Coast Guard every 5 years to request renewal of the course approval.[11] Applicants who take a modified basic firefighting course will receive cost savings due to the course being shorter and less expensive than the basic firefighting course.

IV. Discussion of Comments

The Coast Guard received eight submissions by the public in response to the NPRM published on September 1, 2021. Comments came from towing vessel operators, a national trade association, and individual mariners. The following discussion contains an analysis of comments received. The Coast Guard appreciates all comments on this matter.

Comments in Support of the Proposal

Five commenters agreed that mariners who will serve on towing vessels on inland waters and Western Rivers should not be required to receive training on equipment that is not required to be carried aboard the vessels upon which they will serve. The Coast Guard acknowledges these comments.

Comments Opposed to the Proposal

One commenter opposed the proposed change because a mariner could possibly serve on a vessel that is carrying equipment not required aboard the vessel and would not have received the necessary training in its safe and proper use. To help reduce ''loopholes and lapses in training,'' the commenter believes the current firefighting training should not be reduced.

The Coast Guard appreciates this concern but disagrees that firefighting training for towing vessels on inland waters or Western Rivers should include training on equipment that is not required to be carried aboard those vessels. Formal training provides mariners with a basic knowledge and understanding of firefighting. This will provide a foundation that can be supplemented with shipboard drills and familiarization to ensure mariners can safely and effectively use the firefighting equipment aboard their vessels. A modified basic firefighting course, supplemented by the familiarization requirements in 46 CFR 15.405 and the training and drill requirements in 46 CFR 27.205 and 142.245, is sufficient to ensure that mariners serving on a vessel carrying equipment that is not required to be aboard the vessel would be able to use the equipment safely and effectively.

Duration of the Modified Basic Firefighting Course

Two commenters agreed that the modified basic firefighting course should be 12 hours in length, or ''one full day.'' The Coast Guard agrees the course duration should be 12 hours but notes that it will not approve a course that provides 12 hours of training in a single day. A 12-hour modified basic firefighting course will have to be given over 2 days.

Three commenters stated that the modified basic firefighting course should be 8 hours in duration. One commenter noted that a 12-hour course would not be cost effective when travel

[9] *See* Coast Guard Request for Information entitled, ''Evaluation of Existing Coast Guard Regulations, Guidance Documents, Interpretative Documents, and Collections of Information'' (82 FR 26632, June 8, 2017). This document is available at: *https://www.regulations.gov/document?D=USCG-2017-0480-0001.* This website was accessed on April 24, 2023.

[10] Courses are evaluated and approved by the Coast Guard's National Maritime Center (NMC) Mariner Training & Assessment Division, which, from 2018 to 2022, reports a course approval average annual net processing time of approximately 76 days. Course approvals are valid for 5 years, as specified in 46 CFR 10.402(d).

[11] Approved courses are valid for 5 years from the date of Coast Guard approval. Before the course approval expires, the training provider must seek a course approval renewal to continue to offer the course.

costs and availability of training providers is considered. One of the commenters also stated that an 8-hour course would be adequate, as crewmembers have participated in ongoing firefighting instruction and drills throughout their careers.

The Coast Guard disagrees with the assessment that an 8-hour course would be adequate. Eight hours is not sufficient to achieve the intended level of competence. In reaching this determination, we reviewed the curricula of several Coast Guard-approved basic firefighting courses, as well as the current edition of the International Maritime Organization's Model Course 1.20, *Fire Prevention and Fire Fighting.* These courses are each 16 hours in duration. We identified the time spent in these courses using equipment that is not required to be carried on towing vessels operating on inland waters or Western Rivers and determined that a course length of approximately 12 hours was appropriate. In addition, we disagree the duration can be shortened based on a subjective assumption that trainees have participated in drills and instruction during their careers. We do not consider drills to be equivalent to approved training involving live fire and other scenarios that cannot be safely conducted aboard a vessel.

Content of the Modified Basic Firefighting Course

Two commenters stated that the content of the firefighting course should not include equipment that is not required on towing vessels operating on inland waters and Western Rivers (for example, SCBAs and fire suits). The commenters stated that the modified course should focus on fire principles, basic firefighting strategies and tactics, fire risks, use of portable and semi portable fire extinguishers, fire communication-general alarms and detectors, handling and operating fire pumps and hydrants, types and function of fixed firefighting systems, and significant focus on managing a team for handling a fire emergency.

The Coast Guard agrees. The modified basic firefighting course will not include training on equipment that is not required to be carried aboard towing vessels operating on inland waters or Western Rivers. We agree that the training should focus on the use of equipment that is required to be carried, as well as the other factors cited by the commenters.

Alternatives to a Coast Guard-Approved Course

Five commenters stated the Coast Guard should accept company provided training and drills under 46 CFR subchapter M in lieu of requiring completion of a Coast Guard-approved course. The commenters noted this training would be included in, and audited under, the company's safety management system (SMS).

The Coast Guard disagrees. The inclusion of a company provided firefighting training in an SMS would not ensure an adequate review and oversight of the required training. A Coast Guard-approved course for firefighting will ensure the curriculum is reviewed by qualified subject matter experts (SMEs) and follows sound and accepted training methodology. Coast Guard-approved training also entails more focused audits and oversight than if training were provided as a small part of a much larger SMS.

In addition, it is common for mariners to work on different vessels and for different companies. There is a need for the common foundational training that a Coast Guard-approved course provides. A company provided training may supplement, but not replace, approved firefighting training.

Company Provided Courses

One commenter noted that companies should be able to assemble a curriculum and submit it for approval of the course. This curriculum may include in-house trainers or trainers from local fire departments familiar with onboard firefighting tactics and equipment. The Coast Guard agrees. A company may develop and obtain Coast Guard approval for a course that employs facilities and staff from local fire departments.

The same commenter stated that a towing company should be able to assemble a curriculum that meets the expectations, needs, and standards for the course material and have that training curriculum audited as part of their SMS. The Coast Guard agrees in part. We agree that companies may develop their own course and obtain Coast Guard approval. However, we disagree with the suggestion that this training could be audited as part of the company's SMS. When reviewing training, an SMS audit will generally review whether crew members have completed their required training, not the content of the training or its efficacy.

Three commenters suggested that documentation of the appropriate training by the company should be an acceptable proof of training, like what is used to prove sea service ''letters of designation'' for those who fuel towboats. The Coast Guard disagrees. The modified basic firefighting course should be and audited by or on behalf of the Coast Guard as specified in 46 CFR part 10, subpart D. The audit of approved training will ensure that previously reviewed and approved curricula are adhered to, and are consistent with, sound educational methodology and accepted industry standards and practices.

Firefighting Response by Crews of Towing Vessels on Inland Waters and Western Rivers

Two commenters noted that, unless an onboard fire is readily containable, firefighting is left to trained emergency responders instead of the crew. If a boat's crew uses a fire extinguisher and the fire cannot be contained, they are instructed to get off the vessel once safe harbor is reached.

The Coast Guard disagrees that this strategy is appropriate in all fire emergencies. There may be situations where it is not safe or feasible to secure and abandon the towing vessel awaiting response from shore-based firefighters. The best first response is that provided by the towing vessel's crew, under the direction of a trained officer. A Coast Guard-approved modified basic firefighting course will increase the likelihood that a towing vessel's crew can make an effective first response and extinguish or contain a fire.

One commenter stated that many, if not most, towing vessels on inland waters and Western Rivers are ''dinner bucket'' boats, and on these vessels, only one officer is aboard, and that individual must remain at the helm to control the vessel. In the event of a fire emergency onboard, they must seek a safe harbor to secure the vessel so that the crew can escape.

The Coast Guard disagrees that this is reason to not require completion of a modified basic firefighting course. The national officer endorsements of master of towing vessels, master of towing vessels (limited), and mate (pilot) of towing vessels do not restrict a mariner to working on a vessel day boat or ''dinner bucket'' boat that only operates 12 hours per day, and a mariner must be appropriately trained and qualified for all vessels their credential authorizes them to serve upon. In addition, we do not agree that the only response for a day boat or ''dinner bucket'' boat is to navigate the vessel to a location where the crew can abandon the vessel and call shore-based responders. Regardless of the crew size or the vessel's operating schedule, having officers complete a

Coast Guard-approved modified basic firefighting course will increase the likelihood that they can effectively respond in a fire emergency, and can direct the vessel's crew to make an effective first response and extinguish or contain a fire.

V. Discussion of the Rule

Amendments to 46 CFR 11.201(h), Firefighting Certificate

The Coast Guard is amending § 11.201(h), which requires mariners seeking national officer endorsements to present a certificate of completion from a Coast Guard-approved firefighting course.

The Coast Guard amends paragraph (h)(1) by adding language stating that the firefighting certificate of completion must be ''relevant to the endorsement being sought.'' The Coast Guard is making this change to ensure that mariners are required to provide evidence of completing the appropriate firefighting training for the endorsement they are applying for.

We are also making several changes to paragraph (h)(3), which contains a list of national officer endorsements that require completion of basic firefighting training in accordance with Regulation VI/1 of the STCW Convention and Table A–VI/1–2 of the STCW Code. We modify the start of paragraph (h)(3)(i) by adding ''all'' in front of ''officers'' to make it consistent with the terminology used in paragraphs (h)(3)(ii) through (iv). We revise paragraph (h)(3)(ii) to specify the requirements for officer endorsements for master or mate (pilot) of towing vessels, except apprentice mate (steersman) of towing vessels, for service on near-coastal waters. We add new paragraphs (h)(3)(iii) and (h)(3)(iv) to list the specific waters covered by the phrase, ''in all services except oceans.'' New paragraph (h)(3)(iii) specifies the requirements for officer endorsements for master or mate (pilot) of towing vessels, except apprentice mate (steersman) of towing vessels, for service on the Great Lakes. New paragraph (h)(3)(iv) specifies the requirements for officer endorsements for master or mate (pilot) of towing vessels, except apprentice mate (steersman) of towing vessels, for service on inland waters or Western Rivers.

Mariners seeking a national officer endorsement as master or mate (pilot) of towing vessels authorized for service on near-coastal waters or on the Great Lakes will still need to complete the basic firefighting training referenced in paragraph (h)(3). A modified basic firefighting course is not appropriate for mariners operating on towing vessels on near-coastal waters or on the Great Lakes for two reasons: (1) near-coastal waters and Great Lakes towing vessels may carry the equipment omitted from a modified towing vessel firefighting course, and (2) near-coastal waters and Great Lakes towing vessels operate farther from the shore, where firefighting assistance is not as readily available as it is on inland waters or Western Rivers.

New paragraph (h)(3)(iv)(A) provides mariners the option of completing a modified basic firefighting course for a national officer endorsement as master or mate (pilot) of towing vessels on inland waters or Western Rivers. The course must be a Coast Guard-approved modified basic firefighting course that does not include training on equipment not required to be carried aboard towing vessels for service on inland waters or Western Rivers. When approving a modified course, the Coast Guard will consider the requirements of 46 CFR subchapter M, parts 140 and 142, in determining the content to achieve proficiency in firefighting consistent with the equipment available onboard towing vessels on inland waters or Western Rivers. The Coast Guard anticipates this modified basic firefighting course will have a total of 12 hours of classroom and practical training instead of a total of 16 hours for the basic firefighting course.

Currently, national officer endorsements for towing vessels serving on the Great Lakes and inland waters are issued as one route. In new paragraph (h)(3)(iv)(A), language is added to allow separation of these routes so that a mariner who completes a modified basic firefighting course could be issued an endorsement restricted to inland waters or Western Rivers.

New paragraph (h)(3)(iv)(B) specifies that a mariner who qualifies for an endorsement by completing a modified basic firefighting course will be required to complete the basic firefighting course required in paragraph (h)(3) for an increase in scope [12] of the endorsement to add a Great Lakes or near-coastal waters route. For an increase in scope to add oceans routes, a mariner will need to complete both the basic firefighting course required in paragraph (h)(3) and the advanced firefighting course required in paragraph (h)(2).

Other Changes

In the NPRM, we proposed to change the 46 CFR part 11 authority citation from 14 U.S.C. 503 to 14 U.S.C. 102(3). After publication of the NPRM in the **Federal Register**, the Coast Guard determined it is still appropriate to reference ''14 U.S.C. 503.'' Title 14 U.S.C. 503 states: ''the [DHS] Secretary may promulgate such regulations and orders as he deems appropriate to carry out the provisions of this title or any other law applicable to the Coast Guard.'' We are only making one change to the authority citation for part 11 to refer to change 3 to DHS Delegation number 00170.1.

Section 11.201(l) is revised to allow the Coast Guard to modify training in addition to the service or examination requirements for an endorsement. The change is needed in order to allow for the option of the modified basic firefighting course for a national officer endorsement as master or mate (pilot) of towing vessels on inland waters or Western Rivers routes.

Additionally, we refined our amendatory instructions to the regulatory text that we proposed in the NPRM.

VI. Regulatory Analyses

The Coast Guard received eight comment submissions during the 60-day comment period that ended on November 1, 2021. We received one public comment regarding the travel cost savings associated with the 12-hour modified basic firefighting course implemented by this final rule which we did not analyze for the NPRM. We have since analyzed the travel cost savings associated with the implementation of the 12-hour course and revised the total estimated cost savings for this final rule. Beyond this, the methodology employed in the regulatory analysis is unchanged.

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below, we summarize our analyses based on these statutes or Executive orders.

[12] *Increase in scope* means additional authority added to an existing credential, such as adding a new route or increasing the authorized horsepower or tonnage. (46 CFR 10.107).

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, OMB has not reviewed it. A regulatory analysis (RA) follows.

As discussed earlier in the preamble, this rule provides applicants for an MMC endorsement as master of towing vessels (limited) or mate (pilot) of towing vessels on inland waters or Western Rivers routes the option to take a modified basic firefighting course instead of the basic firefighting course. Specifically, this firefighting course eliminates training on firefighting equipment that is not required to be carried on towing vessels operating on inland waters or Western Rivers routes. Because the modified firefighting course is expected to be shorter in duration and lower in cost than a basic firefighting course, we anticipate eligible mariners will take the modified course.

We estimate that this rule will result in a 10-year net cost savings of $1,301,133, or $185,252 annualized, in 2021 dollars, discounted at 7 percent. The annualized cost savings for mariners is approximately $189,869 in 2021 dollars, discounted at 7 percent. The savings stem from reduced hours spent in training and reduced tuition for firefighting training necessary for an endorsement as master (limited) or mate (pilot) of towing vessels on inland waters or Western Rivers routes.[13]

We estimate that this rule will result in a one-time cost to training providers to develop a modified basic firefighting course and submit the course to the Coast Guard for approval. There will also be a one-time cost to the Government resulting from Coast Guard employees reviewing and approving these new courses. Under existing 46 CFR 10.402(d) and (f), there will be ongoing costs to both the training providers and the Government every 5 years to renew the modified basic firefighting course. We anticipate training providers that offer the modified basic firefighting course to also continue to provide a basic firefighting course, because these courses would serve additional markets.

In the first year, we estimate the costs (in 2021 dollars) to training providers will be $8,738, and the cost to the Government will be $16,669. These costs will not recur after the first year, but there will be ongoing costs for renewal of course approvals every 5 years, resulting in costs to training providers of $1,047 and costs to the Government of $11,981. The 10-year net cost savings will be $1,301,133, or $185,252 annualized, in 2021 dollars, discounted at 7 percent. We do not estimate that there will be any reduction in safety or benefits between the current basic firefighting training and a modified firefighting training, as the modified training would be better suited for the equipment common to the relevant towing vessels. Table 1 summarizes these results. In the following subsections, we describe the changes, the affected population, the potential costs, the potential cost savings, and the qualitative benefits in further detail.

TABLE 1—SUMMARY OF THE RULEMAKING IMPACT

Category	Summary
Applicability	Update title 46 CFR part 11 to permit a modified basic firefighting course for national endorsements as master and mate (pilot) of towing vessels on inland waters or Western Rivers routes.
Affected Population	An estimated 23 training providers and 485 applicants for master (limited) or mate (pilot) towing vessels will take a modified firefighting course to qualify for their endorsement. This is a one-time training requirement for mariners.
Costs to Training Providers ($, 7% discount rate).	*One-time costs:* $8,738 (first year). *Recurring costs:* $1,047 every 5 years.
Costs to the Government ($, 7% discount rate).	*One-time costs:* $16,669 (first year). *Recurring costs:* $11,981 every 5 years.
Cost Savings for Applicants ($, 7% discount rate).	*10-year:* $1,333,558. *Annualized:* $189,869.
Qualitative Benefits	Firefighting courses that are more tailored to the credential endorsement.

Changes From NPRM to Final Rule

In addition to population data updates that create small increases in the cost savings reported in the final rule, the Coast Guard also identified previously unrealized cost savings in the NPRM that are now being realized in the final rule. We derive our newly realized cost savings from an analysis of travel costs associated with the 12-hour modified basic firefighting course. One commenter to the NPRM believes that a 12-hour course would not be cost effective when travel costs are considered. In an examination of travel cost savings, we determined that the 12-hour course established by this rule will also create travel cost savings that were previously unrealized in the NPRM. See Appendix A: Analysis of Cost Savings Associated with Public Comment Alternatives (section 3.2, 3.3, and 3.4) in the docket for a detailed analysis of these additional cost savings, as well as an examination of the cost savings associated with an 8-hour modified course as proposed by public commenters.

Furthermore, the Coast Guard is delaying the effective date of the final rule by 180 days to allow time for training providers to develop, and the Coast Guard to approve, the new modified basic firefighting course. Table 2 summarizes this and other changes from the NPRM to the final rule.

[13] Operating on the Great Lakes is treated separately from operating on inland waters or Western Rivers. Routes on the Great Lakes would require the same firefighting training as near-coastal routes.

TABLE 2—SUMMARY OF CHANGES FROM NPRM TO FINAL RULE

Element of the analysis	NPRM	Final rule	Resulting change in RA
Master (Limited) and Mate (Pilot) Applicant Data.	Calculated 440 inland and Western Rivers master (limited) and mate (pilot) applicants on average from 2016–2019 data.	Calculated 485 inland and Western Rivers master (limited) and mate (pilot) applicants on average from updated 2016–2019 data [14].	This increase in number of affected applicants will lead to increased total and annualized cost savings.
Inland Waters and Western Rivers Towing Vessel Data.	1,265 total towing vessels. 900 of 1,265 towing vessels operating on the Great Lakes, inland waters, or Western Rivers. 5 percent, or 45 vessels, listed as operating on the Great Lakes, meaning 95 percent, or 855 vessels, employ mariners eligible to take the modified basic firefighting course.	5,013 total towing vessels. 3,552 of 5,013 towing vessels operating on the Great Lakes, inland waters, or Western Rivers. 5 percent, or 169 vessels, listed as operating on the Great Lakes, meaning 95 percent, or 3,383 vessels, employ mariners eligible to take the modified basic firefighting course [15].	This does not create a change in the number of affected master (limited) and mate (pilot) applicants each year due to a consistent percentage of inland waters and Western Rivers towing vessels from the total population.
Cost Savings Associated with a 12-hour Modified Basic Firefighting Training Course.	Cost savings resulting from reduced tuition and course time.	Cost savings resulting from reduced tuition, course time, and a reduction in travel expenses for applicants driving to and lodging near a training provider.	We report additional annualized undiscounted cost savings by including previously unrealized cost savings for applicants who would drive and lodge near a training provider.[16]
Delayed Effective Date of Rule.	No delay in effective date of rule	Effective date of rule delayed by 180 days to allow time for training providers to develop and Coast Guard to approve new modified basic firefighting courses.	This change does not impact our cost savings estimates. In this final rule, we are delaying the rule by 180 days to help accommodate the time needed to develop and approve the courses, but we do not anticipate courses will be readily available for the affected population of mariners within the first year of analysis, which is consistent with our assumption in the NPRM.

Description of Regulatory Changes

This rule results in two changes that have potential costs and potential cost savings. First, training providers will have the opportunity to develop a modified firefighting course and submit the course to the Coast Guard for approval. Consequently, this rule will initially result in costs to training providers for developing the course, and to the Federal Government for reviewing and approving the modified basic firefighting course. Second, applicants will likely experience cost savings by taking a shorter and less costly modified basic firefighting course rather than the longer basic firefighting course.

Table 3 lists and describes the changes to 46 CFR part 11, subpart B. The changes contain costs and cost savings, as described above. Text that has been added is italicized, and text that has been deleted is stricken through.

TABLE 3—SUMMARY OF CHANGES TO 46 CFR PART 11 SUBPART B AND IMPACTS

Section	Changes in regulatory text	Description of change	Impact
11.201(h)(1)	Applicants for an original officer endorsement in the following categories must present a certificate of completion from a firefighting course of instruction *relevant to the endorsement being sought* that has been approved by the Coast Guard. The firefighting course must have been completed within the past 5 years, or if it was completed more than 5 years before the date of application, the applicant must provide evidence of maintaining the standard of competence in accordance with the firefighting requirements for the credential sought.	This editorial change makes it clear that the required firefighting training should be based on the operating route of the endorsement sought.	This editorial change will not have any substantive impact and therefore will not impose any costs or cost savings.
11.201(h)(2)(i)	*All* national officer endorsements as master or mate on seagoing vessels of 200 gross register tons (GRT) or more.	This editorial change makes the text easier to read and makes it consistent with other lines in this section.	This editorial change will not have any substantive impact and therefore will not impose any costs or cost savings.
11.201(h)(3)(i)	*All* officer endorsements as master on vessels of less than 500 gross tonnage (GT) in ocean service.	This editorial change makes the text easier to read and makes it consistent with other lines in this section.	This editorial change will not have any substantive impact and therefore will not impose any costs or cost savings.

[14] This increase in the number of inland waters and Western Rivers master (limited) and mate (pilot) applicants was caused by historical data changes within the Merchant Mariner Licensing and Documentation (MMLD) database. These changes are often attributed to an issued credential being postdated, or a credential being withdrawn or voided. Such changes cause credentials to be included or not included in historical counts, leading to variations in data when being examined at different times.

[15] On June 20, 2016, the Coast Guard published the ''Inspection of Towing Vessels'' final rule. (81 FR 40003) That rule had an effective date of July 20, 2016. See *https://www.federalregister.gov/documents/2016/06/20/2016-12857/inspection-of-towing-vessels.* This final rule document was last accessed on April 24, 2023. The rule required towing vessels to be inspected under subchapter M and gave a 5-year implementation period. When we obtained data on inspected towing vessels for the NPRM, many of the towing vessels were not inspected. Now almost all towing vessels are inspected, making our 1,265 total inspected towing vessels from the NPRM an underestimate. We are now including the full population of inspected subchapter M vessels.

[16] See Appendix A for a detailed analysis of the cost savings from reduced travel expenses associated with the 12-hour modified basic firefighting course.

TABLE 3—SUMMARY OF CHANGES TO 46 CFR PART 11 SUBPART B AND IMPACTS—Continued

Section	Changes in regulatory text	Description of change	Impact
11.201(h)(3)(ii)	*All* officer endorsements for master or mate (pilot) of towing vessels *for service on near-coastal waters,* except apprentice mate (steersman) of towing vessels.	This editorial change makes it clear that applicants for master or mate (pilot) of towing vessel endorsements on near-coastal waters must take a basic firefighting course.	This editorial change will not have any substantive impact because these applicants were already required to take a basic firefighting course.
11.201(h)(3)(iii)	*(iii) All officer endorsements for master or mate (pilot) of towing vessels for service on Great Lakes, except apprentice mate (steersman) of towing vessels.*	This editorial change makes it clear that applicants for master or mate (pilot) of towing vessel endorsements on Great Lakes must take a basic firefighting course.	This editorial change will not have any substantive impact because these applicants were already required to take a basic firefighting course.
11.201(h)(3)(iv)	*(iv) All officer endorsements as master or mate (pilot) of towing vessels for service on inland waters or Western Rivers, except apprentice mate (steersman) of towing vessels.*	This editorial change makes it clear that applicants for master or mate (pilot) of towing vessel endorsements on inland waters or Western Rivers routes must take a basic firefighting course.	This editorial change will not have any substantive impact because these applicants were already required to take a basic firefighting course.
11.201(h)(3)(iv)(A)	*(A) The Coast Guard will accept a Coast Guard-approved modified basic firefighting course, which is the basic firefighting training described in paragraph (h)(3) of this section modified to only cover the equipment, fire prevention procedures, and firefighting operations required on towing vessels on inland waters or Western Rivers routes required in 46 CFR parts 140 and 142. A mariner who completes this modified course will be issued an endorsement that is restricted to inland waters or Western Rivers.*	These changes permit master or mate (pilot) applicants operating exclusively on inland waters or Western Rivers routes, other than the Great Lakes, to take a modified basic inland waters and Western Rivers towing vessel firefighting course as opposed to basic firefighting course when they apply for endorsements on inland waters or Western Rivers.	This will lead to costs and costs savings. Costs result from training providers developing a modified firefighting course and submitting the course to the Coast Guard for approval, which will cost an estimated $8,738 to the training providers and an estimated $16,669 to the government for review and approval of the course in the first year. Training providers will need to seek a renewal of their course approval in year 6, resulting in $1,047 in costs to training providers and $11,981 in costs to the Coast Guard. Estimated cost savings will come from applicants for towing vessel master (limited) or mate (pilot) endorsements spending fewer hours in training and less money on tuition and travel, resulting in an estimated $189,869 in annual cost savings discounted at 7% in 2021 dollars.
11.201(h)(3)(iv)(B)	*(B) To increase in scope to Great Lakes, near-coastal or oceans, the applicant will be required to complete the firefighting course appropriate to the route sought.*	This change is a rewording of existing § 11.201(h)(4) to make the text of § 11.201(h) easier to read.	While this new clause is a restatement of the requirements currently existing in § 11.201(h)(4), there could be a cost impact because mariners could apply for an endorsement for inland waters or Western Rivers with a modified basic inland waters and Western Rivers towing vessel firefighting course approved under 11.201(h)(3)(iv)(A), and later request an increase in scope to Great Lakes requiring the mariner to complete a basic firefighting course. Because the mariner would need to take the basic firefighting course, they would spend approximately $552.54 on the tuition for the course. Additionally, they would spend 16 hours taking the course, and the travel time to get to and from the course. However, the Coast Guard cannot forecast who would seek an increase in scope or how frequently this would occur.[17]
11.201(l)	(l) *Restrictions.* The Coast Guard may modify the service*, training,* and examination requirements in this part to satisfy the unique qualification requirements of an applicant or distinct group of mariners. The Coast Guard may also lower the age requirement for OUPV applicants. The authority granted by an officer endorsement will be restricted to reflect any modifications made under the authority of this paragraph.	The addition of the word ''training'' in this paragraph allows the Coast Guard to modify the training requirements based on the unique qualification requirements of a group of mariners, which we have not previously done.	Without the addition of the word ''training'', the Coast Guard will not be able to modify training requirements for specific groups of mariners based on their unique qualifications, and the cost savings will not be attainable. The addition also permits the Coast Guard, in the future, to modify training requirements for other specific groups of mariners. We do not intend to modify other training requirements at this time. As such, we do not estimate any costs or cost savings from this change.

Affected Population

This rule has two affected populations: (1) training providers who would offer a modified basic firefighting course; and (2) applicants for MMC endorsements as a master of towing vessels (limited) or mate (pilot) of towing vessels on inland waters or Western Rivers routes. We first estimate the number of training providers who may submit a modified basic firefighting course to the Coast Guard for approval, and then estimate the number of applicants who may apply for an

[17] Coast Guard does not have data to forecast the number of mariners who will seek an increase in scope in the future. Additionally, we did not receive any additional information from the public comments that would aid in our ability to forecast.

endorsement as master of towing vessels (limited) or mate (pilot) of towing vessels operating on inland waters or Western Rivers.

The Coast Guard does not know how many training providers will request approval for a modified basic firefighting course. However, since this course will be a modified form of the basic firefighting course, we assume that only training providers who already teach a basic firefighting course will take advantage of the opportunity provided by this proposal. Currently, there are 91 training providers approved to offer a basic firefighting course.[18] Historically, the number of training providers does not significantly change on an annual basis. Therefore, we expect that the training providers who will offer a modified firefighting course will be from these 91 training providers.

An SME from the Coast Guard's Office of Merchant Mariner Credentialing (CG–MMC) with extensive experience, involving regular contact with maritime training providers and towing vessel operating companies, reviewed publicly available materials from these 91 providers and rated each on how likely they would be to request approval of a modified basic firefighting course. The SME considered the types of courses offered by each provider, their facilities, geographic location(s), and the segment of the industry their clientele work in. The SME then rated each training provider as either 0 percent, 25 percent, 50 percent, 75 percent, or 100 percent likely to request approval of a modified basic firefighting course. Across the 91 training providers with an approved basic firefighting course, 56 of them were rated as having no likelihood of requesting approval to offer a modified firefighting course because the SME's review indicated that they are unlikely to serve the inland towing population. Among the remaining 35 providers, the SME estimated that the average likelihood to request approval and offer a modified basic firefighting course would be 65 percent. Multiplying 35 by 65 percent yields 23, rounded, or our estimate for the number of training providers likely to offer a modified firefighting course.

Applicants for a national officer endorsement as master of towing vessels (limited) or mate (pilot) of towing vessels on inland water or Western Rivers who take a modified course will realize a cost savings by taking a shorter, less expensive firefighting course. As discussed in Section IV, Background, of the published NPRM associated with this final rule,[19] the Coast Guard issued a final rule in 2013 requiring mariners seeking national officer endorsements as master or mate (pilot) of towing vessels on routes other than oceans to complete a Coast Guard-approved basic firefighting course.[20] Prior to the 2013 final rule, only masters and mates (pilots) of towing vessels serving on an ocean route were required to complete firefighting training.

Grandfathered Population

This rule will affect applicants for endorsements of inland master of towing vessels (limited) if they do not have a prior endorsement as a mate (pilot) that required a firefighting course. The 2013 final rule established grandfathering provisions for which the Coast Guard provided guidance in Navigation and Vessel Inspection Circular (NVIC) 03–16, titled ''Guidelines for Credentialing Officers of Towing Vessels.'' [21] As described in Enclosure 10 of NVIC 03–16, the Coast Guard grandfathered mariners applying for an original MMC endorsed as master or mate (pilot) of towing vessels on non-oceans routes who began sea service prior to March 24, 2014 and submitted an application prior to March 24, 2019. The grandfathering provisions established that applicants for original master or mate (pilot) endorsements on non-oceans routes prior to March 24, 2019, were not required to take a firefighting course.[22]

Mariners raising the grade of their MMC endorsement from mate (pilot) to master of towing vessels were also grandfathered in under NVIC 03–16 and were not required to take a firefighting course. As a result of the grandfathering provisions, this rule will be applicable to new applicants for master of towing vessels (limited) or mate (pilot) of towing vessels endorsements.

In order to qualify for an MMC endorsement as master of towing vessels, other than master of towing vessels (limited), an applicant must have prior sea service experience as either a mate (pilot) of towing vessels or a master of vessels greater than 200 GRT. Holding the endorsement authorizing service in either of these capacities would have required the applicant to either take a firefighting course or be grandfathered in under NVIC 03–16. As a result, this rule does not impact applicants for an endorsement as master of towing vessels other than master of towing vessels (limited).

Masters of towing vessels (limited) do not require prior sea service as a master or mate of vessels greater than 200 GRT. Therefore, this rule will affect applicants for endorsements of inland master of towing vessels (limited) if they do not have a prior endorsement as a mate (pilot) that required a firefighting course. Two towing vessel endorsement applicant groups are thus affected by this rule: (1) mate (pilot) of towing vessels, and (2) master of towing vessels (limited) with no prior endorsement as a mate (pilot).

Affected Population of New Applicants

The Coast Guard's National Maritime Center (NMC) issues MMCs to applicants who meet the regulatory requirements for endorsements described in 46 CFR parts 11, 12, and 13. Applicants for endorsements as master and mate (pilot) of towing vessels may be endorsed to operate on oceans, near coastal, Great Lakes and inland waters, or Western Rivers routes.

The MMLD database is used by the NMC to issue MMCs and maintain records of U.S. merchant mariners. Data was obtained from the MMLD, for the period between 2015–2022, on each issuance of an original master or mate (pilot) of towing vessel endorsement, including when the endorsement was issued, and the authorized routes of operation. We excluded applicants for Great Lakes, near-coastal, or oceans routes, because applicants for endorsements on those routes are required to complete basic firefighting and will not be affected by the rule. Currently, Great Lakes and inland waters are issued as one route for towing vessel endorsements. With this rule, language is added to allow the separation of these two routes so that a mariner who completes the modified

[18] *https://www.dco.uscg.mil/Portals/9/NMC/pdfs/courses/courses.pdf* lists all courses approved by the Coast Guard. There are 91 training providers approved to offer basic firefighting courses.

[19] See Section IV, Background, of the NPRM titled, ''Towing Vessel Firefighting Training'' (86 FR 48925, September 1, 2021. To view the NPRM, go to *www.regulations.gov,* type USCG 2020–0492 in the search box, and click ''Search.'' Next click on the ''Browse Documents'' tab. Then, click on proposed rule document. This website was last accessed on April 6, 2023.

[20] See final rule titled, ''Implementation of the Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, and Changes to National Endorsements'' (78 FR 77796, December 24, 2013).

[21] Current Coast Guard NVICs can be found at: *https://www.dco.uscg.mil/Our-Organization/NVIC/Year/2010/.* (On this site ''click on ''NVIC 03–16.'' This website was last accessed on April 24, 2023.) NVIC 03–16 was updated in September 2020, and the discussion about grandfathering was removed because the grandfathering period had expired. The original NVIC was published June 23, 2016, and can be found here: *https://www.regulations.gov/document/USCG-2016-0611-0001.* This website was last accessed on April 24, 2023.

[22] Coast Guard SMEs estimate that nearly all master or mate (pilot) applicants would have begun sea service prior to March 24, 2014.

basic firefighting course could be issued an endorsement valid for inland waters or Western Rivers. Because towing vessel endorsements are currently issued for Great Lakes and inland routes, the Coast Guard cannot directly estimate from the MMLD data the number of masters and mates (pilots) of towing vessels operating exclusively on inland waters. However, we can estimate the number of towing vessels that operate on these waters based on data from towing vessel inspection records.

As of 2023, 5,013 towing vessels have been inspected under 46 CFR subchapter M.[23] When vessels are inspected, they must declare their operating route, which may include the Great Lakes, inland waters and Western Rivers.

In order to isolate the vessels operating on the Great Lakes, we first reviewed the number of vessels that operate on the Great Lakes, inland waters, or Western Rivers, and then examined the number of vessels that list the Great Lakes as at least one of their routes. Specifically, out of the 5,013 total towing vessels inspected under 46 CFR subchapter M, 3,552 are recorded as one or more of the following routes: Great Lakes, inland waters, or Western Rivers. Of the 3,552 vessels, 169, or 5 percent, rounded (169 ÷ 3,552 = 0.048), include the Great Lakes as one of their listed routes and, therefore, will require basic firefighting training, since they may operate on the Great Lakes. The remaining 95 percent, or 3,383 vessels, do not include the Great Lakes as one of their listed routes and, therefore, mariners serving on these vessels are eligible to take the modified basic firefighting course.

Table 4 shows the number of endorsements issued from 2016–2019 for master of towing vessels (limited) and mate (pilot) of towing vessels, respectively, endorsed to operate on the Great Lakes, inland waters, or Western Rivers routes.[24] While we have data on the number of endorsements issued in 2020 and 2021, we intentionally exclude 2020 and 2021 when calculating the average number of master (limited) and mate (pilot) towing vessel endorsements each year because of the impact of the COVID–19 pandemic on all facets of the U.S. economy. Therefore, we do not believe the number of endorsements issued in 2020 and 2021 represents a typical year, and many individuals who might ordinarily have pursued an endorsement did not because of the general slowdown in business associated with the pandemic. On average, between 2016 and 2019, the Coast Guard issued 16 master of towing vessels (limited) and 495 mate (pilot) of towing vessels endorsements per year, for a total of 511 new endorsements per year on Great Lakes, inland waters, and/or Western Rivers routes.

TABLE 4—ESTIMATED NUMBER OF NEW GREAT LAKES, WESTERN RIVERS, AND/OR INLAND WATERS MATE (PILOT) AND MASTERS (LIMITED) ENDORSEMENTS ISSUED PER YEAR * [25]

Year	Mate (pilot) applicants	Master (limited) with no mate (pilot) endorsement
2016	615	19
2017	530	17
2018	423	15
2019	410	11
Average	495	16

* Numbers may not add due to rounding.

As seen in table 4, the number of individuals applying for an endorsement as mate (pilot) of towing vessels has been declining. The Coast Guard does not know specifically why fewer individuals have applied for an endorsement as mate (pilot) of towing vessels. It may be associated with grandfathering provisions provided in the 2013 final rule, which established grandfathering provisions for master and mate (pilot) of towing vessels. The 2013 final rule could have caused applicants for master of towing vessels (limited) and mate (pilot) of towing vessels endorsements to seek an MMC earlier than they may have otherwise, in order to be grandfathered under the existing regulations. Additionally, the introduction of subchapter M in 2016 may have led to a contraction in the industry. In either case, the Coast Guard believes that the current decline has been more severe than fundamentals would suggest, and, carrying forward, we expect the number of applicants to level off. The Coast Guard therefore utilized the 4-year average of the number of new towing vessel mate (pilot) applicants, or 495, and the 4-year average of the number of master (limited), or 16, to estimate that 511 mariners apply to the Coast Guard for endorsements to operate on the Great Lakes, Western Rivers, or inland waters each year.

Applying the percentage of vessels that do not operate on the Great Lakes (95 percent) to the estimated 511 annual new endorsements yields an estimated 485 new endorsements as mate (pilot) of towing vessels or master of towing vessels (limited) operating in inland waters or Western Rivers per year, rounded (511 × 0.95 = 485).

Costs

The modified basic firefighting course for towing vessels on inland waters and Western Rivers will be a modified version of the basic firefighting course. Mariners are required to take a basic firefighting course, and this final rule permits some mariners to take the modified basic firefighting course in lieu of the basic firefighting course. As such, this rule presents no additional costs to mariners who will continue to operate on inland waters and Western Rivers.

Before mariners could save hours spent in training and tuition for a basic firefighting course, by taking a modified

[23] These data were retrieved from the Coast Guard's Marine Information for Safety and Law Enforcement (MISLE) database in February 2023. Title 46 CFR subchapter M requires all towing vessels greater than 26 feet and those that transport hazardous materials to be inspected.

[24] Endorsement data for 2022 are currently incomplete; therefore, they are not included in our analysis.

[25] Please see footnote 14 for more information about the why the numbers of inland waters and Western Rivers master (limited) and mate (pilot) applicants have increased from the NPRM.

basic firefighting course, training providers will first need to obtain Coast Guard approval for the modified basic firefighting course. training providers submit course approval requests to the NMC in accordance with the requirements of 46 CFR, part 10, subpart D. The NMC then evaluates the course to ensure the content demonstrates comprehensive coverage of the firefighting knowledge and competency requirements of the training. If the course submission does not require edits or revisions, and is approved as submitted, the Coast Guard estimates that it would take a training specialist at a training provider 6 hours to develop and submit a request for course approval of a modified basic firefighting course.[26]

We used the Bureau of Labor Statistics' (BLS) *Occupational Employment Statistics National-Industry-Specific Occupational Employment and Wage Estimates for May 2021* ''Training and Development Specialists'' category to estimate the wages for the employees who would prepare and submit the course for Coast Guard approval, as these employees ''design and conduct training and development programs to improve individual and organization performance.'' [27] The BLS estimates a training and development specialist's mean hourly wages at $32.51. We apply a load factor to account for non-wage compensation and benefits, resulting in a fully loaded hourly wage of $45.51.[28]

If the submission does not require a request for additional information to supplement the course approval request, the Coast Guard estimates that a federal government employee, at a grade level of a General Schedule (GS)-7, will require 1 hour to process the receipt of the course approval submission. One federal employee, at a grade level of a GS–13, will spend 4 hours evaluating the course approval request; another federal employee, at a grade level of GS–13, will spend 0.5 hours reviewing the course; and a fourth federal employee, also at a grade level of GS–13, will spend 0.5 hours conducting a final review of the course. In total, the Coast Guard will spend 1 hour of GS–7 time and 5 hours of GS–13 time per course approval request if the submission does not require a request for additional information to supplement the course approval request.

The impacted employees work in the Washington-Baltimore-Arlington, DC–MD–VA–WV–PA, area. The Office of Personnel Management (OPM) lists the hourly pay for federal employees in the Washington, DC area according to the Washington, DC GS pay tables.[29] We estimate that the impacted employees will, on average, be at a step 5 pay, because that is the midpoint of the pay band. The OPM records the hourly pay of GS–7, step 5 employees as $26.69, and records the hourly pay of GS–13, step 5 employees as $56.31. These wages are not fully loaded, meaning they do not account for associated benefits.

To account for the value of benefits to government employees, we first calculate the share of total compensation of federal employees accounted for by wages. The Congressional Budget Office (2017) reports total compensation to federal employees as $64.80 per hour and wages as $38.30.[30] This implies that total compensation is 1.69 times the average wages ($64.80 ÷ $38.30 = 1.69). We can, therefore, calculate the fully loaded wage rate for the GS–7 and GS–13 hourly wage rates by multiplying by 1.69, yielding $45.11 and $95.16, respectively.

All 23 training providers that may offer a modified basic firefighting course must submit a course approval request to the Coast Guard for evaluation. We estimate the costs of this initial submission to industry and the Coast Guard as shown in table 5.

TABLE 5—COSTS DUE TO INITIAL COURSE APPROVAL APPLICATIONS

	Employee type	Fully loaded wage [A]	Number of training providers [B]	Hours [C]	Total cost [A * B * C]
Training Provider Cost	Training Specialist	45.51	23	6	$6,280
Government Cost	GS–7	45.11	23	1	1,038
Government Cost	GS–13	95.16	23	5	10,943
Total Government Cost					11,981
Total Cost					18,261

It is common for training providers to submit insufficient supporting information with a course approval request to the Coast Guard. When this occurs, the Coast Guard requests additional information from the training provider. We reviewed NMC data on new course approval submissions over 5 years (2018–2022) to determine how likely it is for a training provider to submit a course approval request without the Coast Guard requesting additional information. We reviewed NMC data on the total number of course approval applications received and the number of course approval applications that require additional information such as edits and revisions (see table 6). We

[26] Information provided by an SME from the Coast Guard's NMC.

[27] *https://www.bls.gov/oes/2021/may/oes131151.htm.* This website was accessed on April 24, 2023.

[28] Data on the employer cost of compensation was sourced from the ''Employer Costs for Employee Compensation'' one screen data search. We searched for both the total compensation and the wages and salaries of private industry workers in the ''Educational Services Industry'' yielding BLS series CMU2016100000000D for total compensation and series CMU2026100000000D for wages. To derive the cost of compensation per hour worked, the Coast Guard first took the average of the four quarters of total compensation or $49.86 and the average of the four quarters of wages and salaries of $36.01, rounded. We then divided the total compensation amount of $49.86 by the wage and salary amount of $36.01 to obtain the load factor of about 1.4 for ''Educational Services'' occupations, rounded (49.86 divided by 36.01 equals 1.4, rounded). To load the wage, the Coast Guard multiplied the estimated hourly wage of $32.51 by the loaded wage factor of 1.4 yielding $45.51, rounded, which accounts for the total cost of compensation per hour of work (32.51 multiplied by 1.4 equals 45.51).

[29] *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/21Tables/html/DCB_h.aspx.* This website was last accessed on April 24, 2023.

[30] Congressional Budget Office (2017), ''Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015,'' *https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf.* This document was last accessed on April 24, 2023.

estimate that training providers provide incomplete information in their application packet 38 percent of the time.

TABLE 6—COURSE APPROVAL REQUESTS RECEIVED WITH INSUFFICIENT INFORMATION

Year	Course approval requests received [A]	Course approval requests received with insufficient information [B]	Percent of course approval requests with insufficient information [B ÷ A]
2018	944	362	38
2019	768	335	44
2020	699	199	28
2021	751	182	24
2022	655	362	55
Total	3,817	1,440	38

When training providers submit a course approval request with incomplete information, the Coast Guard will request that the training providers revise their course request and resubmit. The Coast Guard estimates that both the training provider and the Coast Guard will spend an equal number of hours on each resubmittal as they would on the initial submission. In other words, the training provider will spend 6 hours on an initial approval request and 6 hours on the resubmittal, for 12 hours total, and the Coast Guard will spend 1 GS–7 hour and 5 GS–13 hours on the initial request, and 1 GS–7 hour and 5 GS–13 hours on the resubmittal, for 2 GS–7 hours and 10 GS–13 hours total.[31]

Thus, the Coast Guard estimates that 38 percent of the training providers, or 9 training providers ($23 \times 0.38 = 9$), will submit the request for course approval with incomplete information, requiring a second submission taking 6 hours to prepare for submission to the Coast Guard. Similarly, the Federal Government will spend an additional 1 hour at grade level GS–7 and 5 hours at grade level GS–13 to review the information resubmitted for the course approval request. We estimate the costs of modified firefighting course approvals resubmissions as shown in table 7.

TABLE 7—SUMMARY OF RESUBMISSION COSTS FOR MODIFIED FIREFIGHTING TRAINING COURSES

	Employee type	Hourly burdened wage [A]	Number of training providers [B]	Average hours [C]	Total cost[32] [A * B * C]
Training Provider Cost	Training Specialist	$45.51	9	6	$2,458
Government Cost	GS–7	45.11	9	1	406
Government Cost	GS–13	95.16	9	5	4,282
Total Government Cost					4,688
Total Cost					$7,146

We estimate the total costs to training providers from initial applications and any resubmissions to be approximately $8,738 ($6,280 + $2,458), and the total costs to government to be approximately $16,669 ($11,981 + $4,688). Together, we estimate the one-time costs of evaluating approval requests for the modified basic firefighting courses to be $8,738 + $16,669, or $25,407 during the first year of implementation.

As discussed above, Coast Guard course approvals are valid for 5 years, and training providers must seek a renewal every 5 years to continue to offer the course. This course renewal will include a submission similar to that initially provided to and approved by the Coast Guard. Since the Coast Guard will have previously reviewed and approved the course submission, the Coast Guard estimates that it would take training providers less time to prepare all materials for the Coast Guard. Specifically, we estimate that the same training specialist who spent 6 hours on an initial course approval request will spend 1 hour on a renewal request, and the renewal request will be submitted without any revisions.[33] We further estimate that all 23 providers will submit a request for renewal of a course approval, because, based on a review of previous course approval renewals, we do not expect a turnover in training providers. The Coast Guard, however, will spend the same amount of time reviewing the renewal requests as it spent with the initial approval request to ensure that the course still meets regulatory requirements, or 1 hour of GS–7 time and 5 hours of GS–13 time.

These costs will occur 5 years after each approval, or in year 6. We estimate the course renewal costs as shown in table 8. The 10-year distribution of undiscounted and discounted costs from both the initial and renewal requests are recorded in table 9.

[31] Information provided by an SME from the Coast Guard's NMC.

[32] Numbers may not add due to rounding.

[33] According to SMEs from the Coast Guard's Office of Merchant Mariner Credentialing.

TABLE 8—COURSE RENEWAL SUBMISSION COST

	Employee type	Burdened wage [A]	Number of training providers [B]	Hours [C]	Total cost [A * B * C]
Training Provider Cost	Training Specialist	45.51	23	1	$1,047
Government Cost	GS–7	45.11	23	1	1,038
Government Cost	GS–13	95.16	23	5	10,943
Total Government Cost					11,981
Total Cost					13,028

TABLE 9—DISCOUNTED COSTS OVER A 10-YEAR PERIOD OF ANALYSIS IN 2021 DOLLARS DISCOUNTED AT 7% AND 3%

Year	Undiscounted costs	Discounted costs	
		7%	3%
1	$25,407	$23,745	$24,667
2	0	0	0
3	0	0	0
4	0	0	0
5	0	0	0
6	13,028	8,681	10,911
7	0	0	0
8	0	0	0
9	0	0	0
10	0	0	0
Total	38,435	32,426	35,577
Annualized		4,617	4,171

Benefits

The primary benefits of the rule come from the cost savings to mariners in terms of reduced time spent in training and in reduced tuition. The modified course content will eliminate the requirement for training using certain firefighting equipment that is not required to be carried on towing vessels operating on inland waters or Western Rivers. Therefore, the modified basic firefighting course will be shorter, and likely less expensive, than the basic firefighting course. Thus, a mariner will likely prefer to take a modified basic firefighting course instead of a basic firefighting course. Some mariners may prefer to take the basic firefighting course if they are considering the possibility of working on the Great Lakes, near coastal waters, or ocean routes in the future. However, we do not have data to forecast how many of these mariners might opt, in the future, to take the basic firefighting course when they apply for the endorsement as master (limited) of towing vessels or mate (pilot) of towing vessels on inland waters or Western Rivers. Because the modified basic firefighting course will be shorter, less expensive, and located in the same area as the basic firefighting course, and because only a small portion of mariners operate in the Great Lakes (5 percent), and we already account for them, we assume all mariners eligible to take a modified basic firefighting course will do so.

The basic firefighting training costs $552.54, on average, and lasts 16 hours.[34] The Coast Guard estimates that the modified basic firefighting course will be 4 hours shorter than the current 16-hour basic firefighting course. For the purposes of our analysis, we assume the modified basic firefighting course will be less expensive than the basic firefighting course, because it will require fewer resources to host, result in less wear and tear on the facility, and require fewer hours of an instructor's time. As a result, we assume that tuition will decline proportionally with course length.

In the affected population section, we estimate that 485 individuals will apply for an MMC endorsement as master of towing vessels (limited) or mate (pilot) of towing vessels on inland waters or Western Rivers each year and will be eligible to take the modified basic firefighting course in lieu of the basic firefighting course. Therefore, these applicants will save 4 hours of their time and the difference in costs between the basic firefighting tuition and the modified basic firefighting course tuition.

The Coast Guard estimates that these 485 applicants will be mariners who hold an MMC endorsement as apprentice mate (steersman), which is a position between ordinary seaman and mate. The BLS does not have a labor category for apprentice mate (steersman); however, the BLS *Occupational Employment Statistics National-Industry-Specific Occupational Employment and Wage Estimates for May 2021* lists the mean hourly wages for both ''Captains, Mates, and Pilots of Water Vessels'' and ''Sailors and Marine Oilers.'' [35] As an

[34] Data on the price of firefighting training was only publicly available for 24 of the 91 approved training providers. Some of the training providers are private companies that train their own employees, some are in schools like the U.S. Merchant Marine Academy that teach basic firefighting to their own midshipmen but do not separate out the training, and others do not appear to offer basic firefighting training despite having an approval permitting them to teach it.

[35] Master and mate rates were accessed on February 8, 2023 from: *https://www.bls.gov/oes/2021/may/oes535021.htm#ind.* This website was last accessed on April 24, 2023. Sailor and Oiler rates were accessed on February 8, 2023 from: *https://www.bls.gov/oes/2021/may/oes535011.htm.* This website was last accessed on April 24, 2023. For both rates the hourly mean wage for the ''Inland

apprentice mate (steersman) is a position between ordinary seaman and mate, we derive their wages by taking a weighted average mean hourly wage of both ''Captains, Mates, and Pilots of Water Vessels'' and ''Sailors and Marine Oilers'' operating in the ''Inland Water Transportation'' industry. We take a weighted average because the duties and responsibilities of an apprentice mate (steersman) are more like that of sailor than of a mate. Consequently, we rate the sailor's wage more heavily than we weight the mate's wage. Specifically, we estimate the mean hourly wage of an apprentice mate (steersman) by taking one-third of the average mate's mean hourly wage ($55.32) and two-thirds of the average sailor's mean hourly wage ($26.44), yielding $36.07 per hour, rounded.[36] We then apply a load factor to account for non-wage compensation and benefits, which results in a fully loaded mean hourly wage of $54.11.[37] Therefore, we estimate the annual undiscounted cost savings for taking shorter courses to be approximately $104,973 [(485 endorsements × 4 (the number of hours saved) × $54.11 (the burdened wage)].

Applicants for MMC endorsements as master of towing vessel (limited) and mate (pilot) of towing vessels will also save the difference between the tuition for the less expensive, modified basic firefighting course and the basic firefighting course. If we use the tuition for the basic firefighting course, $552.54, as the cost of 16 hours of firefighting instruction, then 12 hours of instruction would be $414.41, rounded [($552.54 × (12 ÷ 16) = $414.41)]. The cost savings for the modified basic firefighting course due to reduced tuition would be $138.13 ($552.54 − $414.41 = $138.13) or $66,993 total ($138.13 × 485 = $66,993), rounded.

In addition, applicants for MMC endorsements as master of towing vessel (limited) and mate (pilot) of towing vessels who drive and lodge near the closest training provider offering a modified basic firefighting training course will save on travel expenses due to the shortened class time on the second day of training. Because the second day of training only involves a half day or 4 hours of training, we assume that applicants who would drive and lodge would be able to use the remainder of the day to travel home, rather than lodge for an additional night and return home the following day. As a result, we estimate a total savings of $47,045 in travel expenses from the removal of 1 day of lodging and reduced meals and incidentals. See Appendix A in the docket for an in-depth analysis of the cost savings associated with reduced travel expenses. In total, applicants for master of towing vessels (limited) and mate (pilot) of towing vessels on inland waters or Western Rivers routes will save an average of $219,011 per year—$104,973 from reduced hours spent in courses, $66,993 from reduced tuition, and $47,045 from reduced travel expenses.

Because courses must be Coast Guard-approved before they can be offered to mariners, and developing a new course and obtaining approval from the Coast Guard can be a lengthy process, we are delaying the effective date of the rule by 180 days. This will allow time both for training providers to develop a modified basic firefighting course and the Coast Guard to evaluate and approve the courses prior to the effective date. However, we assume that a modified firefighting course will not be widely available until the second year of analysis. We show the 10-year distribution of cost savings in table 10.

TABLE 10—DISCOUNTED COST SAVINGS OVER A 10-YEAR PERIOD OF ANALYSIS IN 2021 DOLLARS AT 7% AND 3%

Year	Undiscounted cost savings	Discounted cost savings	
		7%	3%
1			
2	$219,011	$191,293	$206,439
3	219,011	178,778	200,426
4	219,011	167,082	194,588
5	219,011	156,152	188,921
6	219,011	145,936	183,418
7	219,011	136,389	178,076
8	219,011	127,466	172,889
9	219,011	119,127	167,854
10	219,011	111,334	162,965
Total	1,971,099	1,333,558	1,6558,576
Annualized		189,869	194,084

Unquantified Benefits of the Rule

There is no data to quantify any additional benefits beyond the cost savings estimated and noted above. However, a qualitative benefit of this rule is that there will be firefighting courses that are more tailored to the credential endorsement.

Analysis of Alternatives

In addition to our preferred alternative, which is discussed throughout the remainder of this RA, we considered three additional alternatives:

(1) No action, or maintaining the requirement that masters and mates (pilots) of towing vessels be required to take a basic firefighting course. With

Water Transportation'' industry was used as this best approximates the wages of towing vessel masters, mates, and deckhands. The reader can find this wage rate under the ''Industry Profile'' section of each web page.

[36] More specifically, [($55.32 divided by 3) plus ($26.44 multiplied by ⅔)] which equals $36.07.

[37] Data on the employer cost of compensation was sourced from the ''Employer Costs for Employee Compensation'' one screen data search. We searched for both the total compensation and the wages and salaries of private industry workers in the ''Transportation and Warehousing Industry'' yielding BLS series CMU2014300000000D for total compensation and series CMU2024300000000D for wages. To derive the cost of compensation per hour worked, the Coast Guard first took the average of the four quarters of total compensation or $40.79 and the average of the four quarters of wages and salaries of $26.98, rounded. We then divided the total compensation amount of $40.79 by the wage and salary amount of $26.98 to obtain the load factor of about 1.5 for ''Transportation and Warehousing'' occupations, rounded ($40.79 divided by $26.98 equals 1.5, rounded). To load the wage, the Coast Guard multiplied the estimated hourly wage of $36.07 by the loaded wage factor of 1.5 yielding $54.11, rounded, which accounts for the total cost of compensation per hour of work ($36.07 multiplied by 1.5 equals $54.11).

this alternative, applicants would not benefit from a shorter, modified basic firefighting course. Therefore, there would be no cost savings. We rejected the no-action alternative because it would not create cost savings for mariners seeking an endorsement for master or mate (pilot) of towing vessels on inland waters or Western Rivers.

(2) We also considered an alternative from a comment submitted during our request for feedback. This commenter recommended that the Coast Guard eliminate the approved training requirement and rely instead on drills required by existing regulations to ensure mariner competence in firefighting. Proponents of this alternative are likely to argue that the absence of a training requirement could lead to cost savings from: (1) no longer traveling to, paying for, or spending time in the training. However, the Coast Guard believes this alternative has serious drawbacks. First, as noted earlier, firefighting training ensures that mariners have fundamental firefighting and emergency skills that allow for effective fire prevention and the quick extinguishment of small fires that could otherwise spread and lead to property damage and personnel injury or death. Without the training, the Coast Guard cannot be sure that mariners would have the necessary skills to combat fires should they occur on vessels. Second, instructors in courses that are approved by the Coast Guard are required to have experience or training in effectively delivering course material. Third, the content of company managed training and drills would likely be less intensive and exhaustive than what training providers will offer. Firefighting courses include live fire exercises and practical experience identifying potential fire hazards and extinguishing live fires. As part of approved training, these types of activities take place in a controlled environment, allowing students to meet learning objectives while keeping them safe from the associated hazards. These practical exercises cannot be carried out on an operational vessel. Fourth, it is common for mariners to work on different vessels and for different companies. There is a need for the common foundational training that a Coast Guard-approved course provides. While individuals no longer being required to take a firefighting course may view this as a benefit via cost savings, the Coast Guard views this as unacceptably decreasing the quality of firefighting skills and decreasing the safety of the inland waters and Western Rivers towing vessel fleet.

Taken together, these four findings would lower the safety and preparedness of the inland waters and Western Rivers towing vessel fleet substantially. Therefore, the Coast Guard rejected this alternative.

(3) The third alternative we considered was permitting firefighting training specific to inland waters and Western Rivers towing vessels but requiring the new training to have the same 16 hours of coursework and cover additional topics and situations common to inland waters and Western Rivers towing vessels not previously required by regulation. While the addition of topics for training could be beneficial, the Coast Guard has no data or feedback to support its impact on safety. Additionally, the Coast Guard believes training providers will have little incentive to undergo the expense of developing a firefighting course that will not provide cost savings to mariners.

Both courses would occur over 2 days. In the 16-hour course suggested by this alternative, the mariner would likely experience a cost savings from reduced tuition because there would be fewer equipment needs used for the training; however, we do not have a way to estimate the size of this reduction in fees. This reduction in fees would almost certainly be less than the reduction in fees for a 12-hour course instead of a 16-hour course, because the instructors would spend more hours in class under the 16-hour course. Additionally, a 16-hour course would not result in the cost savings from the 4-hour reduced training duration, estimated at $104,973 annually. As a result, the Coast Guard rejected this alternative because it did not lead to the highest cost savings.

Net Cost Savings

As documented above, there will be costs to training providers and the Coast Guard, and cost savings to mariners who will have the option to complete a modified basic firefighting course. Table 11 presents the net cost savings to mariners and the Government over a 10-year period of analysis, in 2021 dollars.

TABLE 11—DISCOUNTED NET COST SAVINGS OVER A 10-YEAR PERIOD OF ANALYSIS IN 2021 DOLLARS AT 7% AND 3%

Year	Undiscounted cost savings	Discounted cost savings	
		7%	3%
1	−$25,407	−$23,745	−$24,667
2	219,011	191,293	206,439
3	219,011	178,778	200,426
4	219,011	167,082	194,588
5	219,011	156,152	188,921
6	205,983	137,255	172,508
7	219,011	136,389	178,076
8	219,011	127,466	172,889
9	219,011	119,127	167,854
10	219,011	111,334	162,965
Total	1,932,664	1,301,133	1,619,999
Annualized	.....	185,252	189,913

B. Small Entities

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, we have considered whether this rule will have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

As described in section VI. A., Regulatory Planning and Review, there will be two affected populations: (1) training providers who develop and submit a course to the Coast Guard for approval, and (2) applicants for master

of towing vessels (limited) and mate (pilot) of towing vessels operating on inland waters or Western Rivers. Applicants are individuals and not entities; as such, the second affected population does not contain any small entities.

Of the 91 training providers approved to offer a basic firefighting course, the Coast Guard identified 35 training providers who might submit requests for course approval to teach a modified firefighting course.[38] Of these 35 providers:

- 13 are public agencies, none of which are classified as small entities;
- 4 are non-profit organizations, and all 4 are classified as small entities;
- 18 are private companies. Of these, 4 are not classified as small businesses, 8 are classified as small businesses, and 6 could not be classified because information could not be found on those 6 businesses. We classify those 6 businesses, where information could not be found, as small entities.

In total, we classified 18 of 35 entities as small entities. Table 12 lists the North American Industry Classification System (NAICS) codes and size standards used to determine whether entities are small and the numbers of small entities.

TABLE 12—SIZE STANDARDS AND THE AFFECTED ENTITIES

NAICS U.S. industry title	NAICS code	Size standard	Number of entities	Number of small entities
Small Government Jurisdiction.	N/A	''governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000''.	13	0
Small Organization	N/A	''any not-for-profit enterprise that is independently owned and operated and not dominant in its field''.	4	4
Crude Petroleum Extraction.	211120	1,250 employees	1	0
Inland Water Freight Transportation.	483211	750 employees	1	1
Inland Water Passenger Transportation.	483212	500 employees	1	0
Navigational Services to Shipping.	488330	$41.5 million in revenue	2	1
Human Resources Consulting Services.	541612	$16.5 million in revenue	1	1
Business and Secretarial Schools.	611410	$8 million in revenue	1	1
Other Technical and Trade Schools.	611519	$16.5 million in revenue	3	3
Sports and Recreation Instruction.	611620	$8 million in revenue	1	1
Ambulance Services	621910	$16.5 million in revenue	1	0
Firms Where the Industry Could not be Identified.	N/A	N/A	6	6
Total			35	18

As shown in the Costs section of this RA, we estimate that it takes either 6 hours to prepare and submit a course approval request for a modified basic firefighting course or 12 hours if the course approval request requires additional information and resubmission. A training and development specialist's time is valued at a burdened rate of $45.51, for a total cost of either $273.06, or $546.12.[39] For this rule to impose a significant impact on a small entity, the impact would have to be greater than 1 percent (.01) of a small entity's annual revenue. That is, for this rule to have a significant economic impact on an entity, the entity's annual revenue has to be less than $54,612 ($546.12 ÷ 0.01 = $54,612). Out of the 8 small entities for which we had revenue information, none had annual revenue under $54,612. Table 13 indicates the distribution of revenue impacts for the small entities for which we were able to identify revenue information.[40]

TABLE 13—DISTRIBUTION OF REVENUE IMPACTS

Percent of revenue impact	Average annual impact	Small entities with known revenue	Portion of small entities with known revenue
<1%	$546.12	8	100
1–3%	546.12	0	0

[38] In the Affected Population section, we estimated that 23 providers will most likely be impacted by this rule based on their location and other factors. While we estimated that 23 providers will be most likely impacted, we identified 35 providers that might offer a modified basic firefighting course. For the purposes of the regulatory flexibility analysis, and because we did not know with certainty which of the 35 training providers will be impacted, we reviewed the potential costs to any of 35 entities to see if this rule will be likely to have a substantial impact on small entities. These 35 training providers are available in the docket where indicated under the **ADDRESSES** portion of the preamble (See Table A1: Basic Firefighting Training Providers, Course Cost, and Likelihood to Offer a Modified Basic Firefighting Course).

[39] See footnote 26 for a calculation of the burdened wage rate for training and development specialists. 6 hours × $45.51 per hour is $273.06, while 12 hours × $45.51 per hour is $546.12.

[40] We were not able to identify revenue information for the 4 nonprofit small entities and for 6 firms we identified as small businesses.

TABLE 13—DISTRIBUTION OF REVENUE IMPACTS—Continued

Percent of revenue impact	Average annual impact	Small entities with known revenue	Portion of small entities with known revenue
>3%	546.12	0	0

Therefore, based on this analysis, 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.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we offer to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. 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.

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).

D. Collection of Information

This rule calls for a change to the existing information collection (OMB Control Number 1625–0028) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering, and maintaining the data needed, and completing and reviewing the collection.

Title: Course Approval and Records for Merchant Mariner Training Schools.

OMB Control Number: 1625–0028.

Summary of the Modification to the Collection of Information: This rule permits training providers to offer a new course, approved under 46 CFR 10.402 and 10.403, by permitting inland waters and Western Rivers towing vessel master and mate (pilot) applicants to take a modified basic course in lieu of a basic firefighting course.

Need for Information: The Coast Guard will need to receive a course approval submission from training providers who will offer a modified basic inland waters and Western Rivers towing vessel firefighting course.

Proposed Use of the Information: The collection of information is intended to ensure that training providers meet the regulatory requirements for the courses that they offer.

Description of the Respondents: The respondents are training providers wishing to offer a modified basic inland waters and Western Rivers towing vessel firefighting course.

Number of Respondents: The Coast Guard estimates that there will not be any additional respondents, because the training providers requesting approval of a modified basic inland waters and Western Rivers towing vessel firefighting course already have other courses approved by the Coast Guard. As such, the Coast Guard expects there will be no additional respondents because the respondents are already included in the collection of information. Out of the 315 current annual respondents for OMB Control Number 1625–0028, 91 are currently approved to offer a basic firefighting course. Based on information provided by an SME from the Coast Guard's Office of Merchant Mariner Credentialing, we estimate that 23 of the 91 training providers offering a basic firefighting course will likely request approval of a modified basic inland waters and Western Rivers towing vessel firefighting course.

Frequency of Response: We expect that 62 percent of the training providers will request course approval and not need to provide additional information, and the other 38 percent will request course approval and need to provide additional information. The Coast Guard expects these requests to happen in the first year. Therefore, we estimate that there will be 32 additional responses from this rule (23 initial submissions, plus 9 submissions of additional information).

Burden of Response: Out of the 32 responses, the Coast Guard estimates that 23 will take 6 hours to request approval of a modified basic inland waters and Western Rivers towing vessel firefighting course because the training provider's submission complies with Coast Guard policies and regulations. Another 9 responses will take an additional 6 hours because the course package will need to be revised and resubmitted.

Estimate of Total Annual Burden: All 32 responses will take 6 hours to complete. Consequently, the Coast Guard estimates that 32×6, or 192 hours, will be incurred by training providers in requesting new modified basic firefighting course approvals.

As required by 44 U.S.C. 3507(d), we will submit a copy of this rule to OMB for its review of the collection of information.

You are not required to respond to a collection of information unless it displays a currently valid OMB control number. OMB has not yet completed its review of this collection. Once OMB completes action on our information collection request, we will publish a **Federal Register** notice describing OMB's action.

E. Federalism

A rule has implications for federalism under Executive Order 13132 (Federalism) if it has a substantial direct effect on 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 Executive Order 13132 and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132. Our analysis follows.

It is well settled that States may not regulate in categories reserved for regulation by the Coast Guard. It is also well settled that all of the categories covered in 46 U.S.C. 7101 (personnel qualifications of officers serving on board merchant vessels), and any other category in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, are within the field foreclosed from regulation by the States. *See, e.g., United States* v. *Locke,*

529 U.S. 89 (2000) (finding that the states are foreclosed from regulating tanker vessels) *see also Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978) (state regulation is preempted where ''the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it [or where] the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'' (citations omitted)). Because this rule involves the credentialing of merchant mariner officers under 46 U.S.C. 7101, it relates to personnel qualifications for vessels subject to a pervasive scheme of federal regulation and is therefore foreclosed from regulation by the States. Because the States may not regulate within this category, this rule is consistent with the principles of federalism and preemption requirements in Executive Order 13132.

While it is well settled that States may not regulate in categories in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, the Coast Guard recognizes the key role that State and local governments may have in making regulatory determinations. Additionally, for rules with federalism implications and preemptive effect, Executive Order 13132 specifically directs agencies to consult with State and local governments during the rulemaking process. If you believe this proposed rule would have implications for federalism under Executive Order 13132, please call or email the person listed in the **FOR FURTHER INFORMATION** section of this preamble.

Therefore, because the States may not regulate within these categories, this rule is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

F. Unfunded Mandates

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. Although this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

H. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform) to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), because it will 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.

K. Energy Effects

We have analyzed this rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev. 1,[41] associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. This rule is categorically excluded under paragraphs L52 and L56 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev.1. Paragraph L52 pertains to regulations concerning vessel operation safety standards and paragraph L56 pertains to regulations concerning the training, qualifying, and credentialing of maritime personnel.

This rule revises the existing merchant mariner credentialing training requirements for national endorsements as master and mate (pilot) for towing vessels. The changes apply to mariners working on towing vessels inspected under 46 CFR subchapter M when operating on inland waters or Western Rivers routes. Under the rule, these mariners will only be required to complete training that is relevant to the firefighting equipment that is available on their vessels. This change promotes marine safety by focusing attention on the resources actually available to affected mariners.

List of Subjects in 46 CFR Part 11

Penalties, Reporting and recordkeeping requirements, Schools, Seamen.

For the reasons discussed in the preamble, the Coast Guard amends 46 CFR part 11 as follows:

■ 1. The authority citation for part 11 is revised to read as follows:

[41] *https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf.* This document was last accessed on April 24, 2023.

Authority: 14 U.S.C. 503; 3*1 U.S.C. 9701;* 46 U.S.C. 2101, 2103, and 2110; 46 U.S.C. chapter 71; 46 U.S.C. 7502, 7505, 7701, 8906, and 70105; E.O. 10173; DHS Delegation No. 00170.1, Revision No. 01.3. Section 11.107 is also issued under the authority of 44 U.S.C. 3507.

■ 2. Amend § 11.201 by:
■ a. Revising the first sentence of paragraph (h)(1) introductory text;
■ b. Revising paragraphs (h)(2)(i), (h)(3)(i) and (ii);
■ c. Adding paragraphs (h)(3)(iii) and (iv); and
■ d. In paragraph (l), after the word ''service'' and before the words ''and examination'' adding the text '', training''.

The revisions and additions read as follows:

§ 11.201 General requirements for national and STCW officer endorsements.

* * * * *

(h) * * *

(1) Applicants for an original officer endorsement in the following categories must present a certificate of completion from a firefighting course of instruction relevant to the endorsement being sought that has been approved by the Coast Guard. * * *

(2) * * *

(i) All national officer endorsements as master or mate on seagoing vessels of 200 GRT or more.

* * * * *

(3) * * *

(i) All officer endorsements as master on vessels of less than 500 GT in ocean service.

(ii) All officer endorsements for master or mate (pilot) of towing vessels for service on near-coastal waters, except apprentice mate (steersman) of towing vessels.

(iii) All officer endorsements for master or mate (pilot) of towing vessels for service on Great Lakes, except apprentice mate (steersman) of towing vessels.

(iv) All officer endorsements as master or mate (pilot) of towing vessels for service on inland waters or Western Rivers, except apprentice mate (steersman) of towing vessels.

(A) The Coast Guard will accept a Coast Guard-approved modified basic firefighting course, which is the basic firefighting training described in paragraph (h)(3) of this section modified to only cover the equipment, fire prevention procedures, and firefighting operations required on towing vessels on inland waters or Western Rivers routes required in 46 CFR parts 140 and 142. A mariner who completes this modified basic firefighting course will be issued an endorsement that is restricted to inland waters or Western Rivers.

(B) To increase in scope to Great Lakes, near-coastal or oceans, the applicant will be required to complete the firefighting course appropriate to the route sought.

* * * * *

Dated: September 21, 2023.

W.R. Arguin,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Prevention Policy.

[FR Doc. 2023–21560 Filed 10–2–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[RTID 0648–XD391]

Pacific Island Fisheries; 2023 U.S. Territorial Longline Bigeye Tuna Catch Limits for the Commonwealth of the Northern Mariana Islands

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

ACTION: Announcement of a valid specified fishing agreement.

SUMMARY: NMFS announces a valid specified fishing agreement that allocates up to 1,500 metric tons (t) of the 2023 bigeye tuna limit for the Commonwealth of the Northern Mariana Islands (CNMI) to U.S. longline fishing vessels. The agreement supports the long-term sustainability of fishery resources of the U.S. Pacific Islands, and fisheries development in the CNMI.

DATES: The specified fishing agreement was valid as of February 2, 2023. The start date for attributing 2023 bigeye tuna catch to the CNMI is October 8, 2023.

ADDRESSES: The Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific (FEP) describes specified fishing agreements and is available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, telephone 808–522–8220, fax 808–522–8226, or *https://www.wpcouncil.org.*

NMFS prepared environmental analyses that describe the potential impacts on the human environment that would result from the action. The analyses, identified by NOAA–NMFS–2022–0117, are available from *https://www.regulations.gov/docket/NOAA-NMFS-2022-0117,* or from Sarah Malloy, Acting Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

FOR FURTHER INFORMATION CONTACT: Keith Kamikawa, NMFS PIR Sustainable Fisheries, 808–725–5177.

SUPPLEMENTARY INFORMATION: In a final rule published on June 15, 2023, NMFS specified a 2023 limit of 2,000 t of longline-caught bigeye tuna for each of the U.S. Pacific Island territories of American Samoa, Guam, and the CNMI (88 FR 39201). NMFS allows each territory to allocate up to 1,500 t of the 2,000 t limit to U.S. longline fishing vessels identified in a valid specified fishing agreement, but the overall allocation limit among all territories may not exceed 3,000 t.

On September 18, 2023, NMFS received from the Council, through its Executive Director, a specified fishing agreement between the CNMI and the Hawaii Longline Association (HLA) allocating 1,500 t of CNMI's 2,000 t bigeye tuna limit to U.S. fishing vessels identified in the agreement for 2023. The Council's Executive Director advised that the agreement is consistent with the FEP and its implementing regulations. On September 26, 2023, NMFS reviewed the agreement and determined that it is consistent with the FEP, implementing regulations, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws.

In accordance with 50 CFR 300.224(d) and 50 CFR 665.819(c)(9), vessels in the agreement may retain and land bigeye tuna in the western and central Pacific Ocean under the CNMI attribution specified in the fishing agreement. Based on logbook data submitted by U.S. longline vessels in the WCPFC Convention Area, NMFS forecasts that the U.S. longline fishery will reach the U.S. bigeye tuna limit of 3,554 t by October 15, 2023. Regulations at 665.819(c)(9)(i) directs NMFS to begin attributing catch to the applicable U.S. territory starting seven days before the date NMFS forecasts the U.S. limit to be reached, or upon the effective date of the agreement, whichever is later. Therefore, on October 8, 2023, NMFS will begin attributing bigeye tuna caught by vessels in the agreement to the CNMI. If NMFS determines that the fishery will reach the overall 2,000 t territorial catch limit or the 1,500 t allocation limit, we will restrict the catch and retention of longline-caught bigeye tuna by vessels in order to not exceed these limits, unless the vessels are included in a subsequent specified

fishing agreement with another U.S. territory.

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

Dated: September 28, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–21838 Filed 10–2–23; 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–XD208]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch 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; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch in the Central Aleutian district (CAI) of the Bering Sea and Aleutian Islands management area (BSAI) by vessels participating in the BSAI trawl limited access sector fishery. This action is necessary to prevent exceeding the 2023 total allowable catch (TAC) of Pacific ocean perch in the CAI allocated to vessels participating in the BSAI trawl limited access sector fishery.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 28, 2023, through 2400 hrs, A.l.t., December 31, 2023.

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

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan (FMP) for Groundfish of the BSAI 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 BSAI FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2023 TAC of Pacific ocean perch, in the CAI, allocated to vessels participating in the BSAI trawl limited access sector fishery was established as a directed fishing allowance of 498 metric tons 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).

In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch in the CAI by vessels participating in the BSAI trawl limited access sector fishery. While this closure is effective, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

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 closure of Pacific ocean perch directed fishery in the CAI for vessels participating in the BSAI trawl limited access sector fishery. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 27, 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 28, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–21846 Filed 9–28–23; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306–0065]

RTID 0648–XD231

Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Central Aleutian District of the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Atka mackerel in the Central Aleutian district (CAI) of the Bering Sea and Aleutian Islands management area (BSAI) by vessels participating in the BSAI trawl limited access sector fishery. This action is necessary to prevent exceeding the 2023 total allowable catch (TAC) of Atka mackerel in the CAI allocated to vessels participating in the BSAI trawl limited access sector fishery.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), September 28, 2023, through 2400 hours, A.l.t., December 31, 2023.

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

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan (FMP) for Groundfish of the BSAI 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 TAC of Atka mackerel, in the CAI, allocated to vessels participating in the BSAI trawl limited access sector fishery was established as a directed fishing allowance of 1,542 metric tons 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).

In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the CAI by vessels

participating in the BSAI trawl limited access sector fishery. While this closure is effective, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

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 closure of the Atka mackerel directed fishing in the CAI for vessels participating in the BSAI trawl limited access sector fishery. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 27, 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 28, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–21844 Filed 9–28–23; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306–0065]

RTID 0648–XD209

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch 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; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch in the Western Aleutian district (WAI) of the Bering Sea and Aleutian Islands management area (BSAI) by vessels participating in the BSAI trawl limited access sector fishery. This action is necessary to prevent exceeding the 2023 total allowable catch (TAC) of Pacific ocean perch in the WAI allocated to vessels participating in the BSAI trawl limited access sector fishery.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 28, 2023, through 2400 hrs, A.l.t., December 31, 2023.

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

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan (FMP) for Groundfish of the BSAI 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 BSAI FMP appear at subpart H of 50 CFR parts 600 and 679.

The 2023 TAC of Pacific ocean perch in the WAI, allocated to vessels participating in the BSAI trawl limited access sector fishery was established as a directed fishing allowance of 214 metric tons by the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) and as corrected (88 FR 18258, March 28, 2023).

In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch in the WAI by vessels participating in the BSAI trawl limited access sector fishery. While this closure is effective, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

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 closure of Pacific ocean perch directed fishery in the WAI for vessels participating in the BSAI trawl limited access sector fishery. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 27, 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 28, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–21836 Filed 9–28–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 190
Tuesday, October 3, 2023

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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2023–0131]

RIN 3150–AL03

List of Approved Spent Fuel Storage Casks: TN Americas LLC Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel, Certificate of Compliance No. 1004, Renewed Amendment No. 18

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its spent fuel regulations by revising the TN Americas, LLC (TN) Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel listing within the ''List of approved spent fuel storage casks'' to include Renewed Amendment No. 18 to Certificate of Compliance No. 1004. Because this amendment was submitted subsequent to the renewal of the TN Americas, LLC Standardized NUHOMS Horizontal Modular Storage System for Irradiated Nuclear Fuel Certificate of Compliance No. 1004 and, therefore, subject to the Aging Management Program requirements of the renewed certificate, NRC is referring to it as ''Renewed Amendment No. 18.'' Renewed Amendment No. 18 amends the certificate of compliance to provide an improved basket design, revise technical specifications, and incorporate administrative controls during short duration independent spent fuel storage installation handling operations. The amendment also includes a change to the horizontal storage module concrete to allow use of a blended Portland cement that meets the requirements of American Society for Testing and Materials standards.

DATES: Submit comments by November 2, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Submit your comments, identified by Docket ID NRC–2023–0131, at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

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

FOR FURTHER INFORMATION CONTACT: Rodnika Murphy, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–7153, email: *Rodnika.Murphy@nrc.gov;* and Christian Jacobs, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–6825, email: *Christian.Jacobs@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Table of Contents:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0131, when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0131. Address questions about NRC dockets to Dawn Forder, telephone: 301–415–3407, email: *Dawn.Forder@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.

B. Submitting Comments

Please include Docket ID NRC–2023–0131, in your comment submission. The NRC requests that you submit comments through the Federal rulemaking website at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

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

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

II. Rulemaking Procedure

Because the NRC considers this action to be non-controversial, the NRC is publishing this proposed rule

concurrently with a direct final rule in the Rules and Regulations section of this issue of the **Federal Register**. The direct final rule will become effective on December 18, 2023. However, if the NRC receives any significant adverse comment by November 2, 2023, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments in a subsequent final rule. In general, absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action in the event the direct final rule is withdrawn.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC to make a change (other than editorial) to the rule.

For a more detailed discussion of the proposed rule changes and associated analyses, see the direct final rule published in the Rules and Regulations section of this issue of the **Federal Register**.

III. Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended, requires that ''[t]he Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the Nuclear Waste Policy Act states, in part, that ''[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) [sic: 218(a)] for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule that added a new subpart K in part 72 of title 10 of the *Code of Federal Regulations* (10 CFR) entitled ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new subpart L in 10 CFR part 72 entitled ''Approval of Spent Fuel Storage Casks,'' which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on December 22, 1994 (59 FR 65897) that approved the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel System design and added it to the list of NRC-approved cask designs in § 72.214 as Certificate of Compliance No. 1004.

IV. Plain Writing

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

V. Availability of Documents

The documents identified in the following table are available to interested persons as indicated.

Document	ADAMS accession no./web link/ **Federal Register** citation
Proposed Certificate of Compliance and Proposed Technical Specifications	
Proposed NUHOMS 1004 Amendment No. 18 Certificate of Compliance	ML23058A330
Proposed NUHOMS 1004 Amendment No. 18 Technical Specification Appendix A	ML23058A332
Proposed NUHOMS 1004 Amendment No. 18 Technical Specification Appendix B	ML23058A334
Proposed NUHOMS 1004 Amendment No. 18 Technical Specification Appendix C	ML23058A336
Proposed NUHOMS 1004 Amendment No. 18 Safety Evaluation Report	ML23058A328
Other Documents	
Plain Language in Government Writing, dated June 10, 1998	63 FR 31885
Storage of Spent Fuel In NRC-Approved Storage Casks at Power Reactor Sites: Final Rule, dated July 18, 1990	55 FR 29181
List of Approved Spent Fuel Storage Casks: TN Americas LLC, NUHOMS ® Horizontal Modular Storage System for Irradiated Nuclear Fuel, Certificate of Compliance No. 1004: Direct Final Rule, dated December 22, 1994	59 FR 65897

The NRC may post materials related to this document, including public comments, on the Federal rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2023–0131. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) navigate to the docket folder (NRC–2023–0131); (2) click the ''Subscribe'' link; and (3) enter an email address and click on the ''Subscribe'' link.

Dated: September 26, 2023.

For the Nuclear Regulatory Commission.

Scott A. Morris,

Acting Executive Director for Operations.

[FR Doc. 2023–21828 Filed 10–2–23; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[EERE–2022–BT–STD–0023]

RIN 1904–AF44

Energy Conservation Program: Energy Conservation Standards for Metal Halide Lamp Fixtures

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notification of proposed determination and request for comment.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including metal halide lamp fixtures (''MHLFs''). EPCA also requires the U.S. Department of Energy (''DOE'') to periodically determine whether more-stringent, amended standards would be technologically feasible and economically justified, and would result in significant energy savings. In this notification of proposed determination (''NOPD''), DOE has initially determined that amended energy conservation standards for MHLFs would not be cost effective. DOE requests comment on this proposed determination and the associated analyses and results.

DATES:

Meeting: DOE will hold a public webinar upon request. Please request a public webinar no later than October 17, 2023. *See* section VI, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

Comments: Written comments and information are requested and will be accepted on or before December 4, 2023.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov* under docket number EERE–2022–BT–STD–0023. Follow the instructions for submitting comments.

Alternatively, interested persons may submit comments, identified by docket number EERE–2022–BT–STD–0023, by any of the following methods:

(1) *Email: MHLF2022STD0023@ee.doe.gov.* Include the docket number EERE–2022–BT–STD–0023 in the subject line of the message.

(2) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

(3) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, *see* section VI of this document.

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts (if one is held), comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket/EERE-2022-BT-STD-0023.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. *See* section VI, ''Public Participation,'' for further information on how to submit comments through *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Mr. Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Kathryn McIntosh, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–2002. Email: *Kathryn.McIntosh@hq.doe.gov.*

For further information on how to submit a comment or review other public comments and the docket contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Synopsis of the Proposed Determination

The Energy Policy and Conservation Act, Pub. L. 94–163, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B of EPCA [2] established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include metal halide lamp fixtures (''MHLFs''), the

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

subject of this NOPD. (42 U.S.C. 6292(a)(19)) [3]

DOE is issuing this NOPD pursuant to the EPCA requirement that not later than 3 years after issuance of a determination that standards do not need to be amended, DOE must publish either a notification of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking (''NOPR'') including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m))

For this proposed determination, DOE analyzed MHLFs that meet the definition of an MHLF in 10 CFR 431.322. DOE first analyzed the technological feasibility of more energy efficient MHLFs. For those MHLFs for which DOE determined higher standards to be technologically feasible, DOE evaluated whether higher standards would be cost effective. DOE has tentatively determined that the market and technology characteristics of MHLFs are largely similar to those analyzed in the previous rulemaking, which concluded with the publication of a final rule determining not to amend standards. 86 FR 58763 (October 25, 2021) (''October 2021 Final Determination''). Therefore, DOE has tentatively determined that the conclusions reached in the October 2021 Final Determination regarding the benefits and burdens of more stringent standards for MHLFs are still relevant to the MHLF market today. Hence, DOE has tentatively determined that the amended standards for MHLFs would not be cost effective.

II. Introduction

The following section briefly discusses the statutory authority underlying this proposed determination, as well as some of the historical background relevant to the establishment of standards for MHLFs.

[3] DOE notes that because of the codification of the MHLF provisions in 42 U.S.C. 6295, MHLF energy conservation standards and the associated test procedures are subject to the requirements of the consumer products provisions of Part B of Title III of EPCA. However, because MHLFs are generally considered to be commercial equipment, DOE established the requirements for MHLFs in 10 Code of Federal Regulations (''CFR'') part 431 (''Energy Efficiency Program for Certain Commercial and Industrial Equipment'') for ease of reference. DOE notes that the location of the provisions within the CFR does not affect either the substance or applicable procedure for MHLFs. Based upon their placement into 10 CFR part 431, MHLFs are referred to as ''equipment'' throughout this document, although covered by the consumer product provisions of EPCA.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. These products include MHLFs, the subject of this document. (42 U.S.C. 6292(a)(19)) EPCA prescribed initial energy conservation standards for these products (42 U.S.C. 6295(hh)(1)) and directed DOE to conduct two cycles of rulemakings to determine whether to amend these standards (42 U.S.C. 6295(hh)(2)(A) and (3)(A)).

The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 42 U.S.C. 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedures for MHLFs appear at title 10 of the Code of Federal Regulations (''CFR'') part 431, subpart S at § 431.324.

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (*See* 42 U.S.C. 6297(d))

Pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) In this analysis DOE considers only active mode energy consumption as standby and off mode energy use are not applicable to MHLFs at this time.

DOE must periodically review its already established energy conservation standards for a covered product no later than 6 years from the issuance of a final rule establishing or amending a standard for a covered product. (42 U.S.C. 6295(m)) This 6-year look-back provision requires that DOE publish either a determination that standards do not need to be amended or a NOPR, including new proposed standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) EPCA further provides that, not later than 3 years after the issuance of a final determination not to amend standards, DOE must publish either a notification of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(3)(B)) DOE must make the analysis on which a determination is based publicly available and provide an opportunity for written comment. (42 U.S.C. 6295(m)(2))

A determination that amended standards are not needed must be based on consideration of whether amended standards will result in significant conservation of energy, are technologically feasible, and are cost effective. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)) Additionally, any new or amended energy conservation standard prescribed by the Secretary for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Among the factors DOE considers in evaluating whether a proposed standard level is economically

justified includes whether the proposed standard at that level is cost-effective, as defined under 42 U.S.C. 6295(o)(2)(B)(i)(II). Under 42 U.S.C. 6295(o)(2)(B)(i)(II), an evaluation of cost-effectiveness requires DOE to consider savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard. (42 U.S.C. 6295(n)(2); 42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE is publishing this NOPD in satisfaction of the 3-year review requirement in EPCA following a determination that standards need not be amended.

B. Background

1. Current Standards

Current standards for MHLFs manufactured on or after February 10, 2017, are set forth in DOE's regulations at 10 CFR 431.326 and are specified in Table II.1. 10 CFR 431.326(c). Additionally, it is specified at 10 CFR 431.326 that MHLFs manufactured on or after February 10, 2017, that operate lamps with rated wattage >500 watts (''W'') to ≤1000W must not contain a probe-start metal halide ballast. 10 CFR 431.326(d). The following MHLFs are not subject to these regulations: (1) MHLFs with regulated-lag ballasts; (2) MHLFs that use electronic ballasts that operate at 480 volts; and (3) MHLFs that use high-frequency electronic ballasts. 10 CFR 431.326(e).

TABLE II.1—FEDERAL ENERGY CONSERVATION STANDARDS FOR MHLFS

Designed to be operated with lamps of the following rated lamp wattage	Tested input voltage *	Minimum standard equation * (%)
≥50W and ≤100W	480 V	$(1/(1 + 1.24 \times P \wedge (-0.351))) - 0.020$ **.
≥50W and ≤100W	All others	$1/(1 + 1.24 \times P \wedge (-0.351))$.
>100W and <150W †	480 V	$(1/(1 + 1.24 \times P \wedge (-0.351))) - 0.020$.
>100W and <150W †	All others	$1/(1 + 1.24 \times P \wedge (-0.351))$.
≥150W ‡ and ≤250W	480 V	0.880.
≥150W ‡ and ≤250W	All others	For ≥150W and ≤200W: 0.880. For >200W and ≤250W: $1/(1 + 0.876 \times P \wedge (-0.351))$.
>250W and ≤500W	480 V	For >250W and <265W: 0.880. For ≥265W and ≤500W: $(1/(1 + 0.876 \times P \wedge (-0.351))) - 0.010$.
>250W and ≤500W	All others	$1/(1 + 0.876 \times P \wedge (-0.351))$.
>500W and ≤1,000W	480 V	>500W and ≤750W: 0.900. >750W and ≤1,000W: $0.000104 \times P + 0.822$ For >500W and ≤1,000W: may not utilize a probe-start ballast.
>500W and ≤1,000W	All others	For >500W and ≤750W: 0.910. For >750W and ≤1,000W: $0.000104 \times P + 0.832$. For >500W and ≤1,000W: may not utilize a probe-start ballast.

* Tested input voltage is specified in 10 CFR 431.324.

** P is defined as the rated wattage of the lamp the fixture is designed to operate.

† Includes 150W fixtures specified in paragraph (b)(3) of 10 CFR 431.326, that are fixtures rated only for 150W lamps; rated for use in wet locations, as specified by the National Fire Protection Association (''NFPA'') 70, section 410.4(A); and containing a ballast that is rated to operate at ambient air temperatures above 50 °C, as specified by Underwriters Laboratory (''UL'') 1029.

‡ Excludes 150W fixtures specified in paragraph (b)(3) of 10 CFR 431.326, that are fixtures rated only for 150W lamps; rated for use in wet locations, as specified by the NFPA 70, section 410.4(A); and containing a ballast that is rated to operate at ambient air temperatures above 50 °C, as specified by UL 1029.

2. History of Standards Rulemakings for Metal Halide Lamp Fixtures

As noted in section II.A of this document, EPCA directed DOE to conduct two rulemaking cycles to determine whether to amend standards for MHLFs established by EPCA. (42 U.S.C. 6295(hh)(2)(A) and (3)(A)) DOE published a final rule amending the standards on February 10, 2014 (''February 2014 Final Rule''). 79 FR 7746. These current standards are set forth in DOE's regulations at 10 CFR 431.326 and are specified in section II.B.1 and Table II.1 of this document. DOE completed the second rulemaking by publishing a final rule on October 25, 2021, that determined not to amend current standards for MHLFs. 86 FR 58763.

In support of the present review of the MHLF energy conservation standards, on October 6, 2022, DOE published a request for information (''RFI''), which identified various issues on which DOE sought comment to inform its determination of whether the standards need to be amended. 87 FR 60555 (''October 2022 RFI'').

DOE received two comments in response to the October 2022 RFI from the interested parties listed in Table II.2.

TABLE II.2—OCTOBER 2022 RFI WRITTEN COMMENTS

Commenter(s)	Reference in this NOPD	Comment No. in the docket	Commenter type
National Electrical Manufacturers Association (''NEMA'')	NEMA	2	Trade Association.
Signify	Signify	3	Manufacturer.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[4]

C. Deviation From Appendix A

In accordance with section 3(a) of 10 CFR part 430, subpart C, appendix A (''appendix A''), DOE notes that it is deviating from the provision in the appendix A regarding the NOPR stage for an energy conservation standards rulemaking.

Section 6(f)(2) of the appendix A specifies that the length of the public comment period for a NOPR will be not less than 75 calendar days. For this NOPD, DOE has opted instead to provide a 60-day comment period, as required by EPCA. 42 U.S.C. 6295(p). DOE is opting to deviate from the 75-day comment period because stakeholders have already been afforded an opportunity to provide comments on this rulemaking. As noted previously, DOE requested comment on various issues pertaining to this standards rulemaking in the October 2022 RFI and provided stakeholders with a 60-day comment period. 87 FR 60555. Further stakeholders had been made familiar with the methodologies and information presented in the October 2022 RFI as they were based on the analysis conducted for the October 2021 Final Determination. 87 FR 60555, 60558. Therefore, DOE believes a 60-day comment period is appropriate and will provide interested parties with a meaningful opportunity to comment on the proposed determination.

III. Rationale of Analysis and Discussion of Related Comments

In response to the October 2022 RFI, NEMA stated that the October 2021 Final Determination is a recent analysis that correctly determined energy conservation standards for MHLFs do not need to be amended because they are not economically justified. NEMA further stated that declining market volume and the mature nature of the technology do not warrant or support additional rulemakings for MHLFs. (NEMA, No. 2 at p. 1)

For this review of MHLF standards, DOE has tentatively determined that, since the October 2021 Final Determination analysis, there has been no substantial change in (1) product offerings of MHLFs to warrant a change in scope of analysis or equipment classes, (2) technologies or design options that could improve the energy efficiency of MHLFs, (3) manufacturers and industry structure, (4) shipments, (5) operating hours, and (6) market and industry trends. Further DOE did not receive any comments in response to the October 2022 RFI indicating technological or market changes for MHLFs. As such, DOE has tentatively determined that the analysis conducted for the October 2021 Final Determination and its conclusion that amended energy conservation standards for MHLFs would not be cost effective remains valid. DOE requests comments on its tentative conclusion that because no substantive changes have occurred in the market and technology of MHLFs, the conclusion of the October 2021 Final Determination that amending MHLF standards is not cost effective remains valid.

The following sections discuss the status of the current MHLF market as well as issues raised in comments received in response to the October 2022 RFI.

A. Scope of Coverage

In this analysis, MHLF is defined as a light fixture for general lighting application designed to be operated with a metal halide lamp and a ballast for a metal halide lamp. 42 U.S.C. 6291(64); 10 CFR 431.322. Any equipment meeting the definition of MHLF is included in DOE's scope of coverage, though all products within the scope of coverage may not be subject to standards.

B. Technology Options and Screening Analysis

In the October 2022 RFI DOE presented technology options for MHLFs considered in the October 2021 Final Determination. 87 FR 60555, 60560. NEMA commented that technology options identified by DOE in the October 2022 RFI have already been designed to achieve maximum efficiencies based on existing standards and no new resources will be invested in these technologies due to continual decrease in product demand. (NEMA, No. 2 at pp. 1–2) NEMA also stated that more efficient products would require a different form factor. Additionally, NEMA stated that end-users are not asking for additional features or design options for MHLFs and current demand is in the form of repair, replacement, and maintenance. (NEMA, No. 2 at p. 4)

In the October 2021 Final Determination, DOE identified technology options that improve the efficiency of MHLFs. DOE then identified design options by screening out technology options that do not meet five screening criteria outlined in Sections 6(c)(3) and 7(b) of appendix A.[5] 86 FR 58763, 58770–58771. DOE has not found any new information or data that indicates that those technology options and resulting design options are no longer valid means for manufacturers to improve the efficiency of MHLFs nor has DOE identified any new technologies not included in the previous rulemaking that may improve the efficiency of MHLFs. Therefore, in this NOPD, DOE continues to consider only the design options identified in the October 2021 Final Determination.

C. Efficiency Levels

In a rulemaking analysis DOE conducts an engineering analysis to establish the relationship between the efficiency and cost of a MHLF. There are two elements to consider in the engineering analysis; the selection of efficiency levels (''ELs'') to analyze (*i.e.,* the ''efficiency analysis'') and the determination of product cost at each efficiency level (*i.e.,* the ''cost analysis''). In determining the performance of higher-efficiency MHLFs, DOE considers technologies and design option combinations not eliminated by the screening analysis. For each equipment class, DOE estimates the baseline cost, as well as the incremental cost for the equipment at efficiency levels above the baseline. The output of the engineering analysis is a set of cost-efficiency ''curves'' that are used in downstream analyses (*i.e.,* the life cycle cost (''LCC'') and payback

[4] The parenthetical reference provides a reference for information located in the docket. (Docket No. EERE–2022–BT–STD–0023, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

[5] The five screening criteria are: (1) Technological feasibility. Technologies that are not incorporated in commercial products or in working prototypes will not be considered further; (2) Practicability to manufacture, install, and service. If it is determined that mass production and reliable installation and servicing of a technology in commercial products could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further; (3) Impacts on product utility or product availability. If it is determined that a technology would have significant adverse impact on the utility of the product to significant subgroups of consumers or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further; (4) Adverse impacts on health or safety. If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further; (5) Unique-Pathway Proprietary Technologies. If a design option utilizes proprietary technology that represents a unique pathway to achieving a given efficiency level, that technology will not be considered further due to the potential for monopolistic concerns. (*See* 10 CFR part 430, subpart C, appendix A, sections 6(b)(3) and 7(b))

period (''PBP'') analyses and the national impact analysis (''NIA'')).

In the October 2022 RFI, DOE presented the maximum technologically feasible (''max-tech'') efficiency levels identified in the October 2021 Final Determination. 87 FR 60555, 60562. NEMA commented that the max-tech efficiency levels presented in the October 2022 RFI are not technically feasible without extended research. Further, NEMA stated that the max-tech efficiency levels presented in the October 2022 RFI for metal halide (''MH'') ballasts between 100 and 150W would be cost prohibitive relative to low customer demand. (NEMA, No. 2 at pp. 2–3)

In the October 2021 Final Determination, DOE used the ballast efficiency values from DOE's compliance certification database (''CCD'') to identify more efficient ballasts for all equipment classes except for the >1,000W and ≤2,000W equipment class, which does not have certification data available. For this equipment class, DOE determined ballast efficiency values by first gathering and analyzing catalog data. DOE then tested the ballasts to verify the ballast efficiency reported by the manufacturer. For instances where the catalog data did not align with the tested data, DOE selected more-efficient ballasts based on the tested ballast efficiency. 86 FR 58763, 58733. Because the max-tech efficiency levels identified in the October 2021 Final Determination were based on commercially available products, DOE found them to be technically feasible in the October 2021 Final Determination and continues to do so in this analysis. 86 FR 58763, 58791.

As noted, in the October 2021 Final Determination, DOE identified ELs for each representative equipment class (*i.e.,* equipment classes directly analyzed) based on MHLFs certified in the CCD at the time of the analysis. For this analysis, DOE assessed the MHLFs currently in the CCD and reviewed current catalog data for those MH ballasts not in the CCD (*i.e.,* MH ballasts designed to operate lamps with rated wattages >1000W and ≤2000W) and reviewed efficiencies of MHLFs representative of the ELs identified in the October 2021 Final Determination. For the ≥50W and ≤100W equipment class, DOE found that the ballast efficiency of the MHLF representative of the max-tech level, EL 3 had been recorded incorrectly in the October 2021 Final Determination and should have been 0.907 rather than 0.901. 86 FR 58763, 58774. However, a slight change (less than 1 percent) to the ballast efficiency would not have a substantial impact to the cost efficiency of this EL, which resulted in negative LCC savings of more than $60 in the October 2021 Final Determination with more than 70 percent of consumers experiencing a net cost. Further, on average, compared to a purchase at the baseline, the increased purchase price at this EL was never recovered by a reduction in operating costs. DOE has tentatively concluded that this change is not substantive enough to result in any significant impact to the cost effectiveness for this equipment class.

Signify commented that, in the previous analysis, DOE cited ballast catalogs, suggesting that MH ballasts operating in the 2000W range are less efficient than ballasts operating in the 1000W range, but research journals and engineering manuals report the opposite trend, that energy efficiency with a magnetic transformer or magnetic ballast increases along with the transformer power rate (Vecchio et al., 2017). Signify stated that it would expect MH ballasts to follow this trend. Signify commented that MH ballasts that operate lamps in the wattage range of >1000W and ≤2000W are not currently subject to DOE's MHLF standards, and, as a result, manufacturers have had no incentive to use a high-efficiency ballast in this range, which may explain why DOE has seen commercially available products not follow the expected trend. Signify proposed that DOE set an energy efficiency standard for MHLFs that includes MH ballasts that operate lamps with wattages in the range of >1000W and ≤2000W and provided the following corresponding efficiency level equation reflecting a trend of increasing efficiency with lamp power: 0.00001*rated wattage of lamp + 0.928. (Signify, No. 3 at pp. 1–4)

In the October 2021 Final Determination DOE determined the appropriate equation for the >1000W and ≤2000W equipment class to be −0.000008*rated wattage of lamp + 0.946 which resulted in an efficiency of 93.7 percent for the 1500W representative lamp wattage analyzed. 86 FR 58763, 58774, 58776. Signify's proposed equation would result in an efficiency of 94.3 percent for the 1500W representative lamp wattage. For this analysis, DOE reviewed catalog data for MHLFs in the >1000W and ≤2000W equipment class and identified a MH ballast with a catalog ballast efficiency of 96.8 percent, which is higher than the 93.7 percent efficiency representative of the max-tech level, EL 1 (for the 1500W representative lamp wattage) identified in the October 2021 Final Determination. However, DOE chose not to test this product to confirm the catalog ballast efficiency, as its analysis would not change the conclusions reached in the October 2021 Final Determination. Even if the increase in ballast efficiency could result in positive life cycle cost savings for this equipment class, the energy savings for the nation, which were estimated as less than 0.000001 quads for this equipment class in the October 2021 Final Determination, would be close to zero due to the low market share for this equipment class and declining shipments for MHLFs (*see* section III.E of this document).

Hence, DOE's review of the CCD and catalog data found no changes in product offerings or efficiencies for MHLFs that would affect the conclusions from the October 2021 Final Determination. Therefore, DOE has tentatively determined that the conclusions in the October 2021 Final Determination remain valid.

D. Scaling Equipment Classes

EPCA requires DOE to specify a different standard level for a type or class of product that has the same function or intended use, if DOE determines that products within such group: (1) consume a different kind of energy; or (2) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) DOE selects certain equipment classes as ''representative'' to focus its analysis. DOE chooses equipment classes as representative primarily because of their high market volumes and/or unique characteristics.

The current energy conservation standards for MHLF are based on 24 equipment classes determined according to performance-related features that provide utility to the consumer, in terms of input voltage, rated lamp wattage, and designation for indoor versus outdoor applications (*see* 10 CFR 431.326). Specifically, in terms of input voltage, DOE separates equipment classes based on MHLFs with ballasts tested at input voltage of 480 volts (''V'') and those tested at all other input voltages per the DOE test procedure at 10 CFR 431.324. In the analysis for the October 2021 Final Determination, DOE did not directly analyze the equipment classes containing only fixtures with ballasts tested at 480V due to low shipment volumes. DOE did directly analyze equipment classes containing only fixtures with ballasts tested at all input voltages other than 480V. DOE scaled the resulting efficiency levels to develop

efficiency levels for equipment classes containing only fixtures with ballasts tested at input voltage of 480V. 86 FR 58763, 58771, 58776. In the October 2022 RFI, DOE requested comment on whether it is necessary to individually analyze all 24 equipment classes identified in the October 2021 Final Determination and also on how the performance of ballasts that are tested at 480V compares to ballasts of the same wattage and indoor/outdoor classification that are in other equipment classes. 87 FR 60560, 60562.

NEMA stated that it is not necessary to individually analyze all 24 equipment classes as the market is changing to more efficient technologies at a rapid pace. NEMA also responded that market requirements do not support extending the rule to equipment classes not directly analyzed in the October 2021 Final Determination (*i.e.,* MH ballasts tested at 480V). (NEMA, No. 2 at pp. 2–3) Further, NEMA commented that comparing the performance of MH ballasts tested at 480V ballasts to their counterparts with the same wattage and indoor/outdoor classification in other equipment classes (*i.e.,* tested at all other voltages) is not economically feasible because of limited demand for MHLFs. NEMA added that efficiency levels are consistent among most multi-voltage high intensity discharge (''HID'') electronic (277–480V) ballasts. (NEMA, No. 2 at p. 4)

DOE notes that equipment classes that were not directly analyzed in the October 2021 Final Determination (*i.e.,* MH ballasts tested at 480V) are already subject to standards (*see* 10 CFR 431.326). Regarding comparing performance of MH ballasts tested at input voltage of 480V to those tested at other input voltages, in the analysis for the October 2021 Final Determination, DOE was able to identify MH ballasts in DOE's CCD that are tested at 480V and those at other input voltages, with the main difference between the ballasts being the tested input voltage. DOE used these efficiency comparisons to develop scaling factors and applied them to the representative equipment class efficiency level equations to develop corresponding efficiency level equations for ballasts tested at an input voltage of 480V. 86 FR 58763, 58776. DOE continues to find the scaling factors from the October 2021 Final Determination appropriate for this analysis.

E. Shipments

In the October 2021 Final Determination, DOE projected a steady decline in the shipments of MHLFs, consistent with market transition away from MHLFs. 86 FR 58763, 58782–58783. The shipments model was initialized using a time series of historical shipments data compiled from the 2014 MHLF final rule and data from NEMA. The historical shipments for 2008 from the 2014 MHLF final rule were projected to 2020 using NEMA sales indices. Consistent with the 2014 MHLF final rule, DOE assumed an increasing fraction of the MHLF market would move to out-of-scope LED alternatives. DOE modeled the incursion of LED equipment into the MHLF market in the form of a Bass diffusion curve. 86 FR 58763, 58782–58783. DOE's projection resulted in fewer than 1500 shipments of MHLFs by 2030, a decline of more than 99 percent relative to MHLF shipments in 2020; see chapter 9 of the October 2021 Final Determination technical support document.[6]

In response to the October 2022 RFI, NEMA provided a graphical representation of its HID Lamp Sales Index indicating a continued decline for HID lamps, including metal halides, consistent with DOE's projections. (NEMA, No. 2 at p. 5)

F. Manufacturer Impacts

NEMA commented that because of the reduction in volume of product sales, the internal annual reporting cost burden for manufacturers has increased relative to product sales for the industry as a whole. (NEMA, No. 2 at p. 6) Because DOE is proposing not to amend standards for MHLFs (*see* section IV for further details), if finalized, the determination would have no impact on manufacturers.

IV. Proposed Determination

As required by EPCA, this NOPD analyzes whether amended standards for MHLFs would result in significant conservation of energy, be technologically feasible, and be cost effective. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)) The criteria considered under 42 U.S.C. 6295(m)(1)(A) and the additional analysis are discussed below. Because an analysis of potential cost effectiveness and energy savings first requires an evaluation of the relevant technology, DOE first discusses the technological feasibility of amended standards. DOE then addresses the cost effectiveness and energy savings associated with potential amended standards.

A. Technological Feasibility

EPCA mandates that DOE consider whether amended energy conservation standards for MHLFs would be technologically feasible. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)(B)) In the October 2021 Final Determination, DOE concluded that there are technology options that would improve the efficiency of MHLFs. Further, DOE concluded that these technology options are being used in commercially available MHLFs and therefore are technologically feasible. 86 FR 58763, 58791. Because there have been no substantive changes in the MHLF market since the October 2021 Final Determination analysis, DOE has tentatively determined that its conclusions regarding technological feasibility from that analysis remain valid. Hence, DOE has tentatively determined that amended energy conservation standards for MHLFs are technologically feasible.

B. Cost Effectiveness

EPCA requires DOE to consider whether energy conservation standards for MHLFs would be cost effective through an evaluation of the savings in operating costs throughout the estimated average life of the covered product compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product which is likely to result from the imposition of an amended standard. (42 U.S.C. 6295(m)(1)(A), 42 U.S.C. 6295(n)(2)(C), and 42 U.S.C. 6295(o)(2)(B)(i)(II))

In the October 2021 Final Determination, DOE determined that the average customer purchasing a representative MHLF would experience an increase in LCC at each evaluated standards case as compared to the no-new-standards case. The simple PBP for the average MHLF customer at most ELs was projected to be generally longer than the mean lifetime of the equipment, which further indicates that the increase in installed cost for more efficient MHLFs is not recouped by their associated operating cost savings. The analysis determined that the net present value (''NPV'') benefits at the trial standard levels (''TSLs'') were also negative for all equipment classes at 3-percent and 7-percent discount rates. 86 FR 58763, 58785–58791. Hence, in the October 2021 Final Determination, DOE determined that more stringent amended energy conservation standards for MHLFs cannot satisfy the relevant statutory requirements because such standards would not be cost effective as required under EPCA. 86 FR 58763,

[6] Chapter 9 of the October 2021 Final Determination technical support document is available at *www.regulations.gov/document/EERE–2017–BT–STD–0016–0017.*

58791 (*See* 42 U.S.C. 6295(n)(2); 42 U.S.C. 6295(o)(2)(B)(II);) 86 FR 58763, 58791.)

Because there have been no substantive changes in the MHLF market that would affect the conclusions of the October 2021 Final Determination analysis, DOE has tentatively determined that its conclusions regarding the cost effectiveness of more stringent amended energy conservation standards for MHLFs remain valid.

C. Significant Conservation of Energy

EPCA also mandates that DOE consider whether amended energy conservation standards for MHLF would result in significant conservation of energy. (42 U.S.C. 6295(m)(1)(A) and 42 U.S.C. 6295(n)(2)(A))

In the October 2021 Final Determination, having determined that amended energy conservation standards for MHLFs would not be cost-effective, DOE did not further evaluate the significance of the amount of energy conservation under the considered amended standards because it had determined that the potential standards would not be cost-effective as required under EPCA. 86 FR 58763, 58791. (42 U.S.C. 6295(m)(1)(A); 42 U.S.C. 6295(n)(2); 42 U.S.C. 6295(o)(2)(B)). 86 FR 58763, 58791.

As DOE has tentatively determined that amended standards would still not be cost effective, DOE has not evaluated the significance of the projected energy savings from an amended standard.

D. Summary

In this proposed determination, based on the initial determination that amended standards would not be cost effective, DOE has tentatively determined that energy conservation standards for MHLFs do not need to be amended. DOE will consider all comments received on this proposed determination in issuing any final determination.

V. Procedural Issues and Regulatory Review

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

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and amended by E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this proposed regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this proposed regulatory action does not constitute a ''significant regulatory action'' within the scope of section 3(f)(1) of E.O. 12866. Accordingly, this action was not submitted to OIRA for review under E.O. 12866.

B. Review Under the Regulatory Flexibility Act

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

DOE reviewed this proposed determination under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. Because DOE is proposing not to amend standards for MHLFs, if adopted, the determination would not amend any energy conservation standards. On the basis of the foregoing, DOE certifies that the proposed determination, if adopted, would have no significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared an IRFA for this proposed determination. DOE will transmit this certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act

This proposed determination, which proposes to determine that amended energy conservation standards for MHLFs are unneeded under the applicable statutory criteria, would impose no new informational or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed action in accordance with the National Environmental Policy Act of 1969 (''NEPA'') and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for actions which are interpretations or rulings with respect to existing regulations. 10 CFR part 1021, subpart D, appendix A4. DOE anticipates that this action qualifies for categorical exclusion A4 because it is an interpretation or ruling in regards to an existing regulation and otherwise meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final action.

E. Review Under Executive Order 13132

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies

formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed determination and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the equipment that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by E.O. 13132.

F. Review Under Executive Order 12988

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

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

DOE examined this proposed determination according to UMRA and its statement of policy and determined that the proposed determination does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of $100 million or more in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. As a result, the analytical requirements of UMRA do not apply.

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

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

I. Review Under Executive Order 12630

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (Mar. 15, 1988), DOE has determined that this proposed determination would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

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

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this NOPD under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (''OIRA'') at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor Executive Order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of

OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This proposed determination, which does not propose to amend energy conservation standards for MHLFs, is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' *Id.* at 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and has prepared a Peer Review report pertaining to the energy conservation standards rulemaking analyses.[7] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve the Department's analyses. DOE is in the process of evaluating the resulting report.[8]

VI. Public Participation

A. Participation in the Webinar

DOE will hold a public webinar upon receiving a request by the deadline identified in the **DATES** section at the beginning of this proposed determination. Interested persons may submit their request for the public webinar to the Appliance and Equipment Standards Program at *MHLF2022STD0023@ee.doe.gov.* If a public webinar is requested, DOE will release webinar registration information, participant instructions, and information about the capabilities available to webinar participants on DOE's website: *www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=14.* Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has an interest in the topics addressed in this NOPD, or who is representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the webinar. Such persons may submit requests to speak to *ApplianceStandardsQuestions@ee.doe.gov.* Persons who wish to speak should include with their request a computer file in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this proposed determination and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

DOE requests persons selected to make an oral presentation to submit an advance copy of their statements at least 2 weeks before the webinar. At its discretion, DOE may permit persons who cannot supply an advance copy of their statement to participate, if those persons have made advance alternative arrangements with the Building Technologies Office. As necessary, requests to give an oral presentation should ask for such alternative arrangements.

C. Conduct of the Webinar

DOE will designate a DOE official to preside at the webinar/public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the webinar/public meeting. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. anti-trust laws. After the webinar/public meeting and until the end of the comment period, interested parties may submit further comments on the proceedings and any aspect of the proposed determination.

The webinar/public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the webinar/public meeting, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this proposed determination. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this proposed determination. The official conducting the webinar/public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the webinar/public meeting.

A transcript of the webinar/public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this NOPD. In addition, any person may buy

[7] ''Energy Conservation Standards Rulemaking Peer Review Report.'' 2007. Available at *www.energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0* (last accessed June 26, 2023).

[8] The report is available at *www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards.*

a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed determination no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via www.regulations.gov. The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

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

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

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

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No faxes will be accepted.

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

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

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email to *MHLF2022STD0023@ee.doe.gov* two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

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

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning its tentative conclusion that because no substantive changes have occurred in the market and technology of MHLFs, the conclusion of the October 2021 Final Determination that amending MHLF standards is not cost effective remains valid.

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notification of proposed determination and request for comment.

Signing Authority

This document of the Department of Energy was signed on September 28, 2023, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, 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 28, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–21834 Filed 10–2–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1894; Project Identifier MCAI–2022–00334–R]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.a. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Leonardo S.p.a. Model A109E, A109S, AW109SP, A119, and AW119 MKII helicopters. This proposed AD was prompted by multiple reports of excessive axial play on the ball bearing of the lower half of the main rotor (MR) rotating scissor assembly. This proposed AD would require one-time scissor coupling and axial play inspections and repetitive quantitative axial play inspections and, depending on the results, additional inspections and replacing certain parts. This proposed AD would also require reporting information and prohibit installing certain parts unless certain inspections have been accomplished as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by November 17, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1894; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA material that is identified in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *easa.europa.eu.* You may find the EASA material on the EASA website at *ad.easa.europa.eu.*
- You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. The EASA material is also available at *regulations.gov* under Docket No. FAA–2023–1894.

Other Related Service Information: For Leonardo Helicopters service information identified in this NPRM, contact Leonardo S.p.A Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G. Agusta 520, 21017 C. Costa di Samarate (Va) Italy; telephone (+39) 0331–225074; fax (+39) 0031–229046; or at *customerportal.leonardocompany.com/en-US.* You may also view this service information at the FAA contact information under *Material Incorporated by Reference* above.

FOR FURTHER INFORMATION CONTACT: Jared Hyman, Aviation Safety Engineer, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (781) 238–7799; email *9-AVS-AIR-BACO-COS@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1894; Project Identifier MCAI–2022–00334–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Jared Hyman, Aviation Safety Engineer, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (781) 238–7799; email *9-AVS-AIR-BACO-COS@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2022–0037, dated March 7, 2022, and corrected March 15, 2022 (EASA AD 2022–0037), to correct an unsafe condition for all Leonardo S.p.A Model A109E, A109LUH, A109S, AW109SP, A119, and AW119 MKII helicopters.

This proposed AD was prompted by multiple reports of excessive axial play on the ball bearing of the lower half of the MR rotating scissor assembly. In some cases, this resulted in dislodgement of the ball bearing from its seat. The FAA is proposing this AD to detect and address any excessive axial play of the MR rotating scissor assembly. See EASA AD 2022–0037 for additional background information.

Related Service Information Under 1 CFR Part 51

For certain applicable model helicopters, EASA AD 2022–0037 requires accomplishing one-time MR rotating scissor coupling and axial play checks. Depending on the results, EASA AD 2022–0037 requires repetitively measuring the axial play or replacing certain parts. For all applicable model helicopters, EASA AD 2022–0037 requires accomplishing repetitive qualitative and quantitative axial play

checks and, depending on the results, repetitively measuring the axial play or replacing certain parts. Furthermore, EASA AD 2022–0037 requires reporting certain information to the manufacturer and prohibits installing certain parts on any helicopter unless the part has passed required inspections.

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

Other Related Service Information

The FAA also reviewed Leonardo Helicopters Alert Service Bulletin (ASB) No. 109EP–177, Leonardo Helicopters ASB No. 109S–105, Leonardo Helicopters ASB No. 109SP–149, and Leonardo Helicopters ASB No. 119–111, each Revision A and dated March 3, 2022. This service information specifies procedures for inspecting the MR rotating scissor coupling and axial play, measuring the axial play, inspecting the qualitative axial play, inspecting the quantitative axial play, and replacing components of the MR rotating scissor assembly (scissor bracket flange assembly, rotary scissor sleeve, lower scissor lever assembly, and upper scissor lever assembly) and bushings.

FAA's Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in EASA AD 2022–0037, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this proposed AD and except as discussed under ''Differences Between this Proposed AD and the EASA AD.''

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2022–0037 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2022–0037 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2022–0037 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2022–0037. Service information referenced in EASA AD 2022–0037 for compliance will be available at regulations.gov under Docket No. FAA–2023–1894 after the FAA final rule is published.

Differences Between This Proposed AD and the EASA AD

EASA AD 2022–0037 applies to Model A109LUH helicopters, whereas this proposed AD would not because that model is not FAA-type certificated. EASA AD 2022–0037 refers to several actions as a ''check,'' whereas this proposed AD would refer to those actions as an ''inspection'' instead because those actions must be accomplished by persons authorized under 14 CFR 43.3. EASA AD 2022–0037 requires discarding certain parts, whereas this proposed AD would require removing those parts from service instead.

Service information referenced in EASA AD 2022–0037 specifies to contact Leonardo Helicopters for instructions as a result of certain M/R rotating scissor maximum torque force check (inspection) results, whereas this proposed AD would require accomplishing corrective action in accordance with a method approved by the FAA, EASA, or Leonardo S.p.a. Helicopters' EASA Design Organization Approval. EASA AD 2022–0037 requires interpreting the MR rotating scissor coupling and axial play inspection results (PASSED or FAILED) by using its required service information, whereas this proposed AD would require interpreting those results by using tables in the body of this proposed AD and recorded results of certain inspections. Furthermore, if the scissor coupling inspection result is an ''UNCERTAIN RESULT,'' the service information referenced in EASA AD 2022–0037 specifies contacting Leonardo Helicopters, whereas this proposed AD would consider an ''UNCERTAIN RESULT'' as ''FAILED.''

EASA AD 2022–0037 requires accomplishing repetitive qualitative axial play checks, whereas this proposed AD would not. EASA AD 2022–0037 requires quantitative axial play checks within intervals not to exceed 200 flight hours, whereas this proposed AD would require quantitative axial play inspections within intervals not to exceed 55 hours time-in-service. The service information referenced in EASA AD 2022–0037 cautions that only approved personnel are permitted to perform the bushing replacement, whereas this proposed AD would not include that caution.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 204 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this proposed AD.

The one-time MR rotating scissor coupling and axial play inspections would take about 2 work-hours for an estimated cost of $170 per helicopter and up to $34,680 for the U.S. fleet.

A quantitative axial play inspection would take about 1 work-hour for an estimated cost of $85 per helicopter and $17,340 for the U.S. fleet per inspection cycle.

Measuring the axial play would take about 1 work-hour for an estimated cost of $85 per helicopter and $17,340 for the U.S. fleet per inspection cycle.

Certain corrective action that may be needed as a result of an inspection could vary significantly from helicopter to helicopter. The FAA has no data to determine the costs to accomplish the corrective action or the number of helicopters that may require corrective action.

Replacing the scissor bracket flange assembly would take about 4 work-hours and parts would cost about $8,099–11,574 (depending on part number) for an estimated cost of $8,439–11,914 per replacement. Alternatively, replacing its bushings would take about 2 work-hours and parts would cost about $225 for an estimated cost of $395 per replacement.

Replacing each rotary scissor sleeve would take about 2 work-hours and parts would cost about $565 for an estimated cost of $735 per replacement.

Replacing the lower scissor lever assembly (including the washer and

retaining bolt) would take about 2 work-hours and parts would cost about $3,308–3,385 (depending on part number) for an estimated cost of $3,478–3,555 per replacement. Alternatively, replacing its bushings would take about 2 work-hours and parts would cost about $225 for an estimated cost of $395 per replacement.

Replacing the upper scissor lever assembly would take about 2 work-hours and parts would cost about $2,219–3,015 (depending on part number) for an estimated cost of $2,389–3,185 per replacement. Alternatively, replacing its bushings would take about 2 work-hours and parts would cost about $225 for an estimated cost of $395 per replacement.

Reporting the inspection results to the manufacturer would take about 1 work-hour for an estimated cost of $85 per report.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to take approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Leonardo S.p.a.: Docket No. FAA–2023–1894; Project Identifier MCAI–2022–00334–R.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 17, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Leonardo S.p.a. Model A109E, A109S, AW109SP, A119, and AW119 MKII helicopters, certificated in any category.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6200, Main Rotor System.

(e) Unsafe Condition

This AD was prompted by multiple reports of excessive axial play on the ball bearing of the lower half of the main rotor rotating scissor assembly. The FAA is issuing this AD to detect and address any excessive axial play of the main rotor rotating scissor assembly. The unsafe condition, if not addressed, could result in failure of the main rotor rotating scissor assembly, loss of control of the helicopter, and subsequent damage to the helicopter and injury to occupants.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency AD 2022–0037, dated March 7, 2022, and corrected March 15, 2022 (EASA AD 2022–0037).

(h) Exceptions to EASA AD 2022–0037

(1) Where EASA AD 2022–0037 defines Affected part ''as identified in the ASB;'' for this AD, replace that text with ''as identified in Table 2 of Leonardo Helicopters Alert Service Bulletin (ASB) No. 109EP–177, Leonardo Helicopters ASB No. 109S–105, Leonardo Helicopters ASB No. 109SP–149, or Leonardo Helicopters ASB No. 119–111, each Revision A and dated March 3, 2022, and as applicable to your model helicopter.''

(2) Where EASA AD 2022–0037 requires compliance in terms of flight hours, this AD requires using hours time-in-service.

(3) Where EASA AD 2022–0037 refers to its effective date, this AD requires using the effective date of this AD.

(4) Where EASA AD 2022–0037 refers to a torque force check, this AD requires a torque force inspection. Where EASA AD 2022–0037 refers to a scissor coupling check, this AD requires a scissor coupling inspection. Where EASA AD 2022–0037 refers to an axial play check, this AD requires an axial play inspection. Where EASA AD 2022–0037 refers to a quantitative axial play check, this AD requires a quantitative axial play inspection. Where EASA AD 2022–0037 refers to a dimensional check, this AD requires a dimensional inspection.

(5) Where the service information referenced in EASA AD 2022–0037 specifies

to use tooling, this AD allows the use of equivalent tooling.

(6) Where the service information referenced in EASA AD 2022–0037 specifies discarding parts, this AD requires removing those parts from service.

(7) Where the service information referenced in paragraphs (1), (4.2), (5.2), and (6) of EASA AD 2022–0037 specifies to contact Leonardo Helicopters for instructions as a result of the M/R rotating scissor maximum torque force check, this AD requires corrective action done in accordance with a method approved by the Manager, International Validation Branch, FAA; or EASA; or Leonardo S.p.a. Helicopters' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(8) Where paragraph (1) of EASA AD 2022–0037 specifies to ''interpret the results (PASSED or FAILED) in accordance with the instructions of PART I of the ASB;'' for this AD, replace that text with, ''interpret the results by using Tables 1 and 2 to paragraph (h)(8) of this AD and the inspection results recorded in Annex E of the service information referenced in EASA AD 2022–0037.''

TABLE 1 TO PARAGRAPH (h)(8)—SCISSOR COUPLING INSPECTION INTERPRETATION

Maximum torque force check	Dimensional check	2nd Maximum torque force check	Scissor coupling check outcome
Passed	N/A	N/A	Passed.
Failed	Passed	Passed	Passed.
Failed	Failed	N/A	Failed.
Failed	Passed	Failed	Failed.

TABLE 2 TO PARAGRAPH (h)(8)—AXIAL PLAY INSPECTION INTERPRETATION

Axial play value is 0.25 mm or less	Passed.
Axial play value is more than 0.25 mm or the ball bearing is dislodged	Failed.

(9) This AD does not require compliance with paragraph (2) of EASA AD 2022–0037. This AD also does not include Note 1 of EASA AD 2022–0037.

(10) Where paragraph (3) of EASA AD 2022–0037 specifies compliance times of ''200 FH;'' for this AD, replace each instance of that text with, ''55 hours time-in-service.'' This AD does not include Note 3 of EASA AD 2022–0037.

(11) Where the service information referenced in EASA AD 2022–0037 cautions that only approved personnel (Leonardo Helicopters facilities, Leonardo authorized component repair centers within the approved capabilities or customers trained by Leonardo Helicopters for specific activities) are permitted to perform the bushing replacement; this AD does not include those cautions.

(12) Where paragraph (10) of EASA AD 2022–0037 specifies reporting inspection results (including the inspection results of no findings) to Leonardo within 30 days, this AD requires reporting inspection results at the applicable time in paragraph (h)(12)(i) or (ii) of this AD.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(13) This AD does not adopt the ''Remarks'' section of EASA AD 2022–0037.

(i) Special Flight Permit

Special flight permits are prohibited.

(j) Alternative Methods of Compliance (AMOCs)

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

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Additional Information

For more information about this AD, contact Jared Hyman, Aviation Safety Engineer, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (781) 238–7799; email *9-AVS-AIR-BACO-COS@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2022–0037, dated March 7, 2022, and corrected March 15, 2022.

(ii) [Reserved]

(3) For EASA AD 2022–0037, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *easa.europa.eu.* You may find the EASA material on the EASA website at *ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on September 26, 2023.

Victor Wicklund,

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

[FR Doc. 2023–21636 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1891; Project Identifier AD–2023–00612–R]

RIN 2120–AA64

Airworthiness Directives; Centerpointe Aerospace Inc. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Centerpointe Aerospace Inc. (Centerpointe) Model S–58BT, S–58DT, S–58ET, S–58FT, S–58HT, and S–58JT helicopters. This proposed AD was prompted by an indication of a crack on the angle gearbox mount (AGBM). This proposed AD would require repetitively performing a fluorescent penetrant inspection (FPI) and depending on the results, removing the AGBM from service. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by November 17, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–1891; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For Centerpointe service information identified in this NPRM, contact Centerpointe Aerospace Inc. at 279 Blackland Road, Fate, TX 75189; (972) 636–9601; email *Operations@avnresources.com; https://www.californiahelicopter.com.*
- You may view this service information at the FAA, Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Jacob Fitch, Aviation Safety Engineer, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: (817) 222–4130; email: *jacob.fitch@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–1891; Project Identifier AD–2023–00612–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Jacob Fitch, Aviation Safety Engineer, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: (817) 222–4130; email: *jacob.fitch@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA proposes to adopt a new AD for all Centerpointe Model S–58BT, S–58DT, S–58ET, S–58FT, S–58HT, and S–58JT helicopters. During a preflight inspection, fatigue cracking was found on a Model S–58BT helicopter in the angle supports and cross-members forming the edges of the AGBM. Due to their similarity to the Model S–58BT helicopter, the FAA has determined that Centerpointe Model S–58DT, S–58ET, S–58FT, S–58HT, and S–58JT helicopters are also affected by the same unsafe condition. This condition, if not addressed, could result in loss of the angle gearbox, resulting in loss of main rotor drive and subsequent loss of control of the helicopter.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Centerpointe Aerospace Service Bulletin No. 58B75, dated April 26, 2023. This service information specifies procedures for repetitively performing an FPI and reporting the results to the manufacturer. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require repetitive FPIs of the AGBM for a crack, as specified in the service information already described, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' This proposed AD would also require removing any cracked AGBM from service before further flight.

Differences Between This Proposed AD and the Service Information

Where the service information specifies that the initial FPI be performed within 120 days after receipt of the service information, this proposed AD would require the initial FPI to be performed within 250 hours time-in-service. The service information specifies reporting the results of the FPI to the manufacturer, whereas this proposed AD would not.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 14 helicopters of U.S. registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this proposed AD.

Performing an FPI of the AGBM would take about 5 work-hours and parts cost $150 for an estimated cost of $575 per helicopter, and $8,050 for the U.S. fleet, per inspection.

If necessary, replacing an AGBM would take about 41 work-hours and the parts cost would be $30,000 for an estimated cost of $33,485 per helicopter.

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Centerpointe Aerospace Inc.: Docket No. FAA–2023–1891; Project Identifier AD–2023–00612–R.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 17, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Centerpointe Aerospace Inc, Model S–58BT, S–58DT, S–58ET, S–58FT, S–58HT, and S–58JT helicopters, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 6300, Main Rotor Drive System.

(e) Unsafe Condition

This AD was prompted by the discovery of a fatigue crack on the angle gearbox mount (AGBM). The FAA is issuing this AD to detect fatigue cracking of the AGBM. The unsafe condition, if not addressed, could lead to loss of the angle gearbox, resulting in loss of main rotor drive and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

(1) Within 250 hours time-in-service (TIS) after the effective date of this AD, and thereafter at intervals not to exceed 250 hours TIS, perform a fluorescent penetrant inspection (FPI) to inspect for any crack on the AGBM in the eight areas depicted in the Accomplishment Instructions, Figures 1A and 1B, of Centerpointe Aerospace Service Bulletin No. 58B75, dated April 26, 2023. This FPI must be accomplished by a Level II or Level III inspector certified in the FAA-acceptable standards for nondestructive inspection personnel.

(2) If there is any crack, before further flight, remove the AGBM from service.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Central Certification Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i) of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Additional Information

Jacob Fitch, Aviation Safety Engineer, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; phone: (817) 222–4130; email: *jacob.fitch@faa.gov.*

(j) Material Incorporated by Reference

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

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

(i) Centerpointe Aerospace Service Bulletin No. 58B75, dated April 26, 2023.

(ii) [Reserved]

(3) For Centerpointe service information identified in this NPRM, contact Centerpointe Aerospace Inc. at 279 Blackland Road, Fate, TX 75189; (972) 636–9601; email *Operations@avnresources.com; https://www.californiahelicopter.com.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on September 22, 2023.

Victor Wicklund,

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

[FR Doc. 2023–21684 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1957; Airspace Docket No. 23–AAL–28RIN 2120–AA66]

Amendment of Jet Route J–133 and Establishment of Area Navigation Route Q–801 in the Vicinity of Anchorage, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Jet Route J–133 by revoking a portion of the airway and establishing Canadian Area Navigation Route (RNAV) Q–801 in the vicinity of Anchorage, AK. The proposed amendment of J–133 is due to the pending decommissioning of several Navigational Aids (NAVAID) that provide course guidance along the airway. The proposed establishment of RNAV route Q–801 serves as a mitigation to J–133 and provides additional routing to the southeast for aircraft traveling to Canada or to the Pacific Northwest United States.

DATES: Comments must be received on or before November 17, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1957 and Airspace Docket No. 23–AAL–28 using any of the following methods:

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

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

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

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

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

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

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

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

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

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Western Service Center, Federal Aviation Administration, 2200 South 216th St., Des Moines, WA 98198.

Incorporation by Reference

Jet Routes are published in paragraph 2004 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. Canadian Area Navigation Routes are published in paragraph 2007 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

Background

In 2003, Congress enacted the Vision 100-Century of Aviation Reauthorization Act (Pub. L. 108–176), which established a joint planning and development office in the FAA to manage the work related to the Next Generation Air Transportation System (NextGen). Today, NextGen is an ongoing FAA-led modernization of the nation's air transportation system to make flying safer, more efficient, and more predictable.

In support of NextGen, this proposal is part of an ongoing, large, and comprehensive airway modernization project in the state of Alaska. Part of this project is to transition the Alaskan en route navigation structure away from dependency on Nondirectional Radio Beacons (NDB) and move to develop and improve the RNAV route structure. The FAA is planning to decommission the Orca Bay, Yakataga, and Sitka NDBs in the state of Alaska. As a result, portions of Jet Route J–133 will become unusable.

The FAA proposes to amend Jet Route J–133 by revoking the portion between the Anchorage, AK, Very High Frequency Omnidirectional Range/Distance Measuring Equipment (VOR/DME) and the Sitka, AK, NDB. This portion of J–133 would be replaced by the proposed RNAV route Q–801. Q–801 would extend between Anchorage, AK, VOR/DME and HARPR, OR, waypoint (WP).

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to amend Jet Route J–133 and to establish Canadian RNAV route Q–801 in United States airspace.

NAV CANADA is amending RNAV route Q–801 in their airspace to ensure continuity and cross-border connectivity with the new RNAV route Q–801 proposed in this NPRM. The proposed Air Traffic Service (ATS) route actions are described below.

J–133: Jet route J–133 currently extends between Galena, AK, VOR/DME and Sitka, AK, NDB. The FAA proposes to revoke the portion between the Anchorage, AK, VOR/DME and the Sitka, AK, NDB. As amended, Jet route J–133 would extend between Galena, AK, VOR/DME and Anchorage, AK, VOR/DME.

Q–801: Q–801 would extend between the Anchorage, AK, VOR/DME and the HARPR, OR, WP. The new route would remain within United States airspace between the Anchorage VOR/DME and the EEVER, AK, Fix and between the CYVIC, WA, WP and the HARPR WP. The new EEVER route point is being established on the Alaska/Canada border north of the MOCHA, AK, Fix. The new CYVIC route point is being established on the United States/Canada border in Washington state replacing, the CFPXC computer navigation fix (CNF) currently charted. This action is part of an ongoing FAA initiative to replace CNF and unpronounceable border fix/waypoint names with standard, pronounceable, five-letter names. This proposed action would establish RNAV route Q–801 within the United States and exclude the airspace in Canada.

Regulatory Notices and Analyses

The FAA has determined that this proposed 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. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 2004 Jet Routes

* * * * *

J–133 [Amended]

From Galena, AK to Anchorage, AK.

* * * * *

Paragraph 2007 Canadian Area Navigation Routes.

Q–801 HARPR, OR to Anchorage, AK (TED) [NEW]

HARPR, OR	WP	(Lat. 42°28′50.00″ N, long. 122°53′01.54″ W)
FELIX, OR	WP	(Lat. 43°19′13.98″ N, long. 123°05′39.51″ W)
ECTOF, OR	WP	(Lat. 44°10′49.55″ N, long. 123°18′57.87″ W)
WAPTO, WA	FIX	(Lat. 47°28′19.54″ N, long. 124°13′50.38″ W)
Tatoosh, WA (TOU)	VORTAC	(Lat. 48°17′59.64″ N, long. 124°37′37.36″ W)
CYVIC, WA	WP	(Lat. 48°29′59.97″ N, long. 124°54′39.80″ W)
GOVAD, Canada	FIX	(Lat. 49°02′48.65″ N, long. 125°42′15.09″ W)
FINGS, Canada	FIX	(Lat. 50°15′00.00″ N, long. 127°34′00.00″ W)
SIMSU, Canada	FIX	(Lat. 50°46′56.00″ N, long. 128°25′37.00″ W)
CAFTA, Canada	FIX	(Lat. 51°17′43.00″ N, long. 129°05′19.00″ W)
EEVER, AK	FIX	(Lat. 54°35′01.79″ N, long. 133°05′54.23″ W)
MACIE, AK	WP	(Lat. 57°43′38.87″ N, long. 137°50′47.74″ W)
LAIRE, AK	FIX	(Lat. 58°48′14.67″ N, long. 140°31′43.36″ W)
FROZN, AK	WP	(Lat. 59°40′34.90″ N, long. 143°29′31.48″ W)
Johnstone Point, AK (JOH)	VOR/DME	(Lat. 60°28′51.43″ N, long. 146°35′57.61″ W)
Anchorage, AK (TED)	VOR/DME	(Lat. 61°10′04.32″ N, long. 149°57′36.52″ W)

* * * * *

Issued in Washington, DC, on September 28, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–21811 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 809

[Docket No. FDA–2023–N–2177]

RIN 0910–AI85

Medical Devices; Laboratory Developed Tests

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is proposing to amend its regulations to make explicit that in vitro diagnostic products (IVDs) are devices under the Federal Food, Drug, and Cosmetic Act (FD&C Act) including when the manufacturer of the IVD is a laboratory. In conjunction with this amendment, FDA is proposing a policy under which FDA intends to phase out its general enforcement discretion approach for laboratory developed tests

(LDTs) so that IVDs manufactured by a laboratory would generally fall under the same enforcement approach as other IVDs. FDA is proposing this phaseout to better protect the public health by helping to assure the safety and effectiveness of LDTs. If finalized, this phaseout may also foster the manufacturing of innovative IVDs for which FDA has determined there is a reasonable assurance of safety and effectiveness.

DATES: Either electronic or written comments on the proposed rule must be submitted by December 4, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of December 4, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2023–N–2177 for ''Medical Devices; Laboratory Developed Tests.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Toby Lowe, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–6512, *LDTProposedRule@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

A. Purpose of the Proposed Rule

FDA is proposing to amend its regulations to make explicit that IVDs are devices under the FD&C Act including when the manufacturer of the IVD is a laboratory. This amendment would reflect that the device definition in the FD&C Act does not differentiate between entities manufacturing the device, and would provide further clarity, including for stakeholders affected by the accompanying changes to FDA's general enforcement discretion approach for LDTs. In connection with amending the regulation, FDA intends to phase out its general enforcement discretion approach for LDTs so that IVDs manufactured by a laboratory would generally fall under the same enforcement approach as other IVDs. For purposes of this document, we use ''manufacture'' and related terms as a shorthand for the various activities that constitute manufacturing as described in FDA regulations (*e.g.,* design,

preparation, propagation, assembly, and processing).

In 1976, the Medical Device Amendments of 1976 (the MDA) amended the FD&C Act to create a comprehensive system for the regulation of devices intended for human use. In implementing the MDA, FDA has generally exercised enforcement discretion such that it generally has not enforced applicable requirements with respect to most LDTs. Enforcement discretion for LDTs developed as a matter of general practice. However, the risks associated with LDTs are much greater today than they were at the time of enactment of the MDA. As discussed more fully in section III.B, today's LDTs are generally, among other things, used more widely, by a more diverse population, with an increasing reliance on high-tech instrumentation and software, and more frequently for the purpose of guiding critical healthcare decisions. In this regard, today's LDTs are similar to other IVDs that have not been under this general enforcement discretion approach. Given these changes, and for the additional reasons discussed in section III.B, phasing out the general enforcement discretion approach for LDTs is important to protect the public health. The phaseout of FDA's general enforcement discretion approach for LDTs is intended to help assure the safety and effectiveness of LDTs, and may also foster the manufacturing of innovative IVDs for which FDA has determined there is a reasonable assurance of safety and effectiveness.

B. Summary of the Major Provisions of the Proposed Rule

This rulemaking would amend the definition of ''in vitro diagnostic products'' in FDA regulations to state that IVDs are devices under the FD&C Act ''including when the manufacturer of these products is a laboratory.'' In conjunction with this amendment, FDA is also proposing a policy under which FDA intends to phase out its general enforcement discretion approach for LDTs so that IVDs manufactured by a laboratory would generally fall under the same enforcement approach as other IVDs. Additional details regarding the proposed phaseout policy are discussed further in section VI.

C. Legal Authority

FDA is proposing to issue this rule under the Agency's general rulemaking authorities and statutory authorities relating to devices. These authorities include sections 201(h)(1), 301, 501, 502, 510, 513, 514, 515, 518, 519, 520, 701, 702, 704, and 801 of the FD&C Act (21 U.S.C. 321(h)(1), 331, 351, 352, 360, 360c, 360d, 360e, 360h, 360i, 360j, 371, 372, 374, and 381).

D. Costs and Benefits

We quantify benefits to patients from averted health losses due to problematic IVDs offered as LDTs.[1] Due to limitations in the data, we quantify health benefits only with respect to IVDs for certain diseases and conditions; however, we would expect additional health benefits associated with averted health losses for other diseases and conditions. We estimate that the annualized benefits over 20 years would range from $2.67 billion to $86.01 billion at a 7 percent discount rate, with a primary estimate of $31.41 billion, and from $1.81 billion to $61.41 billion at a 3 percent discount rate, with a primary estimate of $22.33 billion. Additional benefits would include averted non-health losses from the quantified reduction in costs of problematic IVDs offered as LDTs and unquantified reduction in costs from lawsuits and costs to healthcare systems. We quantify costs to affected laboratories for complying with applicable statutory and regulatory requirements. Additional costs would include some costs to FDA, which we include in our estimates. The annualized costs would range from $2.52 billion to $19.45 billion at a 7 percent discount rate, with a primary estimate of $5.87 billion, and from $2.39 billion to $18.55 billion at a 3 percent discount rate, with a primary estimate of $5.60 billion. The annualized transfers [2] would range from $100 million to $452 million at a 7 percent discount rate, with a primary estimate of $226 million, and from $121 million to $538 million at a 3 percent discount rate, with a primary estimate of $269 million. The annualized costs to FDA would range from $265 million to $1.06 billion at a 7 percent discount rate, with a primary estimate of $530 million, and from $251 million to $1.00 billion at a 3 percent discount rate, with a primary estimate of $501 million. These estimates do not include anticipated offsets from user fees. Factoring in offsets from user fees at current levels, estimated costs to FDA are reduced to $165 million to $607 million at a 7 percent discount rate, with a primary estimate of $304 million, and to $103 million to $465 million at a 7 percent discount rate, with a primary estimate of $233 million, covering approximately half of the estimated costs to FDA.

II. Table of Abbreviations/Commonly Used Acronyms in This Document

Abbreviation/acronym	What it means
510(k)	Premarket Notification.
AMC	Academic Medical Center.
ASR	Analyte Specific Reagent.
CFR	Code of Federal Regulations.
CGMP	Current Good Manufacturing Practice.
CLIA	Clinical Laboratory Improvement Amendments of 1988.
CMS	Centers for Medicare & Medicaid Services.
EUA	Emergency Use Authorization.
FDA	Food and Drug Administration.
FD&C Act	Federal Food, Drug, and Cosmetic Act.
HCT/Ps	Human Cells, Tissues, and Cellular and Tissue-Based Products.
HLA	Human Leukocyte Antigen.
IDE	Investigational Device Exemption.
IVD	In Vitro Diagnostic Product.
IVDMIA	In Vitro Diagnostic Multivariate Index Assay.
LDT	Laboratory Developed Test.

[1] See discussion of ''IVDs offered as LDTs'' in section VI.A below.

[2] This proposed rule would result in compliance costs for laboratories that are ensuring their IVDs offered as LDTs are compliant with applicable statutory and regulatory requirements. These costs overlap somewhat with effects associated with this rule in the form of user fees including annual registration fees, fees for premarket submissions, and annual fees for periodic PMA reporting, which are paid from laboratories to FDA. These fees are paid by laboratories but are considered revenue for FDA. The approach to estimating fee effects is distinct from the approaches for either benefits or costs, so they will be presented as transfers.

Abbreviation/acronym	What it means
MDA	Medical Device Amendments of 1976.
MDR	Medical Device Report.
MDUFA	Medical Device User Fee Amendments.
NIPS	Non-Invasive Prenatal Screening.
PMA	Premarket Approval Application.
QS	Quality System.

III. Background

A. Introduction

FDA's regulations define IVDs as reagents, instruments, and systems intended for use in the diagnosis of disease or other conditions, including a determination of the state of health, in order to cure, mitigate, treat, or prevent disease or its sequelae, and intended for use in the collection, preparation, and examination of specimens taken from the human body. IVDs include test systems (also referred to in this preamble as ''tests'') that are performed on samples taken from the human body, such as blood or tissue, for the purpose of detecting diseases or other conditions, monitoring a person's overall health, identifying patients who are likely to benefit from specific therapies, or otherwise helping to diagnose, cure, mitigate, treat, or prevent disease or its sequelae. Some IVDs are manufactured by conventional manufacturers for use by other entities such as laboratories, healthcare providers, or, in some cases, patients. Such IVDs may include ''test kits,'' containing packaged sets of components that are part of or comprise a test system. Other IVDs are manufactured by laboratories for use by the same or other laboratories. Such IVDs include LDTs. FDA has generally considered an LDT to be an IVD that is intended for clinical use and that is designed, manufactured, and used within a single laboratory that is certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA) and meets the regulatory requirements under CLIA to perform high complexity testing. Section V.B sets forth the legal reasoning for FDA's position that IVDs manufactured by laboratories, including LDTs, are devices.

However, in implementing the MDA, FDA generally has exercised enforcement discretion such that it generally has not enforced applicable requirements with respect to most LDTs. At the time of passage of the MDA, LDTs were mostly manufactured in small volumes by laboratories that served their local communities. They were typically intended for use in diagnosing rare diseases or for other uses to meet the needs of a local patient population, or were generally similar to well-characterized, standard tests. They also tended to employ manual techniques (and did not use automation) performed by laboratory personnel with specialized expertise; to be used and interpreted by physicians or pathologists in a single institution responsible for the patient (and who were actively involved in patient care); and to be manufactured using components legally marketed for clinical use, such as general purpose reagents or immunohistochemical stains marketed in compliance with FDA regulatory requirements. Due to these and other factors, FDA generally exercised enforcement discretion such that it generally has not enforced applicable requirements for most LDTs.[3]

However, the LDT landscape has evolved significantly since 1976. Today, many LDTs rely on high-tech or complex instrumentation and software to generate results and clinical interpretations. They are often used in laboratories outside of the patient's healthcare setting and are often manufactured in high volume for large and diverse populations. Many LDTs are manufactured by laboratory corporations that market the tests nationwide, as they accept specimens from patients across the country and run their LDTs in very large volumes in a single laboratory. Today's LDTs are also more commonly manufactured with instruments or other components not legally marketed for clinical use and are more often used to inform or direct critical treatment decisions, to widely screen for common diseases, to predict personal risk of developing certain diseases, and to diagnose serious medical conditions such as cancer and heart disease.[4] The risks associated with most modern LDTs are therefore much greater today than they were at the time FDA began implementing the MDA, and most LDTs today are similar to other IVDs that have not been under FDA's general enforcement discretion approach. In addition, FDA is concerned that firms are offering IVDs as ''LDTs'' even when they are not LDTs, because they are not actually designed, manufactured, and used within a single laboratory (*see, e.g.,* Refs. 4 and 5).

As a result of this evolution in the testing landscape, FDA has long recognized the need for a change in the Agency's general enforcement discretion approach for LDTs. The history of FDA's efforts with respect to LDTs is set forth in the ''History of the Rulemaking'' section below (section III.D). Over the past few years, FDA has accumulated even more information supporting the need for a change, as discussed below. In light of these developments, FDA is proposing to amend FDA's regulations to make explicit that IVDs are devices under the FD&C Act including when the manufacturer is a laboratory.[5] FDA is also proposing a policy under which FDA intends to phase out FDA's general enforcement discretion approach for LDTs so that IVDs manufactured by a laboratory would generally fall under the same enforcement approach as other IVDs.

B. Need for the Rule

FDA is proposing a policy under which FDA intends to phase out the general enforcement discretion approach for LDTs because that approach has led to an oversight scheme that does not best serve the public health. LDTs that are under the general enforcement discretion approach are treated differently from other IVDs. However, there is no longer a sound basis for this distinction. In FDA's experience, including with COVID–19 tests and IVDs that are offered as LDTs after FDA's approval of a comparable companion diagnostic, many test systems made by laboratories today are functionally the same as those made by other manufacturers of IVDs. They

[3] Although FDA's general enforcement discretion approach continues today, it does not apply to LDTs in all contexts; for example, it does not apply to, among other LDTs, those used for declared emergencies/potential emergencies/material threats under section 564 of the FD&C Act (21 U.S.C. 360bbb–3).

[4] *See, e.g.,* Refs. 1 to 3. These observations are also informed by FDA's own experience, including the review of submissions and site visits, and staff with prior experience in the laboratory industry developing and running LDTs.

[5] As discussed further in section V, FDA is also proposing to amend the statutory citation for the device definition included in § 809.3 (21 CFR 809.3) to reflect that it is now codified at section 201(h)(1) of the FD&C Act (21 U.S.C. 321(h)(1)).

involve the same materials and technologies, are intended for the same or similar purposes, are developed by and for individuals with similar expertise, and are marketed to the same patients, sometimes on a national scale. For these reasons, tests made by laboratories are often used interchangeably by healthcare providers and patients with tests made by other manufacturers. In fact, today, the testing industry has come to view FDA's general enforcement discretion approach as an alternative pathway to market for test systems, such that test systems are often ''launched as LDTs'' with no assurance that they meet requirements under the FD&C Act and its implementing regulations (see, *e.g.,* Refs. 6 and 7).[6] These tests lack the characteristics and institutional safeguards that originally justified FDA's general enforcement discretion approach, as discussed above, and may directly compete with FDA-authorized kit-based test systems. FDA views this bifurcated system of oversight as untenable and inconsistent with FDA's public health mission.

The proposed phaseout of FDA's general enforcement discretion approach is designed to redress the imbalance in oversight and protect the public health. Diagnostic testing is a cornerstone of modern medicine; CDC estimates that 70 percent of medical decisions are based on laboratory test results (Ref. 8). IVDs offered as LDTs are a growing sector of that market (Ref. 1). Moreover, these tests are proliferating in some of the most complicated and sensitive areas of medical practice, where the presence of a valid test can be most important.

As the testing landscape has evolved, information about these tests in the scientific literature, news articles, and anecdotal reports submitted to the Agency, among other sources, has exposed evidence of problems associated with these tests. This evidence is discussed in more detail below. Particularly over the last few years, this evidence has been growing and likely does not reflect the full scale of the problems. (Until FDA systematically collects information on these tests, such as adverse event reports, it will not be able to assess more fully the extent of the risks to patients in the manner it does for other devices.) Based on current safety signals, FDA is proposing to phase out the general enforcement discretion approach to help assure that patients are receiving accurate and reliable diagnostic test results regardless of where the tests are made.

1. IVDs Offered as LDTs Have a Significant Impact on Modern Medical Care

Today, IVDs offered as LDTs are ubiquitous, and are intended to diagnose a broad range of diseases and conditions (see Ref. 2). In many cases, these IVDs are meant for use in complex areas of medicine involving life-threatening diseases, such as cancer, neurological diseases, cardiovascular illness, infectious diseases, and rare diseases. They can proliferate in areas where diagnosis is difficult, and the healthcare community has few points of reference for determining test validity. Sometimes, they use complex algorithms to calculate ''scores'' for diagnosis with little transparency to the user about the basis for these algorithms. Increasingly, these IVDs are intended to inform drug treatment, directing physicians to choose certain drugs based on a patient's genetic or other information. FDA has witnessed an explosion in the volume, complexity, and scope of IVDs offered as LDTs for use in determining cancer treatments,[7] and as discussed below, news coverage, including as recently as this year, has drawn attention to the use of IVDs offered as LDTs for non-invasive prenatal screening (NIPS), which evaluate fetal DNA circulating in a pregnant individual's blood. In general, IVDs offered as LDTs are occupying a growing share of the testing market and are used in some of the most complex areas of medicine (*see, e.g.,* Refs. 1 and 2).

Given the role these IVDs play in modern medical care, their validity has a significant impact on the public health. False positive test results, which erroneously indicate that a patient has a certain disease or condition, can delay diagnosis and treatment of the true disease or condition, lead to unwarranted interventions, and cause needless distress. Interventions may involve medication with serious side effects or risky medical procedures. False negative results can lead to progression of disease, in some cases without the opportunity for life-saving treatment, and the spread of infectious disease. The harms to patients from false positive and negative results can be significant. For example, the application of an ineffective oncology treatment due to a false positive for a patient already weakened from disease, or the failure to receive a life-saving medication due to a false negative, can be fatal. These false results can stem from an analytical error or from a lack of clinical validity where a measured result is incorrectly associated with a particular clinical state. Flaws in a test's algorithm can mean the difference in whether a patient with cancer receives a beneficial immunotherapy. Pregnant people may use screening tests to make decisions without obtaining appropriate confirmatory testing. In 2016, FDA learned of a false positive result from a genetic test for long QT syndrome (a heart signaling disorder) that led to the erroneous implantation of a defibrillator in a healthy individual. In addition to the risks associated with the implantation procedure, the defibrillator delivered inappropriate shocks to the patient, which posed the risk of sudden cardiac death (Refs. 9 and 10). These are just a few examples of how diagnostic tests can and do have significant long-term consequences for patients.

2. Current Information Raises Serious Questions About Whether Patients Can Rely on IVDs Offered as LDTs

FDA has highlighted the risks associated with IVDs offered as LDTs for decades, and our concerns have grown in recent years. As described in the ''History of the Rulemaking'' section, we first took steps to address the issue in the late 1990s, followed by a series of different proposed strategies for increasing oversight. In 2015, the Agency published a report of 20 case studies involving inaccurate, unsafe, ineffective, or poor quality LDTs that caused or may have caused patient harm (''2015 Report'') (Ref. 11). More recent evidence suggests that the situation is getting worse. This evidence cuts across test types and laboratories and is from a variety of sources, including published studies in the scientific literature, allegations of problematic tests reported to FDA, FDA's own experience in reviewing IVDs offered as LDTs, news articles, and class-action lawsuits. Overall, the evidence points to fundamental uncertainty in the marketplace about whether IVDs offered as LDTs provide accurate and reliable results.

Scientific literature is one source of evidence. Over time, FDA has become aware of various publications that describe problems with IVDs offered as LDTs. In the past 3 years, four different studies have documented high variability in performance among these IVDs (Refs. 12 to 15). In one study, the

[6] The references cited are examples of the described practice. Their inclusion does not represent FDA support for or approval of the activities described.

[7] FDA has initiated a pilot program for certain oncology diagnostics as one step that may be helpful in reducing the risks associated with using certain LDTs to identify cancer biomarkers (see 88 FR 40273 (June 21, 2023)).

same samples were sent to 19 laboratories for testing using their own manufactured test and only 7 of those laboratories correctly reported all results (Ref. 12). For almost half of the tests studied, analytical accuracy was significantly lower than that of the parallel test approved by FDA. In another study, researchers sent identical samples to two different laboratories to detect tumor mutations and found over 70 percent discordance in the results from their tests (Ref. 13). A study by Friends of Cancer Research found substantial variability among tumor mutational burden (TMB) tests manufactured by laboratories and used to identify patients with cancer most likely to benefit from immunotherapy (Ref. 14). A fourth study highlighted validity concerns specific to early cancer detection tests, including one IVD offered as an LDT that delivered nine false positive results for every true cancer diagnosis (Ref. 15). An article published earlier this year detailed an oncologist's experience with false results from an unapproved blood-based multi-cancer early detection IVD offered as an LDT and intended to screen for more than 50 types of cancer (Ref. 16). A 2016 study published in the *New England Journal of Medicine* reported false positive results from genetic IVDs offered as LDTs for hypertrophic cardiomyopathy in multiple patients of African American descent (Ref. 17). These studies do not mean that every laboratory is manufacturing bad tests or that no patient can rely on IVDs offered as LDTs. Instead, they reflect a level of variability, including the potential for inaccurate or incomplete results, that highlights the need for changes to the basic oversight scheme.

FDA's own experience has reinforced concerns regarding IVDs offered as LDTs. FDA has gathered information about IVDs offered as LDTs through its review of submissions. Although the Agency generally has not enforced requirements for LDTs, it has received premarket submissions from some laboratories seeking authorization for their tests. We have received numerous submissions for such tests, including premarket review submissions,[8] Q-submissions,[9] and investigational use submissions for IVDs offered as LDTs, as well as many emergency use authorization (EUA) requests from laboratories (which are discussed further below). FDA's review of these submissions has provided insight into laboratory test development and, in some cases, revealed significant concerns. For example, FDA has observed that many laboratories fail to perform appropriate or adequate validation studies, have data demonstrating their test does not work as intended but offer the test anyway, or use instruments and other components that are not adequately controlled for clinical use. The tests described in these submissions have been intended for a range of diseases or conditions, some of which are very serious. FDA has received submissions for IVDs offered as LDTs to diagnose Alzheimer's disease, predict heart disease risk, diagnose Fabry disease (a rare neurological disorder), and inform treatment considerations for a rare blood cancer, all of which lacked adequate validation to support authorization.

In addition, given that FDA's general enforcement discretion approach for LDTs has not applied to IVDs for emergency use (though FDA has issued enforcement policies for such IVDs during specific emergencies, as explained elsewhere in this preamble), FDA has received EUA requests for tests from laboratories, including many for COVID–19 diagnostics. Of the first 125 EUA requests for COVID–19 molecular diagnostic tests submitted from laboratories, 82 showed test design or validation problems (Ref. 18). In one case, the approach to validation was so poor that when redone correctly, there was a 400-fold difference in performance, leading the laboratory to take the test off the market. In another example, an academic medical center (AMC) laboratory purported to validate its test with only 12 positive samples, showing perfect performance. FDA requested evaluation of additional specimens to confirm. When an additional 12 samples were evaluated, the cumulative performance revealed an unacceptably high false negative rate, where the test identified only 71 percent of known positive specimens as positive and falsely identified 29 percent of known positive samples as negative, and the EUA request was withdrawn. In addition, multiple laboratories that offered their tests as described in FDA's COVID–19 test guidance (see discussion in Ref. 19) did not provide any analytical and/or clinical validation data in the EUA requests that they submitted after the tests were in use. This experience provided a window into the approach that many laboratories may take to test validation, and not only confirmed but increased FDA's concerns about the validation of IVDs offered as LDTs. The experience also showed that even tests involving relatively well-understood techniques (here, the polymerase chain reaction, or PCR, technique) may not perform well. In all, test performance seen in this subset of submissions from laboratories was far worse than we expected. To the extent that this sample represents larger trends in the performance of IVDs offered as LDTs, it underscores the need for greater FDA oversight.

FDA has also received multiple complaints, adverse event reports, and other allegations identifying problems with IVDs offered as LDTs.[10] One complaint alleged that an IVD offered as an LDT to diagnose autism had insufficient clinical validation to support this use. In another complaint, an informant alleged that a laboratory was forging results when its liquid biopsy test did not work. Additionally, FDA has received multiple voluntary medical device reports (primarily from patients) of inaccurate NIPS test results, as well as inaccurate results from an oncology IVD offered as an LDT that predicts risk of breast cancer recurrence and informs the decision to pursue chemotherapy, both of which can pose serious, irreversible harm to patients. Another report described a false negative result from a BRCA test marketed to predict one's risk of breast cancer. The patient was later diagnosed with breast cancer and found to be BRCA1 positive by another test. A separate report from a healthcare provider described a different patient that received discrepant results from testing with this BRCA test and with another IVD offered as an LDT for hereditary cancer risk prediction. In yet another report, a patient described a false positive breast cancer result from an oncology blood IVD offered as an LDT and that led to invasive followup procedures, emotional anguish, and unnecessary monetary expenses. FDA also received a report regarding a blood-based test for lung cancer that underestimated cancer in about 40 percent of patients. Additionally, FDA has received medical device reports

[8] These submissions have been for a wide variety of indications, including tests intended to detect nucleic acids from viruses associated with head and neck cancers; to identify patients with obesity due to rare genetic conditions to inform treatment eligibility; to aid in the management of therapy for patients taking certain anticoagulants; and tests for breast cancer prognosis, tumor profiling, and treatment selection, for patients with cancer.

[9] For discussion of FDA's Q-submission program, see FDA's guidance document issued on June 2, 2023, entitled ''Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submissions Program,'' available at *https://www.fda.gov/media/114034/download.*

[10] FDA has not confirmed the veracity of the allegations or facts in every complaint, report, and allegation. Nevertheless, collectively this information points to potential problems among IVDs offered as LDTs.

regarding infectious disease genetic IVDs offered as LDTs without validation, from which inaccurate results could lead to limb loss or women's health issues, and regarding inaccurate results from an IVD offered as an LDT to assess medication adherence. As noted above, collectively, this information, though anecdotal, points to potential problems among IVDs offered as LDTs, the scope and scale of which FDA cannot fully assess or address without phasing out the general enforcement discretion approach for applicable requirements (such as adverse event reporting).

Aside from the scientific community and FDA, the general public is coming to recognize concerns with the current scheme, in which most LDTs are generally not overseen by FDA. General news sources and other outlets have reported on such concerns (see, *e.g.,* Refs. 20 to 26). For example, the *New York Times* recently conducted an indepth investigation into NIPS tests and found that positive results from the tests are incorrect about 85 percent of the time (Ref. 22). NIPS tests are screening tests, so they should be followed up with confirmatory diagnostic testing, but the *New York Times* article reported that patients and healthcare providers are making healthcare decisions based on results from these screening tests alone due to manufacturers' marketing claims. A device whose labeling is false or misleading in any particular manner is misbranded under the FD&C Act; however, under the general enforcement discretion approach, FDA generally has not enforced this proscription for IVDs offered as LDTs. As another example, *ProPublica* reported on a COVID–19 test offered by a laboratory under contract with a university without EUA authorization from FDA, which, according to the report, missed 96 percent of the positive cases from the university campus, and routinely sent people infected with COVID–19 back into the community (Ref. 26). In addition, consumers, shareholders, and investors are filing lawsuits against laboratory manufacturers for false and misleading statements about test efficacy, including lawsuits related to pharmacogenetic tests (genetic tests intended to inform drug selection) and NIPS (see, *e.g.,* Complaint, *In re Myriad Genetics, Inc. Sec. Litig.,* No. 2:19–cv–00707–PMW (D. Utah 2019); Complaint, *Hickok* v. *Capone,* No. 2021–0686 (Del. Ch. 2021); Complaint, *Davis* v. *Natera, Inc.,* No. 3:22–cv–00985 (N.D. Cal. 2022); Complaint, *Carroll* v. *Myriad Genetics Inc.,* No. 4:22–CV–00739 (N.D. Cal. 2022); *Biesterfeld* v. *Ariosa Diagnostics, Inc.,* No. 1:21–CV–03085, 2022 WL 972281 (N.D. Ill. 2022); and Complaint, *Kogus* v. *Capone,* No. 2022–0047–SG (Del. Ch. 2022)). The overall picture presented by this evidence indicates that a change in oversight is needed to better assure the safety and effectiveness of IVDs offered as LDTs.

3. Greater FDA Oversight is Needed To Protect the Public Health

As described above, the evidence FDA has collected points to flaws in laboratory manufacturing of tests that need to be addressed to protect the public. Greater oversight by FDA would help address these flaws.

In the past, FDA has communicated with the public when it is particularly concerned about a type of IVD offered as an LDT. For example, in addition to the 2015 Report, FDA has issued safety communications about pharmacogenetic tests, NIPS tests, ovarian cancer screening tests, nipple aspirate tests, and instruments used in the design of many different LDTs (Refs. 27 to 31). FDA has also taken compliance action in some circumstances, such as issuing a warning letter to a laboratory manufacturing a pharmacogenetic test in April 2019 (Ref. 32). However, more structural change is needed. FDA's general enforcement discretion approach emerged at a time when the typical IVD offered as an LDT looked very different from how it looks today. FDA has made a preliminary determination that this approach has become outdated, and the proposed steps to end this approach in this rulemaking would better protect the public health.

Increased oversight would help to ensure the safety and effectiveness of IVDs offered as LDTs. More accurate diagnoses would lead to better care, which would advance public health overall. Through increased oversight, the public, including patients and healthcare professionals, could have more confidence that the test results they rely on are accurate. Greater FDA oversight of IVDs offered as LDTs has become particularly important as more and more novel treatments require use of a specialized test to identify patients likely to benefit from them. This, in turn, has led to increased development of tests used as the primary driver for therapeutic decisions. These include tests to determine whether to administer a therapeutic, which therapeutic to administer, and at what dose to administer the therapeutic. For example, recent approvals of drug products to treat diseases in their early stages, such as for early-stage Alzheimer's patients, make accurate and early diagnosis of these diseases more critical today than ever before. As another example, gene therapy is an emerging field with incredible potential to treat many diseases or conditions. Testing is required to identify patients with the defective gene targeted by the treatment and, in some cases, to assess whether the patient has antibodies to the vector delivering the treatment that would prevent it from working. In these and other cases, accurate and reliable test results are essential for safe and effective use of a therapeutic.

Increased oversight would also address business strategies that take advantage of the current bifurcated system. For example, in a number of cases, laboratories that have submitted premarket submissions for their tests, but whose tests did not meet applicable requirements for authorization, have still offered these IVDs as ''LDTs.'' Some of these tests, such as a test intended to diagnose Alzheimer's disease, had inadequate validation data to support authorization (see Ref. 33). A genotyping test purported to predict heart disease risk, but FDA found that there was no association between the genetic information the test identified (*KIF6*) and heart disease. A third test, intended to diagnose Fabry disease, showed a high level of false negatives. The public health is not served by a scheme in which tests that have these types of problems are still offered to patients simply because the manufacturer is a laboratory. FDA is also aware that some industry players have created business models that claim a connection to laboratories and offer IVDs as LDTs. The increase in firms using these business models, as well as their substantial magnitude of reach, underscores the need for more oversight.

In addition, FDA anticipates that consistent oversight would bring more stability to the testing market overall, which could help to encourage the manufacture of IVDs for which there is a reasonable assurance of safety and effectiveness. FDA is aware of arguments that better assuring the safety and effectiveness of LDTs would foster test innovation. FDA is also aware of arguments that IVD manufacturers that are not laboratories may currently be discouraged from investing time and resources into developing novel tests due to the concern that once the manufacturer receives marketing authorization for its test, laboratories will develop similar tests and market their tests without complying with FDA requirements. We anticipate that applying the same oversight approach to

laboratories and non-laboratories that manufacture IVDs would better assure the safety and effectiveness of LDTs, and would remove a disincentive for non-laboratory manufacturers to develop novel tests, thereby spurring innovation and access to IVDs for which there is a reasonable assurance of safety and effectiveness. As a result, we anticipate that phasing out the general enforcement discretion approach for LDTs would advance responsible innovation by both laboratory and non-laboratory IVD manufacturers alike, rather than discouraging it.

FDA is aware of other arguments that ending the general enforcement discretion approach for LDTs would interfere with test innovation and patient access due to the potential need for premarket review of new tests. However, under FDA's device authorities, FDA premarket review is only required for certain tests (generally those classified into class II or class III), and FDA estimates that approximately 50 percent of IVDs offered as LDTs would not require premarket review (see section II.F.4 of the Preliminary Economic Analysis of Impacts (Ref. 34)). In addition, FDA review is only required for device modifications in certain circumstances. For devices that are subject to PMA requirements, a PMA supplement is required only for changes that affect the safety or effectiveness of the device, and in some cases the change may be made prior to FDA approval (see 21 CFR 814.39(d)); may be made 30 days after a supplement has been filed, unless FDA takes certain action (see 21 CFR 814.39(e)); or may be made 30 days after FDA receives a notice describing the change (in lieu of a supplement), unless FDA takes certain action (see 21 CFR 814.39(f)). For devices that are subject to 510(k) requirements, a new 510(k) is only required for a significant change or modification in design, components, method of manufacture, or intended use, where a significant change or modification is one that could significantly affect the safety or effectiveness of the device or that is a major change or modification in the device's intended use (21 CFR 807.81(a)). FDA has published several guidance documents to help stakeholders determine whether a certain change or modification may require a PMA supplement, new 510(k), or other submission to FDA, and FDA has several mechanisms available through which manufacturers may seek FDA assistance in making this determination. In addition, under section 515C of the FD&C Act (21 U.S.C. 360e–4), a PMA supplement or new 510(k) is not required for a change to a device that would otherwise require a supplement or new 510(k) if the change is consistent with a predetermined change control plan previously approved or cleared by FDA. We also note that as described in section VI.B, FDA is proposing to phase out the general enforcement discretion approach for LDTs with respect to premarket review requirements on a date that aligns with or follows the beginning of a new user fee cycle, such that FDA's review timelines and goals would be reflected in commitments newly negotiated with industry. For all of these reasons, FDA does not anticipate that ending the general enforcement discretion approach for LDTs would unduly impair test innovation and patient access.

Furthermore, FDA's approach was never intended to selectively foster laboratory innovation at a cost to public health. Rather, the approach arose based on certain test characteristics and institutional safeguards that at the time adequately protected patients. In general, those characteristics and safeguards are no longer present, putting public health at risk. Further, FDA is aware that this scheme is in some cases fostering unfounded claims of innovation rather than responsible innovation. These claims are concerning to FDA because they can mislead the public, undermine legitimate competition, and disincentivize responsible, science-based innovation.

Finally, increased oversight may help to advance health equity. FDA is aware of concerns that IVDs offered as LDTs may exacerbate health inequities due to higher rates of inaccurate results among underrepresented patient populations, particularly racial and ethnic minorities undergoing genetic testing (see, *e.g.,* Refs. 17 and 35 to 38). Some IVDs offered as LDTs have not been validated for use in all patient populations within a disease state, meaning that it is unknown how well the test may perform across diverse patient populations expected to use the test and the test may be less accurate in underrepresented patient populations, potentially contributing to health disparities (see, *e.g.,* Ref. 39). Increased FDA oversight may help to ensure that information is available pertaining to device safety and effectiveness for specific demographic characteristics if performance differs within the target population, through the enforcement of applicable labeling requirements. In addition, when FDA conducts premarket review of a device, FDA may ask that sponsors provide data for different intended patient populations, and with new authorities under the Food and Drug Omnibus Reform Act of 2022 (FDORA), sponsors generally are required to submit diversity action plans to FDA, including the sponsor's goals for enrollment in device clinical studies. In contrast, with limited oversight over these tests, FDA does not know whether diverse patient populations are being included in validation studies for these IVDs. FDA has made a preliminary determination that increased oversight for these IVDs would help ensure adequate representation of the intended use population in validation studies and transparency regarding potential differential performance, helping to advance health equity. FDA also recognizes that IVDs offered as LDTs may serve communities in rural, medically underserved areas with disparities in access to diagnostic tests. However, the benefits of test access directly depend on the ability of tests to work as intended. Thus, to the extent that access to IVDs offered as LDTs may benefit patients in rural, medically underserved communities, the harms of unsafe or ineffective IVDs offered as LDTs may also be realized among these underserved patient populations. By increasing its oversight, FDA may better prevent and mitigate such harms, thereby better protecting the health of these underserved populations.

We are aware of arguments that other mechanisms—such as the medical expertise of laboratorians or requirements under CLIA—already provide adequate oversight of IVDs offered as LDTs. However, our review of the evidence indicates otherwise. Evidence suggests that under the current scheme, the healthcare community lacks adequate assurances about the safety and effectiveness of IVDs offered as LDTs. Although laboratories that offer LDTs are also subject to CLIA, which is primarily administered by the Centers for Medicare & Medicaid Services (CMS), CLIA is not a substitute for FDA oversight. CLIA establishes requirements for laboratories and laboratory personnel pertaining to operations, inspections, and certification, with a focus on the proficiency with which laboratories perform clinical testing (see 42 U.S.C. 263a and 42 CFR part 493). Among other requirements, clinical laboratories generally must have a CLIA certificate that corresponds to the complexity of tests performed prior to accepting human samples for testing. However, under CLIA, CMS does not regulate critical aspects of laboratory test

development; does not evaluate the performance of a test before it is offered to patients and healthcare providers; does not assess clinical validity (*i.e.,* the accuracy with which a test identifies, measures, or predicts the presence or absence of a clinical condition or predisposition in a patient); does not regulate certain manufacturing activities, such as design controls and acceptance activities; does not provide human subject protections for patients who participate in test clinical research trials; and does not require adverse event reporting. As such, CMS has described the FDA and CMS ''regulatory schemes'' as ''different in focus, scope and purpose, but they are intended to be complementary'' (Ref. 40). Where CLIA does play a role (as discussed further below, compliance with CLIA may provide certain assurances relating to quality system (QS) requirements), FDA has tailored its proposed phaseout policy accordingly.[11]

We are also aware of arguments that any additional oversight of LDTs should be accomplished by granting new statutory authorities to CMS. However, this would cause a problematic split in oversight, with the same types of tests being reviewed by different Agencies depending on where the test was made. For example, a cancer diagnostic test developed by a conventional manufacturer would be reviewed by FDA while a similar cancer diagnostic test (using the same sample type and testing for the same analytes) developed by a laboratory would be reviewed by another Agency. Further, with that divided oversight, an IVD developed by a conventional manufacturer could even be reviewed and cleared by FDA and subsequently reviewed by another Agency if a laboratory made certain modifications to it. However, if those same modifications were made by the original manufacturer, they would be reviewed by FDA. This could lead to confusion and inconsistency.

FDA has both the authority and the expertise to perform the necessary oversight of IVDs offered as LDTs and is the only Agency for which that is the case. One of FDA's most basic and well-understood responsibilities is helping to ensure the safety and effectiveness of medical products. FDA employs staff across a wide range of disciplines, including physicians, statisticians, engineers, biologists, chemists, geneticists, and others, to evaluate the science behind medical products before they reach the market. Understanding the complex technical information in applications, such as clinical trial data, bench testing results, and product manufacturing and design characteristics—and putting that information in context to assess whether a product can be marketed—is within the unique expertise of FDA. This type of expertise is no less important for IVDs, which can have a wide variety of public-health consequences, as described elsewhere in this rule. During review of an application for an IVD, FDA reviewers closely examine data relevant to analytical validity, clinical validity, and safety, and draw on their expertise and experience to understand both the product and the science supporting the product.

Review of the underlying science behind an IVD is based on what the IVD does and is in no way related to where the IVD is made. Thus, FDA's experience and expertise with respect to oversight of other IVDs is directly applicable to oversight of LDTs. In fact, FDA has already applied its expertise to the review of some IVDs offered as LDTs—for example, during public health emergencies. As stated above, FDA has reviewed many EUA requests for tests from laboratories during the public health response to COVID–19.

Entities outside FDA have also recognized that FDA should oversee LDTs, and that greater oversight is needed. For example, the Secretary's Advisory Committee on Genetics, Health, and Society, in its April 2008 report entitled ''U.S. System of Oversight of Genetic Testing,'' stated that ''FDA should address all laboratory tests, regardless of how they are produced (*i.e.,* as a commercial test kit or laboratory-developed test), in a manner that takes advantage of its current experience'' (Ref. 41). The American Cancer Society Cancer Action Network has taken a similar position, noting in a November 2016 statement that ''[c]urrent oversight of LDTs falls short of ensuring these tests produce accurate and meaningful results . . . [t]he FDA is the most appropriate agency to evaluate the analytical and clinical validity of diagnostic tests, along with their safety, to help ensure that cancer patients and their doctors are able to make appropriate treatment decisions based on accurate information'' (Ref. 42). Likewise, the Advanced Medical Technology Association (AdvaMed) stated in November 2021 that the association has ''long supported the idea that all diagnostic test developers . . . should be subject to the same FDA standards and processes'' (Ref. 43).

4. FDA Should Increase Oversight in a Manner That Recognizes the Current State of the Testing Market

As discussed throughout this section, increased oversight of IVDs offered as LDTs is needed. However, FDA has also made a preliminary determination that our general enforcement discretion approach should be phased out in a manner that accounts for the level of public health concern and the importance of avoiding undue disruption to the testing market, including undue disruption to the provision of care. Therefore, we are proposing a gradual phaseout to occur in stages over a total period of 4 years, as described in section VI.B. FDA anticipates that this phaseout policy should ultimately enable IVDs offered as LDTs that are supported by sound science to remain on the market. FDA also recognizes that some IVDs may need to come off the market, because, for example, the IVD cannot meet applicable requirements under the FD&C Act and its implementing regulations, or the laboratory chooses not to invest resources to meet those requirements. To the extent that withdrawal from the market of these IVDs implicates any reliance interests, FDA has made a preliminary determination that the public-health benefits associated with the reasonable assurance of safety and effectiveness of IVDs offered as LDTs outweigh any such interests. In addition, in the long run, it is possible that any reduction in the number of current IVDs offered as LDTs may be offset by the market entry of IVDs from other manufacturers who will have benefitted from a more consistent oversight approach and increased stability spurring innovation.

C. FDA's Current Regulatory Framework

The FD&C Act, as amended by the MDA and subsequent statutes, establishes a comprehensive system for the regulation of devices, defined in section 201(h)(1) of the FD&C Act, that are intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) establishes three categories (classes) of devices depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Class I devices are those devices for which the general controls of the FD&C

[11] When ''QS'' requirements are discussed throughout this preamble, FDA is referring to the current good manufacturing practice (CGMP) requirements set forth in part 820 (21 CFR part 820). Generally, the requirements are referred to as QS requirements, but that terminology may change when amendments to part 820 are finalized. See 87 FR 10119 (February 23, 2022) and section VI.B.3 for a further discussion of FDA's proposed amendments to part 820.

Act (controls authorized by or under section 501, 502, 510, 516, 518, 519, or 520 (21 U.S.C. 351, 352, 360, 360f, 360h, 360i, or 360j) or any combination of such sections) are sufficient to provide reasonable assurance of safety and effectiveness of the device; or those devices for which insufficient information exists to determine that general controls are sufficient to provide reasonable assurance of safety and effectiveness or to establish special controls to provide such assurance, but because the devices are not purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, and do not present a potential unreasonable risk of illness or injury, are to be regulated by general controls (section 513(a)(1)(A) of the FD&C Act).

General controls include, but are not limited to, provisions that relate to establishment registration and device listing; premarket notification; prohibitions against adulteration and misbranding (*e.g.,* labeling that fails to bear adequate directions for use); recordkeeping and reporting, including adverse event reporting and reporting of corrections and removals initiated to reduce a risk to health posed by the device or to remedy a violation of the FD&C Act caused by the device which may present a risk to health; and current good manufacturing practice (CGMP) requirements. These controls apply to all devices unless an exemption applies.

Class II devices are those devices for which general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but for which there is sufficient information to establish special controls to provide such assurance, including the promulgation of performance standards, post-market surveillance, patient registries, development and dissemination of guidelines, recommendations, and other appropriate actions the Agency deems necessary to provide such assurance (section 513(a)(1)(B) of the FD&C Act).

Class III devices are those devices for which insufficient information exists to determine that general controls and special controls would provide a reasonable assurance of safety and effectiveness, and are purported or represented for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or present a potential unreasonable risk of illness or injury (section 513(a)(1)(C) of the FD&C Act).

Under section 513(d)(1) of the FD&C Act, devices that were introduced or delivered for introduction into interstate commerce for commercial distribution before the enactment of the MDA on May 28, 1976 (generally referred to as ''preamendments devices'') are classified after FDA: (1) receives a recommendation from a device classification panel (an FDA advisory committee); (2) publishes the panel's recommendation, along with a proposed regulation classifying the device, and provides an opportunity for interested persons to submit comments; and (3) publishes a final regulation classifying the device. A preamendments device for which a classification regulation has not been promulgated is known as an ''unclassified device.'' Until an unclassified device type has been formally classified by regulation, the marketing of new devices within the device type requires FDA premarket review through a premarket notification (510(k)) under section 510(k) of the FD&C Act.

Devices that were not introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976 (generally referred to as ''postamendments devices'') are classified automatically by section 513(f) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require approval of a premarket approval application (PMA), unless and until: (1) FDA classifies or reclassifies the device into class I or II under section 513(f)(2) or (3) of the FD&C Act, or (2) FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act and part 807 of the regulations (21 CFR part 807).

In addition, under section 520(g) of the FD&C Act and part 812 of FDA's regulations (21 CFR part 812), a clinical investigation to determine the safety and effectiveness of certain devices must be the subject of an approved investigational device exemption (IDE) before such investigation may commence. If an IDE has been granted, a failure to comply with a requirement under which the device was exempted for investigational use renders the device adulterated (see section 501(i) of the FD&C Act).

Failure to comply with applicable requirements of the FD&C Act and FDA regulations may render the device adulterated and misbranded under sections 501 and 502 of the FD&C Act and may constitute a prohibited act under section 301 of the FD&C Act (21 U.S.C. 331).

IVDs, as defined in § 809.3 (21 CFR 809.3), are devices intended for human use and are subject to the FD&C Act. They include class I, class II, and class III devices, as well as both preamendments and postamendments devices. Like other devices, IVDs are subject to general controls, including premarket notification, reporting requirements regarding adverse events and corrections and removals, IDE requirements (though most investigations of IVDs are exempt from most provisions of the IDE regulation), and other applicable requirements under the FD&C Act and FDA's regulations. IVDs are also subject to specific labeling requirements in part 809 of the regulations (21 CFR part 809).

D. History of the Rulemaking

1. FDA's Longstanding Recognition That IVDs Manufactured by Laboratories Are Devices

FDA has made clear, on many occasions and over many years, that LDTs are devices under the FD&C Act (for the legal reasoning for this conclusion, see section V.B). Over 25 years ago, FDA explained that clinical laboratories that develop tests are acting as manufacturers of medical devices (62 FR 62243 at 62249 (November 21, 1997)). FDA reiterated that position in a citizen petition response a year later (Ref. 44), and in the preamble to a final rule 3 years after that (65 FR 18230 at 18231 (April 7, 2000)). In 2006, FDA again cited its prior statement that clinical laboratories that develop tests are acting as manufacturers of medical devices (Ref. 45 (quoting 62 FR 62243 at 62249)). In 2014, FDA expressly considered and rejected arguments that LDTs are not devices under the FD&C Act, stating in a citizen petition response that ''LDTs are devices within the plain language of the [statutory] definition'' (Ref. 46). Five years later, FDA issued a warning letter stating that ''FDA has not created a legal 'carve-out' for LDTs such that they are not required to comply with the requirements under the Act that otherwise would apply. . . . Although FDA has generally exercised enforcement discretion for LDTs, the Agency always retains discretion to take action when appropriate, such as when it is appropriate to address significant public health concerns'' (Ref. 47). A wide range of other FDA documents, including guidance documents, safety communications, compliance letters, and other public statements, have

indicated or otherwise taken as their premise that IVDs are devices even when the manufacturer is a laboratory (see, *e.g.,* Refs. 11, 18, 27, 28, and 48 to 56).

FDA has also taken regulatory actions consistent with these statements and documents. Since 2017, the Agency has reviewed over 40 PMAs, 510(k)s, and De Novo classification requests for tests identified by the manufacturer as LDTs, and has approved, cleared, or granted De Novo classification for roughly half of those tests under authorities in the FD&C Act specifically reserved for ''devices.'' FDA has also received many EUA requests from laboratories and has authorized over 150 such tests for emergency use, an authority that is also limited to ''devices'' or other FDA-regulated medical products.

2. Past FDA Initiatives To Address LDTs

In light of FDA's recognition that LDTs are devices and our increasing concerns about IVDs offered as LDTs (as detailed in the ''Need for the Rule'' section, section III.B of this document), over the years the Agency has considered various ways to address IVDs manufactured by laboratories that raise safety or effectiveness concerns. In 1997, FDA sought to address these concerns by establishing restrictions on the sale, distribution, and use of analyte specific reagents (ASRs), which the Agency described as the ''primary ingredients'' of most LDTs (62 FR 62243 at 62249). In 2006, FDA issued a draft guidance outlining a different enforcement approach for a type of LDT known as an in vitro diagnostic multivariate index assay (IVDMIA),[12] which raised particular safety and effectiveness concerns (Ref. 45). FDA later determined that it should engage in a more comprehensive effort to oversee LDTs, in part due to stakeholder feedback.

Consistent with this determination, in 2010, FDA announced plans to develop a broader approach to the oversight of LDTs. The Agency held a 2-day public meeting and opened a docket for public comment (75 FR 34463 (June 17, 2010)). Input received through those proceedings informed two draft guidance documents issued by FDA on October 3, 2014, entitled ''Framework for Regulatory Oversight of Laboratory Developed Tests (LDTs)'' (79 FR 59776) and ''FDA Notification and Medical Device Reporting for Laboratory Developed Tests (LDTs)'' (79 FR 59779) (Refs. 48 and 49). In those draft guidance documents, FDA proposed to implement a risk-based oversight framework for IVDs offered as LDTs, with a phased enforcement strategy. FDA solicited public feedback on the draft guidance documents and held a public workshop on January 8 and 9, 2015 (79 FR 69860 (November 24, 2014)).

From October 2014 through 2016, FDA analyzed more than 300 sets of comments on the draft guidance documents, as well as discussion from the public workshop, and engaged extensively with stakeholders in meetings and conferences. A number of interested parties provided feedback, including laboratories, healthcare providers, patients, conventional IVD manufacturers, government agencies, and Congress. The feedback ranged generally from strong opposition to strong support for FDA's proposed increased oversight of LDTs and addressed a wide range of topics, including FDA's authority to regulate LDTs, the risks posed by LDTs without increased FDA enforcement, the effect of a new enforcement approach on test access and innovation, the potential interplay between FDA regulation and CLIA, and the implications of increased FDA oversight for competition in the IVD market.

On January 13, 2017, FDA issued a discussion paper (2017 Discussion Paper) synthesizing the feedback that had been provided to the Agency, following a choice by FDA not to finalize the draft guidance documents to allow for further public discussion and to provide an opportunity for Congress to develop legislation for a new regulatory framework encompassing all IVDs that appropriately balances patient protection with continued access and innovation (Ref. 50).

In August 2020, HHS posted a statement on its website entitled ''Rescission of Guidances and Other Informal Issuances,'' which stated, among other things, that ''the department has determined that the Food and Drug Administration ('FDA') will not require premarket review of laboratory developed tests ('LDT') absent notice-and-comment rulemaking'' (Ref. 57).[13] This statement was informed by advice in a legal memorandum from the HHS Office of General Counsel (see Ref. 59). In November 2021, based on new advice from the HHS Office of General Counsel, HHS leadership determined that the August 2020 statement no longer represented the Department's policy or legal views (Ref. 59). HHS Secretary Xavier Becerra publicly announced the withdrawal of the statement on November 15, 2021 (Ref. 60). Various news outlets have reported on these events (Refs. 61 to 64).

IV. Legal Authority

FDA is proposing to issue this rule under the Agency's general rulemaking authorities and statutory authorities relating to devices. These authorities include sections 201(h)(1), 301, 501, 502, 510, 513, 514, 515, 518, 519, 520, 701, 702, 704, and 801 (21 U.S.C. 321(h)(1), 331, 351, 352, 360, 360c, 360d, 360e, 360h, 360i, 360j, 371, 372, 374, and 381). In particular:

- Under section 201(h)(1) of the FD&C Act, a device is defined as ''an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is (A) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them, (B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (C) intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes.''
- Section 701(a) of the FD&C Act authorizes FDA to issue regulations for the efficient enforcement of the FD&C Act.

For additional descriptions of some of the authorities referenced above, see ''FDA's Current Regulatory Framework'' section (section III.C.). For additional discussion of how these legal authorities apply to LDTs, see ''Legal Basis for the Proposed Amendment'' section (section V.B.).

[12] As defined in the draft guidance document, IVDMIAs are ''test systems that employ data, derived in part from one or more in vitro assays, and an algorithm that usually, but not necessarily, runs on software to generate a result that diagnoses a disease or condition or is used in the cure, mitigation, treatment, or prevention of disease.'' The draft guidance document further characterized IVDMIAs as having the following three features: they use clinical data to empirically identify variables and derive weights/coefficients used in an algorithm; they employ that algorithm to calculate a patient-specific result, which cannot be independently derived and confirmed by another laboratory (absent access to proprietary information used in the development and derivation of the test); and they report that result, which cannot be interpreted by a well-trained healthcare practitioner using prior knowledge of medicine in the absence of information from the test developer regarding clinical performance and effectiveness.

[13] HHS also posted an accompanying document entitled ''FAQs on Laboratory Developed Tests (LDTs)'' on its website (Ref. 58).

V. Description of the Proposed Amendment to the Definition of In Vitro Diagnostic Products

A. Proposed Amendment

We are proposing to amend part 809, subpart A, specifically § 809.3, by updating the definition of ''in vitro diagnostic products'' to make explicit that IVDs are devices under the FD&C Act including when the manufacturer of the IVD is a laboratory. IVDs are defined as ''those reagents, instruments, and systems intended for use in the diagnosis of disease or other conditions, including a determination of the state of health, in order to cure, mitigate, treat, or prevent disease or its sequelae. Such products are intended for use in the collection, preparation, and examination of specimens taken from the human body'' (§ 809.3). This amendment would reflect FDA's longstanding view that LDTs are devices under the FD&C Act, and would reflect the fact that the device definition in the FD&C Act does not differentiate between entities manufacturing the device. In other words, whether an IVD is a device does not depend on where or by whom the IVD is manufactured.

FDA is also proposing to amend the statutory citation for the device definition included in § 809.3 to reflect amendments to section 201(h) of the FD&C Act as a result of the enactment of the Safeguarding Therapeutics Act (Pub. L. 116–304, 134 Stat. 4915). For many years, the definition of ''device'' had been codified at section 201(h) of the FD&C Act. Upon enactment of the Safeguarding Therapeutics Act, the definition of ''device'' was redesignated as paragraph (h)(1) and a new definition of ''counterfeit device'' was codified at paragraph (h)(2).

B. Legal Basis for the Proposed Amendment

If amended as proposed, § 809.3 would express in plain terms that IVDs, including test systems, fall within the definition of a device in section 201(h)(1) of the FD&C Act when they have been manufactured by laboratories. In this subsection, FDA sets forth the legal reasoning for this position.

1. In Vitro Diagnostic Test Systems Are Devices

The FD&C Act defines a device as, in relevant part, ''an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is . . . intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease'' (see 21 U.S.C. 321(h)(1); see also 21 U.S.C. 360j(o) (identifying circumstances under which software is and is not within the device definition)). This definition includes IVD test systems. Test systems are sets of IVDs—for example, reagents, instruments, specimen collection devices, software, and other related materials—that function together to produce a test result. See, *e.g.,* § 809.10(a)(9)(iii) (21 CFR 809.10(a)(9)(iii)) (discussing ''multiple unit products which require the use of included units together as a system''); id. § 809.10(b) (referring to reagents and instruments within a system). According to a straightforward reading of the statutory text, these systems are ''apparatus[es],'' ''contrivance[s],'' and articles that are ''similar or related'' to ''instrument[s]'' and ''in vitro reagent[s],'' that are intended for use in the diagnosis of disease or other conditions or in the cure, mitigation, treatment, or prevention of disease. They consist of individual parts that have their own regulatory identity, but, when combined, constitute a new device.

The device definition expressly contemplates this scenario because it provides that both an overall article and each of its ''components'' and ''parts'' are devices subject to regulation. (21 U.S.C. 321(h)(1); *cf. Shuker* v. *Smith & Nephew, PLC,* 885 F.3d 760, 768 (3d Cir. 2018) (describing the distinct status of a ''system that is itself a 'device' but that is comprised of Class II [device] components in addition to one or more Class III [device] components'').) The word ''apparatus,'' which is defined as ''a set of materials or equipment designed for a particular use,'' encompasses test systems by its plain terms. (See Apparatus, Merriam-Webster.com (last accessed June 28, 2023); see also *United States* v. *Bacto-Unidisk,* 394 U.S. 784, 798 (1969) (''Congress fully intended that the [FD&C] Act's coverage be as broad as its literal language indicates'').) Consistent with this analysis, FDA's definition of an ''in vitro diagnostic product,'' which was first promulgated in 1973 and is still in effect today, identifies a ''system'' as a type of IVD and a device under the FD&C Act. (Section 809.3 (IVDs include ''reagents, instruments, and systems''); see 38 FR 7096 at 7098 (March 15, 1973).)

The regulation of test systems is important because test systems are generally the IVDs that produce a result—a ''positive'' or ''negative'' (such as what patients receive in the context of COVID–19 diagnostic tests), a quantitative value (such as a concentration of glucose), or perhaps a more detailed report of results. The quality of test results is generally what defines both the risks and benefits of IVDs: the risks stem from inaccurate, unreliable, incomplete, or misleading test results, and the benefits stem from accurate, reliable, and complete test results. For that reason, test systems and their results are a key focus of FDA's regulation of IVDs. FDA has issued over 350 regulations classifying different types of test systems (see generally 21 CFR parts 862, 864, 866) and has evaluated the performance and results of innumerable test systems over the course of decades. Patients and healthcare professionals rely on FDA to help ensure the validity of test systems, and conventional IVD manufacturers have built their business around this premise.

The focus on test systems and their results is not new; it has been a consistent theme throughout the history of FDA's regulation of IVDs. Congress expressly granted FDA authority over diagnostic products in 1938. (Federal Food, Drug and Cosmetic Act (June 25, 1938), Pub. L. 75–717, 52 Stat. 1040 (defining ''drug'' and ''device'' with reference to an intended use in ''diagnosis,'' among other things).) Following the 1938 Act, FDA took action against diagnostic products, including against a system intended to diagnose illness based on human blood samples. (See *Drown* v. *United States,* 198 F.2d 999, 1001 (9th Cir. 1952).) And, in the early 1970s, FDA established a specific IVD regulatory program in response to ''rapid growth in development of in vitro diagnostic products combined with the increasing use and reliance on the results by physicians, hospital personnel, and clinical laboratories.'' (37 FR 819, January 19, 1972). This program addressed the ''need [for] closer scrutiny because of the possibility that inaccurate and unreliable results may be obtained.'' Id. FDA issued final regulations establishing controls over IVDs, including ''systems,'' in 1973 (38 FR 7096 at 7098) (creating, among other things, ''product class standards'' to set ''performance requirements necessary to assure accuracy and reliability of results''). FDA's increasing concerns about these products was evident from the fact that—even before Congress expanded the Agency's device authorities in 1976—it applied the *drug* authorities to certain IVDs. The Supreme Court upheld that application in *Bacto-Unidisk,* 394 U.S. at 800–01.

In 1976, Congress enacted the MDA, sweeping legislation meant to broaden and strengthen FDA's authority over

devices. (See, *e.g.,* H.R. Rep. 94–853 at 11 (February 29, 1976).) The MDA included revisions to the definition of ''device'' to clarify that IVDs should be regulated under the new, more robust device authorities. (Medical Device Amendments of 1976, Pub. L. 94–295, 90 Stat. 539 (adding the term ''in vitro reagent'' to the definition of a device); S. Rep. No. 93–670 at 16 (January 29, 1974) (''The Committee recognizes that there is confusion at the present time about whether certain articles are to be treated as devices or drugs under the Food, Drug and Cosmetic Act. Therefore, the Committee reported bill has carefully defined 'device' so as to specifically include implants, in vitro diagnostic products, and other similar or related articles.''). The legislative history shows that Congress had serious concerns about test systems and sought to empower FDA to address them. (See, *e.g.,* S. Rep. No. 93–670 at 3–4 (January 29, 1974) (describing with concern ''quack devices'' such as a ''diagnostic service'' in which ''[p]ractitioners . . . mailed in the blood spots taken from their patients,'' ''[t]he blood-spotted paper was put into a slot of the electrical device called the 'Radioscope' while the operator stroked with a wand the abdomen of a person holding metal plates connected to the device,'' and ''the operator determined from this the identity, kind, location, and significance of any disease present'').) Congress also contemplated performance standards relevant to test systems, such as required labeling with ''ranges of accuracy of diagnosis.'' (H.R. Rep. 94–853 at 27.) Thus, in the MDA, Congress endorsed FDA's focus on test systems and their results.

2. Test Systems Manufactured by Laboratories Are Devices

The definition of ''device'' in the FD&C Act encompasses test systems regardless of where or by whom they are manufactured. (See 21 U.S.C. 321(h)(1).) In particular, the definition contains no exception or limitation for devices manufactured by laboratories. ''Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto).'' (*Oklahoma* v. *Castro-Huerta,* 142 S. Ct. 2486, 2496 (2022).) If Congress had intended such a limitation, it could have said so. Instead, Congress made clear that the definition does not turn on the type of entity manufacturing the device: for example, the statute expressly recognizes that even ''practitioners licensed by law to prescribe or administer . . . devices'' (the professionals most closely associated with traditional medical practice) can ''manufacture . . . devices,'' though they may be exempt from certain requirements when they do so ''solely for use in the course of their professional practice.'' [14] (See 21 U.S.C. 360(g)(2); see also 21 U.S.C. 360i(c)(1), 374(a)(2)(B).)

Courts have repeatedly recognized that articles manufactured by medical professionals fall within FDA's jurisdiction (*e.g., United States* v. *Regenerative Sciences,* 741 F.3d 1314 (D.C. Cir. 2014) (holding that doctors ''producing, as part of their medical practice,'' a ''drug'' under the FD&C Act violated the FD&C Act); *Drown* v. *United States,* 198 F.2d 999, 1001 (9th Cir. 1952) (upholding FDA action against chiropractor who ''manufacture[d] certain photographic, therapeutic and diagnostic instruments of her own design which she use[d] in her practice'')). As the D.C. Circuit in *Regenerative Sciences* observed, an approach that rejects ''the [FD&C Act]'s regulation of doctors'' would ''create an enormous gap in the [FD&C Act]'s coverage.'' (741 F.3d at 1320.)

The inclusion of articles in the FD&C Act's definition of a device without regard to the identity of their manufacturer makes particular sense in the context of test systems. Today, in FDA's experience, there is little distinction between the test systems manufactured by laboratories and other manufacturers. These systems generally consist of highly specialized components with complex functionality working in combination; they rarely resemble the ''1976-type'' tests discussed in this rule. For example, a modern-day next generation sequencing (NGS) test system for genetic testing typically consists of (among other things) a DNA extraction kit to extract nucleic acids from a human sample; an NGS instrument that analyzes the nucleic-acid output and (after days) generates gigabytes of sequencing raw data; and multiple pieces of computer software that translate that raw data into a test report. The systems look the same, and function the same way, regardless of who manufactures them. And although not all systems look exactly like an NGS system, they do typically involve sophisticated instruments with advanced software that, when used in conjunction with other test components, produce the system's results. Their manufacture generally requires knowledge of bioinformatics, software development, and an underlying specialty, such as medical genetics—knowledge that is neither traditionally associated with nor unique to laboratories. FDA understands that many test systems offered as LDTs are designed at Fortune 500 companies (see Ref. 65) by a ''development team,'' similar to how systems from conventional manufacturers are designed. And in FDA's experience, the individuals on these development teams generally have the same training and expertise regardless of whether they are employed by a ''laboratory'' organization or a conventional manufacturer. Even smaller laboratories use the same complex equipment for their systems, although they may purchase and use components that are labeled by other companies for ''research use only.'' In short, there is nothing inherent in the nature or design of laboratory developed test systems that would justify exclusion from FDA's jurisdiction.

That is not to say that laboratories and conventional IVD manufacturers are identical. Laboratories do occupy a distinct role in diagnostic testing because they are the entities that generally *perform* the tests. Like many devices, such as a magnetic resonance imaging unit used by a trained technician, test systems are usually used by trained professionals. Laboratories that are certified under CLIA and that meet the regulatory requirements under CLIA to perform high complexity testing employ trained laboratorians to ''run'' test systems, and CLIA is the statutory scheme that governs that work, as discussed in more detail in section III.B. However, a laboratory's role in performing test systems does not change its obligations under the FD&C Act when it is *manufacturing* test systems. As previously noted, the FD&C Act does not exclude medical professionals who manufacture devices from its scope, and the mere fact that a device is manufactured in connection with a

[14] These exemptions apply when a practitioner (1) is licensed by law to prescribe or administer a device such as an IVD, (2) manufactures that device, and (3) does so ''solely for use in the course of [his or her] professional practice.'' Thus, these exemptions apply to practitioners, not entities such as corporate or hospital laboratories that employ licensed practitioners. For example, FDA has long held that hospitals that reprocess single-use devices are subject to registration and other requirements under the FD&C Act because they are the owners/operators, manufacturers, etc. even though those hospitals employ licensed practitioners. *See Frequently-Asked-Questions about the Reprocessing and Reuse of Single-Use Devices by Third-Party and Hospital Reprocessors; Final Guidance for Industry and FDA Staff* (July 2001), available at *https://www.fda.gov/media/71057/download* (stating ''Third-party and hospital reprocessors of single-use devices (SUDs) are subject to all the regulatory requirements currently applicable to original equipment manufacturers, including premarket submission requirements'' and including a Q&A that provides instructions on how to register and list for such entities).

medical service or procedure does not eliminate FDA's jurisdiction. (See *United States* v. *Regenerative Sciences,* 741 F.3d at 1319 (''Notwithstanding appellants' attempt to characterize this case as an effort by the FDA to 'restrict[ ] the use of an autologous stem cell *procedure,*' the focus of the FDA's regulation is on the *Mixture* [that is, the product that is created in connection with the procedure].'').)

Although some commentators have argued that laboratory manufacturing is immune from regulation because it is within the ''practice of medicine,'' that argument misconstrues the scope of the FD&C Act's ''practice of medicine'' provision. Section 1006 of the FD&C Act (21 U.S.C. 396) provides: ''Nothing in this [Act] shall be construed to limit or interfere with the authority of a health care practitioner to prescribe or administer any legally marketed device to a patient for any condition or disease within a legitimate health care practitioner-patient relationship.'' Section 1006 carves out a specific zone of protected conduct that does not reach laboratory manufacturing of test systems. The purpose of the provision is to ''ensure[ ] that *once the FDA permits a device to be marketed for one use,* health care practitioners have the flexibility to draw on their expertise to *prescribe or administer* the device'' for other uses. (*Judge Rotenberg Educ. Ctr., Inc.* v. *United States,* 3 F.4th at 395 (emphases added); *see also* Conf. Rep. 105–399 at 97 (November 9, 1997) (provision intended to cover ''off-label use of a medical device by a physician using his or her best medical judgment in determining how and when to use the medical product for the care of a particular patient'').) The statutory provision applies only in the context of use of a ''legally marketed device''—that is, a device that is already manufactured and lawfully on the market—and only applies to ''prescrib[ing] or administer[ing] . . . within a legitimate health care practitioner-patient relationship.'' It does not apply to the manufacture of *new* test systems. The manufacture of a new device falls squarely within FDA's realm. *Cf. United States* v. *Regenerative Sciences,* 741 F.3d at 1320 (''[W]hile the [FD&C Act] was not intended to regulate the practice of medicine, it was obviously intended to control the availability of drugs for prescribing by physicians.'') (quoting *United States* v. *Evers,* 643 F.2d 1043, 1048 (1981)). The fact that healthcare practitioners may prescribe a device, such as a test system, in the context of a healthcare practitioner-patient relationship does not mean that entities manufacturing that device can escape regulation. If that were the case, few devices would be regulated, because most are intended for use by healthcare practitioners in the context of a healthcare practitioner-patient relationship.

Furthermore, contrary to what some commentators have suggested, CLIA did not repeal FDA's authority over IVDs manufactured by laboratories, which dates back to at least 1938. CLIA does not expressly repeal FDA's authority, nor was FDA's authority repealed by implication. ''An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.'' (*Branch* v. *Smith,* 538 U.S. 254, 273 (2003) (cleaned up).) Here, as CMS itself has explained, ''the regulatory schemes of the two agencies are different in focus, scope and purpose'' and ''are intended to be complementary'' (Ref. 40). As explained in section III.B, CLIA puts a focus on the proficiency with which laboratories perform clinical testing, and the FD&C Act puts a focus on the manufacturing of test systems. CMS and FDA have different areas of expertise, and CLIA does not address a wide range of activities regulated under the FD&C Act, such as clinical validation and design activities. Thus, ''CLIA does not preempt the FDA's authority to regulate facilities like [Clinical Reference Laboratory]. When two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective.' '' (*Clinical Reference Lab.* v. *Sullivan,* 791 F. Supp. 1499, 1509 (D. Kan. 1992) (quoting *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1018, (1984)), *aff'd in part and rev'd in part on other grounds sub nom., United States* v. *Undetermined No. of Unlabeled Cases,* 21 F.3d 1026 (10th Cir. 1994).)

In fact, Congress has affirmed that test systems manufactured by laboratories are devices under the FD&C Act. In the Protecting Access to Medicare Act of 2014 (PAMA) (Pub. L. 113–93), Congress listed 510(k) clearance or premarket approval under the FD&C Act as one of several bases for Medicare payment for an ''advanced diagnostic laboratory test,'' which is defined in part as a clinical diagnostic laboratory test ''that is offered and furnished only by a single laboratory and not sold for use by a laboratory other than the original developing laboratory (or a successor owner)'' (section 216(a) of PAMA). If such laboratory tests were not devices, the 510(k) clearance and premarket approval provisions would not apply to them and the inclusion of such provisions would be pointless and ineffectual. In addition, Congress indicated that clinical laboratory tests are devices in 2016 amendments to the FD&C Act. (21 U.S.C. 360j(o)(1)(D) (repeatedly referring to ''clinical laboratory test or *other* device data'') (emphasis added).)

The FD&C Act confers jurisdiction on FDA to regulate test systems, a point that has been codified in FDA's regulations for more than half a century. And nothing in the text, history, or purpose of the statute suggests that test systems manufactured by laboratories are excluded from that jurisdiction. This interpretation is not only the most straightforward reading of the statute, it is also the most reasonable: any other interpretation would create a bifurcated scheme in which systems that are functionally identical are treated differently under the law.

3. FDA's Jurisdiction Over IVDs Manufactured by Laboratories Is Not Altered by the FD&C Act's Provisions Related to Interstate Commerce and Commercial Distribution

Modern Commerce Clause jurisprudence holds that Congress has ''authority to regulate even purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.'' (*United States* v. *Regenerative Sciences,* 741 F.3d at 1320 (quoting *Gonzales* v. *Raich,* 545 U.S. 1, 17 (2005)).) Thus, few have disputed that Congress possesses the power to grant FDA authority to regulate even purely intrastate activities. However, some commentators have asserted that language in the FD&C Act referencing ''interstate commerce'' and ''commercial distribution'' precludes FDA from regulating IVDs that are designed, manufactured, and used in a single laboratory. As discussed below, these assertions lack merit.

a. Interstate commerce. There is no overarching requirement in the FD&C Act that FDA-regulated articles have a particular nexus with interstate commerce. Interstate commerce is not a prerequisite to FDA jurisdiction (beyond the constitutional minimum). Rather, under the FD&C Act, a limited number of provisions include specific interstate commerce ''elements,'' and thus require a particular connection with interstate commerce in order for those provisions to apply. For example, certain of the FD&C Act's ''prohibited acts'' contain an interstate commerce element that must be satisfied before the government can bring an enforcement action under those

provisions (*e.g.,* 21 U.S.C. 331(a), (c), (d), and (k)). But relatively few of the FD&C Act's device provisions include a specific interstate commerce element, and most of the device-related prohibited acts do not. (See, *e.g.,* 21 U.S.C. 331(e) (prohibiting the failure to establish or maintain any record, or make any report, required under the device adverse-event reporting requirements without reference to interstate commerce); id. 331(p) (prohibiting the failure to register a device establishment without reference to interstate commerce); id. 331(q)(1) (prohibiting the failure to comply with device investigational-use requirements without reference to interstate commerce); id. 331(fff)(3) (prohibiting the doing of any act which causes a device to be a counterfeit device, or the sale or dispensing, or holding for sale or dispensing, of a counterfeit device without reference to interstate commerce); see generally *United States* v. *Walsh,* 331 U.S. 432, 434–36 (1947) (finding no interstate commerce element to 21 U.S.C. 331(h), which prohibits false guaranties) (''[21 U.S.C. 331(a)] is directed to illegal interstate shipments, while [21 U.S.C. 331(h)] is directed to the giving of false guaranties'').) If an FD&C Act provision does not contain an interstate commerce element, ''interstate commerce'' imposes no limit on FDA's powers beyond the constitutional minimum. For devices, the FD&C Act imposes obligations even where there is no interstate commerce element and likewise gives FDA authority to take action when there is a violation of those obligations. Thus, FDA does not, for example, somehow lose jurisdiction if a particular device has not been ''introduced'' into interstate commerce.

In fact, Congress intentionally revised a provision of the FD&C Act to ensure that FDA could take action against devices without satisfying any particular interstate commerce element. In the MDA, Congress revised the seizure provisions in section 304 of the FD&C Act to ''permit seizure of devices without reference to interstate commerce'' because the previous interstate commerce requirement ''ha[d] been a burden to the effective enforcement of existing authorities'' and ''whether or not a medical device actually crosses state lines has nothing to do with the principal intent of this proposal: to assure the safety and effectiveness of medical devices.'' (H.R. Rep. 94–853 at 15; see 21 U.S.C. 334(a)(2).) In other words, Congress recognized that the interstate commerce element in this provision did not advance the goals of the MDA. Consistent with that view, the FD&C Act grants FDA wide-ranging authority over devices, including IVDs, and that general authority does not turn on a connection with interstate commerce above the constitutional minimum.

In addition, one of the key prohibited acts on which FDA relies, section 301(k) of the FD&C Act (21 U.S.C. 331(k)), contains an interstate commerce element, but applies even when a problematic device has not been introduced in interstate commerce. That provision prohibits ''the doing of any . . . act with respect to[ ] a . . . device . . . if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.'' Courts have held that even if a product is wholly manufactured and sold intrastate, the interstate commerce element is satisfied if the components used in manufacturing the product have traveled in interstate commerce. (See *United States* v. *Regenerative Sciences,* 741 F.3d at 1320–21 (upholding FDA enforcement action under 331(k) because a drug component had traveled in interstate commerce); *Baker* v. *United States,* 932 F.2d 813, 815 (9th Cir. 1991); *United States* v. *Dianovin Pharm., Inc.,* 475 F.2d 100, 102 (1st Cir. 1973).) At least some components of test systems, such as general purpose reagents, ASRs, instruments, and collection devices, are usually shipped in interstate commerce even if the system itself is designed, manufactured, and used solely in the laboratory (*i.e.,* intrastate). And section 709 of the FD&C Act (21 U.S.C. 379a) establishes a presumption of interstate commerce in enforcement actions, meaning that the burden is on regulated parties to demonstrate, for example, that no component of a system traveled across State lines. (''In any action to enforce the requirements of this Act respecting a device . . . the connection with interstate commerce . . . shall be presumed to exist.'').

Some commentators have cited the interstate commerce element in section 510(k) of the FD&C Act to raise questions about FDA's authority over LDTs. Section 510(k) provides that a person who is required to register and ''proposes to begin the introduction or delivery for introduction into interstate commerce'' of a device ''shall'' submit a premarket notification. Under this line of argument, laboratories that design, manufacture, and use an IVD in a single laboratory are not proposing to introduce their IVD into interstate commerce, and therefore section 510(k) does not apply to them. That argument, however, does not lead to the conclusion that FDA lacks jurisdiction over LDTs or that none of the FD&C Act requirements apply to LDTs. It would mean only that section 510(k) does not apply. And if accepted, the only practical consequence of that assertion would be that affected laboratories are subject to *more burdensome* requirements under the FD&C Act.

In particular, if section 510(k) is construed to mean that such IVDs are not eligible for the premarket notification pathway, that would only mean that those IVDs (unless they are 510(k)-exempt, in which case section 510(k) would not apply anyway, or are for investigational use) would be forced into the more rigorous review pathways of premarket approval or authorization through the De Novo pathway. That is because under section 513(f)(l) of the FD&C Act, a postamendments device, *i.e.,* a device that was ''not introduced or delivered for introduction into interstate commerce for commercial distribution before [May 28, 1976],'' is a class III device by operation of law (21 U.S.C. 360c(f)(1)). If such a device cannot be found to be substantially equivalent through the premarket notification pathway, it must either have an approved PMA (21 U.S.C. 360e(a)), or be reclassified and gain authorization through a pathway such as the De Novo process (21 U.S.C. 360c(f)(2)(A)(ii)). Thus, under this theory, laboratories would not escape FDA regulation—they would face heavier regulation. However, because section 510(k) does not, in fact, preclude regulated entities from submitting premarket notifications even assuming their devices are not introduced into interstate commerce, and because laboratories have every incentive to take the less burdensome path to market of 510(k) notification, the 510(k) pathway should play the same role in device reclassification (21 U.S.C. 360c(f)) for IVDs offered as LDTs as for any other device. Regardless, the inclusion of an interstate commerce element in section 510(k) in no way affects FDA's overall authority to regulate IVDs manufactured by laboratories.

b. Commercial distribution. The phrase ''for commercial distribution'' also appears in various device provisions of the FD&C Act, and some commentators have asserted that this phrase, too, signals that FDA lacks authority over LDTs. For example, they point to the 510(k) premarket notification requirement, which is triggered when a person who is required to register ''proposes to begin the introduction or delivery for introduction into interstate commerce for commercial distribution of a device intended for

human use'' (21 U.S.C. 360(k)). As with ''interstate commerce,'' the presence of this phrase in that provision and certain other specific device provisions does not bear on the Agency's overall jurisdiction. Furthermore, LDTs are for commercial distribution, so the presence of the phrase does not change the operation of those provisions with respect to these IVDs.

Under our longstanding, judicially endorsed interpretation, ''commercial distribution'' does *not* require the physical transfer of an object, as some commentators have argued. Instead, the legislative history, FDA's near-contemporaneous regulation, and at least one judicial decision reflect that the phrase ''commercial distribution'' means ''on the market.'' A House Report issued 3 months before enactment of the MDA contains an unusually clear statement of the intended meaning of the phrase: '''Commercial distribution' is the functional equivalent of the popular phrase 'on the market.' '' (H.R. Rep. No. 94–853 at 36) FDA's regulations implementing the registration, listing, and 510(k) provisions, which were finalized in 1977 (soon after enactment of the MDA), similarly define commercial distribution as ''any distribution of a device intended for human use which is held or offered for sale.'' (21 CFR 807.3(b)) In the preambles to the proposed and final rule, FDA equated the term with the phrase ''on the market'' (41 FR 37458 at 37459 (September 3, 1976); 42 FR 42520 at 42524 (August 23, 1977)). A court has also endorsed this interpretation of the term (*United States* v. *An Article of Device Consisting of 1,217 Cardboard Boxes,* 607 F. Supp. 990, 994–95 (W.D. Mich. 1985) (giving deference to FDA's reasonable interpretation of ''commercial distribution'' to mean, ''in its popular sense, 'on the market' '')). These sources show that the term does not relate to physical movement, and because IVDs manufactured by laboratories (including LDTs) generally are ''on the market,'' they are for commercial distribution.

VI. Description of the Proposed Enforcement Policy

Based on the considerations set forth in this preamble, FDA is proposing to end the general enforcement discretion approach for LDTs. However, FDA also recognizes that many IVDs manufactured by laboratories are currently being marketed as LDTs, and that a sudden change could negatively affect the public, including patients and industry. In particular, FDA understands that the healthcare community and patients have been using these IVDs, and that coming into compliance will take time for manufacturers. FDA also recognizes that we should consider Agency resources. For additional information regarding the estimated costs associated with this rulemaking, see the Preliminary Economic Analysis of Impacts (Ref. 34).

To achieve greater oversight in a manner that accounts for the various considerations, FDA is proposing to gradually end its general enforcement discretion approach in stages, as described below (hereinafter ''the phaseout policy''). FDA's intent is that, following a 4-year phaseout period, IVDs offered as LDTs generally would be expected to meet applicable requirements.

Although FDA is proposing to gradually end its current general enforcement discretion approach over a period of years, the phaseout policy does not in any way alter the fact that it is illegal to offer IVDs without complying with applicable requirements. Regardless of the phaseout timeline and continued enforcement discretion approach for certain IVDs discussed below, FDA retains discretion to pursue enforcement action at any time against violative IVDs when appropriate.

Moreover, FDA has adopted and intends to continue adopting enforcement discretion policies for certain types of IVDs in certain circumstances, as appropriate. For example, FDA issued guidance documents with enforcement discretion policies for certain COVID–19 and Mpox tests at the beginning of each declared emergency (as described further below), and intends to issue a draft guidance with an enforcement policy for IVDs for emerging outbreaks offered prior to FDA review to address the immediate public health need. FDA will seek public comment on such draft guidance in accordance with good guidance practices (see 21 CFR 10.115).

With this notice of proposed rulemaking, FDA seeks public comment on whether specific enforcement discretion policies would be appropriate for IVDs offered as LDTs for other public health scenarios. If so, please provide a description of those scenarios, an explanation of why enforcement discretion policies with respect to those scenarios would be appropriate, and any relevant evidence to support such policies. FDA would also appreciate public comment on what, if any, unintended consequences may result from the proposed phaseout policy to certain patient populations (for example, Medicare beneficiaries, rural populations, etc.) and what steps could be taken to mitigate those consequences.

FDA's proposed phaseout policy, including the scope and phaseout timeline, is set forth below.

A. Scope

While FDA's general enforcement discretion approach has been focused on LDTs, FDA is proposing a broader scope for the phaseout policy. Specifically, FDA is proposing to apply the phaseout policy to IVDs that are *manufactured and offered* as LDTs by laboratories that are certified under CLIA and that meet the regulatory requirements under CLIA to perform high complexity testing,[15] even if those IVDs do not fall within FDA's traditional understanding of an LDT because they are not designed, manufactured, and used within a single laboratory.[16] Throughout this preamble, these IVDs are referred to as ''IVDs offered as LDTs.'' FDA is proposing this scope because it recognizes that not all laboratories have understood the limited nature of FDA's general enforcement discretion approach and have been offering IVDs based on the approach even when they do not fit what FDA generally considers to be an LDT. As previously discussed, FDA has made a preliminary determination to structure the phaseout in a way that avoids undue disruption to the testing market. This is important even for certain IVDs currently on the market that do not fall within the scope of FDA's general enforcement discretion approach.

Although FDA is proposing this broader scope for the phaseout policy, it does not intend to sweep in certain tests that were excluded from the general enforcement discretion approach, as reflected in compliance patterns, multiple public FDA actions and communications, or both. These tests are:

1. Tests that are intended as blood donor screening or human cells, tissues, and cellular and tissue-based products (HCT/Ps) donor screening tests required for infectious disease testing under 21 CFR 610.40 and 1271.80(c), respectively, or for determination of

[15] Other laboratories would be out of compliance with CLIA regulations if they were developing and performing tests that are not FDA authorized. Such tests have never fallen within FDA's general enforcement discretion approach (see, *e.g.,* Refs. 32, 40, and 54).

[16] As discussed elsewhere in this preamble, FDA has generally considered the term ''laboratory developed test (LDT)'' to mean an IVD that is intended for clinical use and that is designed, manufactured, and used within a single CLIA-certified laboratory that meets the regulatory requirements under CLIA to perform high complexity testing.

blood group and Rh factors required under 21 CFR 640.5. Under the cited regulations, a blood or HCT/P establishment must not use a test for the purposes listed here unless the test is licensed, approved, or cleared by FDA for such use. Blood and HCT/P establishments must register with FDA and are subject to FDA inspection (see 21 CFR parts 207, 607, 807 and 1271). FDA's general enforcement discretion approach for LDTs has never applied to these tests because these tests are a critical part of the overall process of ensuring the safety of blood and blood components and HCT/Ps by preventing infectious disease transmission and incompatible blood transfusions which can have life-threatening consequences. Based on FDA experience, establishments have been generally complying with these requirements (see, *e.g.,* Refs. 66 and 67).

2. Tests intended for emergencies, potential emergencies, or material threats declared under section 564 of the FD&C Act. After all previous declarations under section 564(b), FDA has generally expected LDTs to comply with applicable requirements in the FD&C Act and FDA regulations. FDA's general enforcement discretion approach has not applied to these tests because of the significant risk posed by the disease (as signified by the unusual step of issuing a declaration) and because false results can have serious implications for disease progression and public health decision-making, in addition to the individual patient's care. As it has done in other areas, FDA has adopted (and may continue to adopt) specific enforcement discretion policies for such tests (see, *e.g.,* Refs. 51 and 52). In addition, consistent with the Government Accountability Office's 2022 recommendation that ''FDA should develop a policy for the use of enforcement discretion regarding unauthorized tests in future public health emergencies,'' FDA intends to issue guidance on factors to consider in adopting such enforcement discretion policies (Ref. 68). FDA has communicated its expectations regarding tests for emergency use in guidance and elsewhere, including ''It has come to our attention'' letters posted on FDA's website and other public communications (see, *e.g.,* Refs. 51 to 54, 69, and 70).

3. Direct-to-consumer tests. FDA's general enforcement discretion approach has not applied to tests intended for consumer use (without meaningful involvement by a licensed healthcare professional), given the greater risks to patients presented by these tests (see, *e.g.,* Refs. 48, 55, and 71 to 75). FDA's enforcement discretion approach for LDTs was originally premised, in part, on the participation of medical professionals to help determine whether a particular test was appropriate, counsel patients on the significance and limitations of a test, assist in interpreting results, assess how the results fit in the overall clinical picture, and consider next steps. When patients order tests, receive results, and make decisions (such as a decision to stop medication) without this expert intermediary, there is a heightened need for FDA oversight.

For these categories of tests, FDA has generally expected applicable requirements to be met, and we are not proposing to change that approach.

FDA notes that the manufacturing of test components *outside* of a laboratory—for example, when the same entity owns both the laboratory and a manufacturing facility separate from the laboratory—does not fall within FDA's general enforcement discretion approach. FDA's approach has long been specific to *laboratory* development (*e.g.,* 61 FR 10484 (''*in-house* developed tests have not been actively regulated by the Agency'') (emphasis added); Ref. 48 (describing an LDT as an IVD that is ''designed, manufactured, and used within a single laboratory''). The proposed phaseout policy would not change FDA's longstanding expectation that IVD manufacturing activities occurring outside of a CLIA-certified laboratory comply with applicable device requirements.

In addition, for certain categories of tests manufactured by laboratories, FDA is proposing to continue to apply the current general enforcement discretion approach going forward. One such category of tests is referred to in this preamble as ''1976-Type LDTs.'' Such tests have the following characteristics common among LDTs offered in 1976: use of manual techniques (without automation) performed by laboratory personnel with specialized expertise; use of components legally marketed for clinical use; and design, manufacture, and use within a single CLIA-certified laboratory that meets the requirements under CLIA for high complexity testing. The characteristics associated with LDTs offered in 1976 resulted in the emergence of FDA's general enforcement discretion approach for LDTs, and the specific characteristics listed above provide the greatest risk mitigation among the characteristics that were commonly associated with LDTs offered in 1976 (discussed in section III.A). Based on changes to the LDT landscape since 1976, the risks associated with most modern LDTs are generally much greater today than they were in 1976; however, for tests that share the characteristics listed above, FDA has made a preliminary determination that the risks are sufficiently mitigated such that FDA's general enforcement discretion approach for LDTs should continue to apply. These tests might include, for example, immunohistochemistry tests that involve no automated preparation or interpretation, but would not include, for example, lateral flow tests, as they do not generally rely on laboratory personnel expertise.

FDA is also proposing to continue to apply the general enforcement discretion approach to Human Leukocyte Antigen (HLA) tests that are designed, manufactured, and used in a single laboratory certified under CLIA that meets the requirements to perform high-complexity histocompatibility testing when used in connection with organ, stem cell, and tissue transplantation to perform HLA allele typing, for HLA antibody screening and monitoring, or for conducting real and ''virtual'' HLA crossmatch tests. FDA has made a preliminary determination that HLA LDTs for transplantation used in histocompatibility laboratories that meet the regulatory requirements under CLIA to perform high complexity testing, when used in connection with organ, stem cell, and tissue transplantation for certain purposes as described in this paragraph, are unique in that they are generally developed, and the testing is generally performed, in urgent, life-saving situations for the patient. Physicians must often make prompt decisions about transplantation based on medical judgment regarding their patient's condition and degree of mismatch between the donor and patient should an organ, stem cells, or tissue become available. Further, these tests are often individualized within each medical facility, for example, they include reagents that reflect local HLA polymorphisms and patient demographics. Note that the general enforcement discretion approach does not apply to HLA tests used for blood transfusion as such tests are highly standardized across institutions; FDA intends to continue to enforce applicable requirements for HLA tests used for blood transfusion.

FDA also intends to maintain its longstanding enforcement discretion approach for tests intended solely for forensic (law enforcement) purposes. This approach has been in place for over 20 years and applies to such tests regardless of whether they are offered as an LDT. See, *e.g.,* 65 FR 18230 (April 7, 2000). Tests used in the law

enforcement setting are subject to protections and requirements associated with the judicial process that mitigate risk related to test accuracy and sample collection and that generally are not available in the home, workplace, insurance, and sports settings. These protections include the use of rules of evidence in judicial proceedings and legal representation of the accused (*i.e.,* the person being tested) through the judicial process during which the accuracy of the test may be raised during the adjudication. We seek comment on any implications of continued enforcement discretion with regard to LDTs used for law enforcement purposes and any factors that FDA should consider—particularly as it relates to civil rights and equity—related to the scientific validity and accuracy of these tests.

In addition, tests exclusively used for public health surveillance are distinct from other tests where: (1) they are intended solely for use on systematically collected samples for analysis and interpretation of health data in connection with disease prevention and control, and (2) test results are not reported to patients or their healthcare providers. These tests would not be affected by the phaseout policy. The results of these tests are generally used for trending on a population basis. Public health authorities also have access to test results from non-surveillance tests that are FDA approved, cleared, or authorized and that are reported under State reporting laws for infectious and other diseases. In addition, during a public health emergency, if there was a 564 declaration (as there was for past public health emergencies), FDA could require test result reporting to public health authorities under emergency use authorizations, as appropriate.

In 2017, FDA indicated support for less oversight of other categories of tests, such as low-risk tests (class I devices), tests currently on the market, and tests for rare diseases. However, FDA has accumulated information in the intervening years that suggests we should treat these categories of tests similarly to other FDA-regulated tests. For example, as discussed above in section III.B, FDA has gained additional information showing that there is a high variability in the performance of IVDs offered as LDTs that are currently on the market, including in circumstances where the test technology is relatively simple and well-understood, where the tests are for rare diseases, and where the tests are low risk. Among other things, FDA's recent experience with tests for COVID–19 suggests that many tests manufactured by laboratories are not appropriately validated. Compliance with premarket review requirements (when applicable), QS requirements, and registration and listing requirements would help assure that these IVDs work as intended, enable FDA to keep track of IVDs offered as LDTs (and, for example, help FDA locate IVDs that are raising concerns or independently evaluate the risk status of marketed IVDs), assist with FDA's inspection and planning efforts, and make information available to patients and healthcare providers that may inform the selection of particular IVDs for use. Therefore, FDA is now proposing to end the general enforcement discretion approach, via a phaseout approach, with respect to premarket review requirements (as applicable), QS requirements, and registration and listing requirements for these tests, in addition to medical device reporting (MDR) requirements (*i.e.,* reporting of adverse events), correction and removal reporting requirements, and other requirements applicable to such tests. Based on the information available at this time, FDA has made a preliminary determination that this proposal appropriately balances the relevant considerations with respect to these tests, including currently marketed IVDs offered as LDTs.

However, FDA expects that some stakeholders will suggest that FDA continue to maintain the current general enforcement discretion approach with respect to premarket review and some or all QS requirements for currently marketed LDTs or a subset of currently marketed LDTs (*i.e.,* what some previously referred to as ''grandfathering''). To the extent commenters suggest such an approach for FDA's consideration, FDA requests information to support such an approach, including the following:

- Given the information in the ''Need for the Rule'' section of this preamble in particular, what would be the public health rationale for generally exercising enforcement discretion with respect to premarket review and some or all QS requirements, for LDTs that are being offered as of the date of issuance of this proposed rule and are not changed with respect to indications for use or performance after that date? Please provide data to support such an approach. Also, if you think there are steps that might help support such an approach, including ideas that might help to address the public health concerns discussed in the ''Need for the Rule'' section, please describe them, and include a rationale and any supporting evidence.
- If commenters suggest maintaining the general enforcement discretion approach with respect to premarket review and QS requirements for a subset of LDTs (*e.g.,* low and moderate risk LDTs) currently on the market that are being offered as of the date of issuance of this proposed rule and are not changed with respect to indications for use or performance after that date, what would be the public health rationale to support such an approach? Please provide any data supporting such an approach. Also, if you think there are steps that might help support such an approach, including ideas that might help to address the public health concerns discussed in the ''Need for the Rule'' section, please describe them and include a rationale and any supporting evidence.

FDA recognizes that the phaseout of the general enforcement discretion approach described in this section may have a relatively greater impact on small laboratories. Therefore, FDA seeks comment on the following:

- Is there a public health rationale to have a longer phaseout period for IVDs offered as LDTs by laboratories with annual receipts below a certain threshold (*e.g.,* $150,000) (see Table 43 in the Preliminary Economic Analysis of Impacts (Ref. 34))? If so, please provide relevant data and comment specifically on an alternative recommended timeline.

In addition, FDA is aware that some AMCs have claimed that their laboratories operate under unique circumstances (such as being integrated into direct patient care) and therefore their tests should be treated differently than tests manufactured by other laboratories. Although FDA is not aware of an established definition of an AMC laboratory, one possible description is: a laboratory for which a certificate is in effect under CLIA and that meets the requirements under CLIA to perform tests of high-complexity; that is part of an accredited public or nonprofit private AMC that has a medical residency training program or fellowship program related to test development, application, and interpretation; and that is integrated into the direct medical care for a patient, including specimen collection, testing, interaction with the treating provider, and, as appropriate, patient treatment based on the test, all at the same physical location. FDA seeks comments on the following:

- What are the characteristics of AMC laboratories? Do the characteristics included above accurately describe

AMC laboratories and in fact distinguish them from other laboratories?

- Should FDA continue the general enforcement discretion approach with respect to any requirements, such as premarket review requirements, for tests manufactured by AMC laboratories?
- If FDA should continue the general enforcement discretion approach with respect to any requirements, such as premarket review requirements, for tests manufactured by AMC laboratories, are there any additional considerations that should be taken into account with respect to this approach, for example, whether an FDA cleared or approved test is available for the same intended use as the test manufactured by an AMC laboratory? Please provide a rationale and other information (*e.g.,* data) to support any additional considerations.
- If FDA should have a different policy for AMC laboratories, what would be the public health rationale to support such a policy? For example, if integration of an AMC laboratory into direct patient care is included as a basis for a different policy, please include a public health rationale when explaining why and how such integration supports the different policy, and how integration could ensure that there is a reasonable assurance of IVD safety and effectiveness.
- If FDA should have a different policy for AMC laboratories, is there evidence to support such a policy?

FDA also is interested in and seeks comment on leveraging programs such as the New York State Department of Health Clinical Laboratory Evaluation Program (NYSDOH CLEP) or those within the Veterans Health Administration (VHA), as appropriate. In particular, FDA requests comment on whether it may be appropriate to continue the general enforcement discretion approach, such that FDA generally would not enforce any applicable device requirements, where outside programs can be leveraged. If FDA should continue to exercise enforcement discretion under these circumstances:

- What specific characteristics of and activities within these programs justify such an approach?
- Should the scope of such a policy be more limited for each program in question? For example, should FDA continue enforcement discretion for premarket review requirements and intend to enforce other requirements, such as reporting adverse events?
- Are there any additional considerations that should be taken into account?

Please provide a rationale and other information (*e.g.,* data) to support any suggestions.

B. Stages

As previously discussed, FDA is proposing to gradually phase out its current general enforcement discretion approach so that most IVDs offered as LDTs would generally fall under the same enforcement approach as other IVDs. In developing the proposed phaseout policy, FDA has considered a number of factors, including the public health importance of better assuring the safety and effectiveness of IVDs offered as LDTs, the desire to avoid undue disruption to the testing market, the time it may take for laboratories to come into compliance with FDA requirements, the need for adequate resources to implement the phaseout policy in a manner that does not undermine reasonable expectations with regards to premarket review timing (per the Medical Device User Fee Amendments (MDUFA) V agreement), and the benefits of a relatively simple policy that can be easily understood and implemented. Keeping these factors in mind, FDA has structured the phaseout policy to contain five key stages:

- *Stage 1:* End the general enforcement discretion approach with respect to MDR requirements and correction and removal reporting requirements 1 year after FDA publishes a final phaseout policy, which FDA intends to issue in the preamble of the final rule.
- *Stage 2:* End the general enforcement discretion approach with respect to requirements other than MDR, correction and removal reporting, QS, and premarket review requirements 2 years after FDA publishes a final phaseout policy.
- *Stage 3:* End the general enforcement discretion approach with respect to QS requirements 3 years after FDA publishes a final phaseout policy.
- *Stage 4:* End the general enforcement discretion approach with respect to premarket review requirements for high-risk IVDs 3½ years after FDA publishes a final phaseout policy, but not before October 1, 2027.
- *Stage 5:* End the general enforcement discretion approach with respect to premarket review requirements for moderate risk and low risk IVDs (that require premarket submissions) 4 years after FDA publishes a final phaseout policy, but not before April 1, 2028.

Each of these stages is discussed in further detail below. For each stage, FDA is proposing a period of time for laboratories to come into compliance before FDA intends to end the general enforcement discretion approach. FDA encourages laboratory manufacturers to begin early and work toward compliance with requirements sooner than the end of the specified timeframes. FDA also intends to consider providing more targeted guidance and/or making additional resources available on specific topics, such as compliance with applicable labeling requirements, over the course of the phaseout period.

1. *Stage 1:* End the general enforcement discretion approach with respect to MDR requirements and correction and removal reporting requirements 1 year after FDA publishes a final phaseout policy.

FDA has structured the phaseout policy to obtain information about potentially harmful IVDs offered as LDTs as soon as feasible. As detailed elsewhere in this preamble, FDA is concerned that some of the IVDs offered as LDTs may be posing risks to patients. Therefore, FDA is prioritizing the phaseout of the general enforcement discretion approach for requirements that would help FDA identify and monitor significant issues with IVDs offered as LDTs, consistent with other considerations described in this proposed policy.

Enforcement of the MDR requirements under 21 U.S.C. 360i(a) through (c) and 21 CFR part 803, in particular, would enable FDA to systematically monitor significant adverse events to identify problematic IVDs offered as LDTs, such as those with poor performance or other safety issues. FDA has made a preliminary determination that gathering this information is important for IVDs that do not have the safeguards associated with compliance with other FDA requirements, such as manufacturing under QS requirements or confirmation of analytical and clinical validity through premarket review.

For similar reasons, FDA is prioritizing the collection of information about when a manufacturer has initiated a correction or removal of its IVD to reduce a risk to health or to remedy a violation of the FD&C Act that may present a risk to health. Under 21 U.S.C. 360i(g) and part 806 (21 CFR part 806), manufacturers are required to report such corrections or removals to FDA, and FDA intends to phase out the general enforcement discretion approach for these requirements at the same time it does so for MDR requirements. Because FDA intends for the phaseout of the general enforcement discretion approach with respect to

correction and removal reporting requirements to occur before phaseout of the general enforcement discretion approach with respect to registration and listing requirements, FDA intends to exercise enforcement discretion, such that it generally does not intend to enforce, the requirement to use the establishment registration number on such reports (21 CFR 806.10) when laboratories use their CLIA certificate number instead prior to registering.

FDA's proposal to phase out enforcement discretion for MDR requirements within 1 year after finalization of the policy is informed by comments FDA received in response to the draft guidance documents that FDA issued in 2014 proposing to implement an oversight framework for IVDs offered as LDTs. In 2014, FDA proposed a 6-month timeline for laboratory compliance with MDR requirements (Ref. 48), and we received comments suggesting that a longer period may be appropriate for the establishment of a system to identify, review, and report adverse events. Based in part on those comments, FDA is now proposing a 1-year time period for laboratories to come into compliance with the MDR requirements. In conjunction with the phaseout of the general enforcement discretion approach with respect to the MDR requirements, FDA is also proposing to end the general enforcement discretion approach with respect to the requirements of part 806, concerning reports of corrections and removals. Because MDRs frequently are a basis for corrections and removals, FDA views these requirements as working together to provide information to FDA about issues with device performance or quality. We anticipate that this 1-year time period is adequate, particularly given that laboratories should already have some processes in place for detecting problems with their IVDs to comply with CLIA regulations.

2. *Stage 2:* End the general enforcement discretion approach with respect to requirements not covered during other stages of the phaseout policy 2 years after FDA publishes a final phaseout policy.

FDA is proposing to end the general enforcement discretion approach for requirements besides MDR, correction and removal reporting, QS, and premarket review requirements 2 years after the final policy is published. These other requirements include registration and listing requirements under 21 U.S.C. 360 and part 807 (excluding subpart E); labeling requirements under 21 U.S.C. 352 and parts 801 and 809, subpart B; and investigational use requirements under 21 U.S.C. 360j(g) and part 812. We have included compliance with investigational use requirements at this stage, in recognition that there has been some confusion about our enforcement approach in this area. Our understanding is that laboratories often are not complying with investigational use requirements currently, even though FDA has generally expected compliance with these requirements.[17] We are therefore including these requirements in the phaseout policy.

FDA recognizes that this proposal is different from FDA's prior statements in the 2017 Discussion Paper regarding oversight of IVDs manufactured by laboratories with respect to certain requirements, for which the timing of FDA's expectations for compliance generally depended on the type of premarket review applicable to the device. However, upon review, FDA anticipates that it would better serve the public health and be simpler to phase out the general enforcement discretion approach for these requirements at the 2-year mark. For example, under this timeline, laboratories could work toward compliance with the stage 2 requirements without necessarily determining the risk category of their IVDs until later stages of the proposed phaseout policy. Another advantage of this timeline is that FDA would obtain registration and listing information before the enforcement discretion phaseout date for premarket review requirements, which could give the Agency an initial understanding of the universe of IVDs offered as LDTs to facilitate premarket review of those IVDs. Based on its experience, FDA anticipates that 2 years is adequate time to come into compliance with the various requirements.

3. *Stage 3:* End the general enforcement discretion approach with respect to QS requirements 3 years after FDA publishes a final phaseout policy.

At the 3-year mark, FDA would expect compliance with the device CGMP requirements of the QS requirements under 21 U.S.C. 360j(f) and part 820 (21 CFR part 820). However, for IVDs for which all manufacturing activities occur within a single CLIA-certified laboratory that meets the regulatory requirements to perform high complexity testing and for which distribution of the IVD does not occur outside that single laboratory, FDA would expect compliance at the 3-year mark with some, but not all, of the QS requirements. Although FDA and CMS regulation are different and complementary, compliance with CLIA requirements provides some quality assurances that may be relevant to laboratories' manufacturing practices. In particular, laboratories may in practice be able to apply concepts set forth under CLIA requirements for laboratory operations to manufacturing activities regulated by FDA. For FDA to effectively leverage the CLIA assurances, this proposed approach would apply only when all manufacturing activities occur within a single laboratory and the IVD is not distributed outside that laboratory. However, even in the context of this approach, there are certain QS requirements for which CLIA regulations do not provide the assurances that FDA requirements would provide. These requirements include design controls under 21 CFR 820.30; purchasing controls (including supplier controls) under 21 CFR 820.50; acceptance activities (receiving, in-process, and finished device acceptance) under 21 CFR 820.80 and 21 CFR 820.86; corrective and preventative actions (CAPA) under 21 CFR 820.100; and records requirements under part 820, subpart M. Because CLIA does not provide assurances relevant to these requirements, FDA is proposing to end the general enforcement discretion approach for these specific requirements for IVDs for which all manufacturing activities occur within a single CLIA-certified laboratory that meets the regulatory requirements to perform high complexity testing, and which are not distributed outside that laboratory, 3 years after finalizing this policy. For all other IVDs offered as LDTs and subject to this phaseout policy, FDA is proposing to end the general enforcement discretion approach for all QS requirements 3 years after finalizing this policy.

Based on its experience, FDA anticipates that 3 years is adequate time for laboratories to come into compliance with QS requirements. In addition, based on the discussion above regarding concerns with the quality and validation of IVDs offered as LDTs, FDA has made a preliminary determination that phasing out the general enforcement discretion approach for QS requirements later than 3 years would not be in the best interest of the public health. Compliance with QS requirements is critical to the quality and validity of IVDs offered as LDTs.

[17] For example, FDA stated in the ''Framework for Regulatory Oversight of Laboratory Developed Tests (LDTs)'' draft guidance that ''FDA intends to *continue to enforce* investigational device requirements under 21 CFR part 812 for all clinical investigations of LDTs that are conducted under clinical protocols that require institutional review board approval'' (Ref. 48).

For example, under the design controls of the QS requirements, laboratories would, among other things, generally have better procedures for validating the design of their tests, which would help to ensure that they are analytically and clinically valid (see Ref. 76).

FDA also notes that on February 23, 2022, FDA proposed to amend the device QS regulation, part 820, to align more closely with international consensus standards for devices (87 FR 10119). As stated in that proposed rule, the requirements, if finalized, would be substantially similar to the requirements of the current part 820, providing a similar level of assurance in a firm's quality management system, and FDA intends for this phaseout policy to apply with respect to any regulations promulgated through that rulemaking.

FDA intends to finalize amendments to the QS regulation expeditiously, such that the amended QS requirements would be in effect before the proposed beginning of stage 3. Upon the start of stage 3, or if the laboratory complies with QS requirements prior to the start of stage 3, FDA would expect compliance with the QS requirements that are in effect at that time. For further information on the QS requirements that would be established pursuant to the amendments to the QS regulation, if finalized as proposed, please refer to the proposed codified at 87 FR 10119 at 10133 and 10134. Notably, the requirements relating to design controls, purchasing controls, acceptance activities, CAPA, and records requirements are set forth in the following ISO 13485 clauses as modified by the proposed codified for part 820: Clause 4. Quality Management System, Subclause 4.2.5; Clause 6. Resource Management; Clause 7. Product Realization, Subclause 7.1, Subclause 7.3, Subclause 7.4, and Subclause 7.4.3; and Clause 8. Measurement, Analysis, & Improvement, Subclause 8.2.5, Subclause 8.2.6, and Subclause 8.3.

In addition, FDA notes that under section 515(d)(2) of the FD&C Act, the Agency may not approve a PMA if the applicant fails to demonstrate conformity with the QS requirements. Therefore, compliance with the QS requirements is needed to support approval of a PMA. As provided in section 520(f)(2) of the FD&C Act, any person subject to the QS requirements may petition for an exemption or variance from any QS requirement (see also 21 CFR 820.1).

4. *Stage 4:* End the general enforcement discretion approach with respect to premarket review requirements for high-risk IVDs 3½ years after FDA publishes a final phaseout policy, but not before October 1, 2027.

FDA proposes that the phaseout date for the general enforcement discretion approach with respect to premarket review requirements for high-risk IVDs offered as LDTs (IVDs that may be eligible for classification into class III) should occur 3½ years from the time that FDA issues a final phaseout policy. The premarket review requirements are set forth in 21 U.S.C. 360e and 21 CFR part 814. FDA is proposing this time period because it is mindful that phasing out the general enforcement discretion approach on a timeline that is too short could cause undue disruption in the testing market. Among other things, we anticipate that 3½ years would provide sufficient notice and opportunity for laboratories manufacturing IVDs to plan for and prepare PMAs and would appropriately account for any reliance interests. We note that 3½ years is a longer time period than was discussed in either the 2014 draft guidance documents or the 2017 Discussion Paper for the phaseout of the general enforcement discretion approach for premarket review requirements.

This timeline is also intended to align the phaseout date for the general enforcement discretion approach for premarket review requirements for high-risk IVDs offered as LDTs with the start of fiscal year 2028, which coincides with the beginning of a new user fee cycle. This alignment would provide an opportunity for industry participation in negotiations regarding the next user fee cycle with the knowledge that laboratory manufacturers would be expected to comply with premarket review requirements. (Although a trade association representing laboratories previously has participated in MDUFA negotiations, the prior negotiations have not incorporated similar expectations regarding laboratory compliance with premarket requirements.) Thus, we propose that this amount of time is appropriate to foster stability and consistency in the marketplace for the current MDUFA cycle, and would take into account the need for adequate FDA resources to implement the phaseout policy in a manner that does not compromise the capacity to achieve MDUFA V performance expectations. FDA anticipates that during this 3½-year period, laboratories would work with FDA to determine whether PMAs should be submitted for their IVDs.

Under FDA's proposed policy, FDA generally would not intend to enforce against IVDs offered as LDTs after a PMA has been submitted (within the 3½-year timeframe) until FDA completes its review of the application. Given that such IVDs may already be on the market and available to patients, FDA generally does not intend to interrupt access at the point when a submission is made.

Finally, FDA recognizes that the 2017 Discussion Paper described a possible premarket-review approach specific to LDTs for unmet needs. FDA has not included such an approach in this proposed policy because we anticipate that the 3½-year timeframe should be sufficient for laboratories to meet premarket review requirements for each of their marketed IVDs, as applicable, including IVDs for unmet needs. FDA also anticipates that programs currently in place may facilitate the development and premarket authorization of IVDs for unmet needs. These programs include the Humanitarian Use Devices (HUD)/Humanitarian Device Exemption (HDE) program,[18] which, among other things, provides an exemption from the requirement to establish a reasonable assurance of effectiveness for devices intended for use in the treatment or diagnosis of rare diseases or conditions (21 U.S.C. 360j(m); 21 CFR part 814, subpart H), and the Breakthrough Devices program, which is intended to help expedite the development and review of certain devices that provide for more effective treatment or diagnosis of life-threatening or irreversibly debilitating diseases or conditions (21 U.S.C. 360e–3).

5. Stage 5: End the general enforcement discretion approach with respect to premarket review requirements for moderate risk and low risk IVDs (that require premarket submissions) 4 years after FDA publishes a final phaseout policy, but not before April 1, 2028.

FDA is proposing to end the general enforcement discretion approach with respect to premarket review requirements for moderate risk IVDs offered as LDTs (IVDs that may be eligible for classification into class II) and low risk IVDs offered as LDTs (IVDs that may be eligible for classification into class I) that require a premarket submission 4 years after FDA publishes the final phaseout policy. These premarket submissions include 510(k) submissions, the requirements for which are set forth at 21 U.S.C. 360(k),

[18] Under the proposed phaseout policy, laboratories that intend to submit an HDE application should do so within the same 3½-year timeframe provided for submission of PMAs. As in the case of PMAs, under FDA's proposed policy, FDA generally would not intend to enforce against IVDs after an HDE application has been submitted (within the 3½-year timeframe) until FDA completes its review of the application.

360c(i), and part 807, subpart E. These submissions also include De Novo requests, which laboratories may submit for IVDs offered as LDTs for which there is no legally marketed device upon which to base a determination of substantial equivalence, and for which the laboratory seeks classification into class I or class II. These requirements are set forth at 21 U.S.C. 360c(f)(2) and 21 CFR part 860, subpart D.

FDA intends this stage to begin no earlier than April 1, 2028. FDA's reasons for proposing this time period to phase out the general enforcement discretion approach with respect to premarket review requirements for moderate risk and low risk IVDs offered as LDTs are similar to those for the ''stage 4'' time period, except that FDA has lengthened the time period by 6 months in order to prioritize the review of applications for high-risk IVDs offered as LDTs (subject to premarket approval requirements), so that FDA can focus first on IVDs for which the consequences of a false result are most significant. FDA also recognizes that a greater number of IVDs are subject to the 510(k) requirements, as compared with premarket approval requirements, so a longer period of time for laboratories to come into compliance with these requirements may be appropriate, particularly for laboratories with large test menus.

FDA generally would not intend to enforce against IVDs offered as LDTs after a 510(k) or De Novo request has been submitted (within the 4-year timeframe) until FDA completes its review of the submission.

FDA also anticipates that laboratories may seek to utilize FDA's Third Party review program. FDA currently operates a Third Party review program for medical devices, and multiple organizations are accredited to conduct reviews of 510(k) submissions for certain IVDs (see Ref. 77). We anticipate interest in the Third Party review program among test manufacturers, as well as potential new Third Party review organizations. In particular, FDA is aware of certain CLIA accreditation organizations that may be interested in potentially becoming Third Party reviewers under FDA's program, and to the extent laboratories are already familiar with these organizations, laboratories may be inclined to use the Third Party review program. In addition, under the MDUFA V agreement, FDA is currently working to enhance the Third Party review program, which may make it more attractive to manufacturers including laboratories.

VII. Proposed Effective Date

The Agency proposes that any final rule based on this proposed rule will become effective 60 days after the date of publication of the final rule in the **Federal Register**.

VIII. Preliminary Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, Executive Order 14094, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Orders 12866, 13563, and 14094 direct us to assess all benefits, costs, and transfers of available regulatory alternatives and to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Rules are ''significant'' under Executive Order 12866 Section 3(f)(1) (as amended by Executive Order 14094) if they ''have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of [the Office of Information and Regulatory Affairs (OIRA)] for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities.'' OIRA has determined that this proposed rule is a significant regulatory action under Executive Order 12866 Section 3(f)(1).

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because most facilities that will be affected by this rule are defined as small businesses and the proposed rule is likely to impose a substantial burden on the affected small entities, we find that the proposed rule will have a significant economic impact on a substantial number of small entities.

We prepared an analysis consistent with the Unfunded Mandates Reform Act of 1995 (section 202(a)), which requires us to prepare a written statement that includes estimates of anticipated impacts, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would result in an expenditure in at least one year that meets or exceeds this amount.

This proposed rule, if finalized, would amend FDA's regulations to make explicit that IVDs are devices under the FD&C Act including when the manufacturer of the IVD is a laboratory. As discussed in section VI, FDA intends to phase out its general enforcement discretion approach for LDTs so that IVDs manufactured by a laboratory would generally fall under the same enforcement approach as other IVDs.

We anticipate that the benefits of phasing out FDA's general enforcement discretion approach for LDTs would include a reduction in healthcare costs associated with unsafe or ineffective tests, including tests promoted with false or misleading claims, and from therapeutic decisions based on the results of those tests. Quantified benefits are the annualized sum of both health and non-health benefits. Unquantified benefits would include the reduction in costs from lawsuits and reduction in costs to healthcare systems.

Table 1 summarizes the annualized benefits, costs, and transfers of the proposed rule. At a 7 percent discount rate, 20-year annualized benefits range from $2.67 billion to $86.01 billion, with a primary estimate of $31.41 billion per year. At a 3 percent discount rate, 20-year annualized benefits range from $1.81 billion to $61.41 billion, with a primary estimate of $22.33 billion per year. At a 7 percent discount rate, 20-year annualized costs range from about $2.52 billion to $19.45 billion, with a primary estimate of $5.87 billion per year. At a 3 percent discount rate, annualized costs range from about $2.39 billion to $18.55 billion, with a primary estimate of $5.60 billion per year. At a 7 percent discount rate, 20-year annualized transfers range from $100 million to $452 million, with a primary estimate of $226 million per year. At a 3 percent discount rate, 20-year annualized transfers range from $121 million to $538 million, with a primary estimate of $269 million per year.

TABLE 1—SUMMARY OF BENEFITS, COSTS AND TRANSFERS OF THE PROPOSED RULE
[Millions of 2022 U.S. dollars]

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Benefits:							
Annualized Monetized ($m/year).	$31,408 22,332	$2,670 1,810	$86,013 61,413	2022 2022	7 3	20 20	
Annualized Quantified ..	.....	.....	.....	.....	7 3		
Qualitative							
Costs:							
Annualized Monetized ($m/year).	5,874 5,598	2,522 2,394	19,452 18,549	2022 2022	7 3	20 20	A portion of foreign costs could be passed on to domestic consumers. We estimate that up to $30.73 million in annualized costs (7%, 20 years) to foreign facilities could be passed on to domestic consumers.
Annualized Quantified ..	.....	.....	.....	.....	7 3		
Qualitative							
Transfers:							
Federal Annualized Monetized ($m/year).	226 269	100 121	452 538	2022 2022	7 3	20 20	
	From: Device Industry			To: FDA			
Other Annualized Monetized ($m/year).	.....	.....	.....	.....	7 3		
	From:			To:			

Effects:
State, Local, or Tribal Government:
Small Business: The proposed rule is likely to have a significant economic impact on a substantial number of small laboratories that manufacture IVDs offered as LDTs.
Wages:
Growth:

We have developed a comprehensive Preliminary Economic Analysis of Impacts that assesses the impacts of the proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 34) and at *https://www.fda.gov/about-fda/economics-staff/regulatory-impact-analyses-ria.*

IX. Analysis of Environmental Impact

We have determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

X. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no new collections of information. However, FDA does assume that there will need to be corresponding adjustments to the burden estimates for relevant approved collections of information before the relevant phaseout stage begins and any such collection of information would not be as a result of the implementation of the proposed rule. FDA tentatively concludes that the following information collections will need adjustment before the relevant phaseout stage begins: Office of Management and Budget (OMB) control number 0910–0437, Medical Device Reporting; OMB control number 0910–0359, Corrections and Removals; OMB control number 0910–0625, Device Registration and Listing; OMB control number 0910–0485, Labeling; OMB control number 0910–0078, Investigational Device Exemption; OMB control number 0910–0073, Quality Systems; OMB control number 0910–0231, Premarket Approval; OMB control number 0910–0332, Humanitarian Device Exemption; OMB control number 0910–0756, Q-Submissions; OMB control number 0910–0120, Premarket Notification; and OMB control number 0910–0844 De Novo. Such adjustments will be submitted for review and clearance by OMB under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521).

XI. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that this proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required. Through publication of this proposed rule, we are providing notice and an opportunity for State and local officials to comment on this rulemaking.

XII. Consultation and Coordination With Indian Tribal Governments

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13175. We have tentatively determined that the rule does not contain policies that would 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. The Agency solicits comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

XIII. Other Issues for Consideration

FDA anticipates that this proposed rule, if finalized, may require conforming amendments to other FDA regulations, including provisions regarding IVD labeling and ASRs in part 809. FDA intends to consider and propose conforming amendments, where appropriate, at a future date.

In addition, we note that various bills have been introduced in Congress that would change the legal status of IVDs as devices (under these bills, IVDs would generally be regulated as ''in vitro clinical tests'' and would be subject to new statutory authorities).[19] We recognize that the enactment of such legislation would directly impact this rule, given that it is being proposed under the statutory device authorities and other authorities under the FD&C Act.

XIV. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (see ADDRESSES) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at *https://www.regulations.gov.* References without asterisks are not on public display at *https://www.regulations.gov* because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

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List of Subjects in 21 CFR Part 809

Labeling, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, FDA proposes to amend 21 CFR part 809 as follows:

PART 809—IN VITRO DIAGNOSTIC PRODUCTS FOR HUMAN USE

■ 1. The authority citation for part 809 is revised to read as follows:

Authority: 21 U.S.C. 321(h)(1), 331, 351, 352, 360, 360c, 360d, 360e, 360h, 360i, 360j, 371, 372, 374, 381.

■ 2. In § 809.3, revise the last sentence of paragraph (a) to read as follows:

§ 809.3 Definitions.

(a) * * * These products are devices as defined in section 201(h)(1) of the Federal Food, Drug, and Cosmetic Act (the act) and may also be biological products subject to section 351 of the Public Health Service Act, including when the manufacturer of these products is a laboratory.

* * * * *

Dated: September 27, 2023.

Robert M. Califf,

Commissioner of Food and Drugs.

[FR Doc. 2023–21662 Filed 9–29–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2023–0530]

RIN 1625–AA09

Drawbridge Operation Regulation; Long Creek, Nassau County, NY

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to temporarily modify the operating schedule that governs the Loop Parkway Bridge across Long Creek, mile 0.7, Nassau County, NY. The bridge owner, New York State Department of Transportation (NYSDOT), submitted a request to operate the bridge under single leaf openings to perform bridge deck replacement. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must reach the Coast Guard on or before November 2, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0530 using Federal Decision Making Portal at *https://www.regulations.gov.*

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 212–514–4335, email *Stephanie.E.Lopez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of proposed rulemaking (advance, supplemental)
§ Section
U.S.C. United States Code
NYSDOT New York State Department of Transportation

II. Background, Purpose, and Legal Basis

The Loop Parkway Bridge across Long Creek, mile 0.7, Nassau County, NY, has a vertical clearance of 21 feet at mean high water and a horizontal clearance of 75.5 feet at mean high water. Waterway

users include recreational and commercial vessels, including fishing vessels.

The existing drawbridge operating regulations are listed at 33 CFR 117.799(f). NYSDOT is requesting a temporary rulemaking to operate under single leaf openings while they perform bridge deck replacements. NYSDOT has reached out to local mariners and notified them of the proposed temporary rulemaking as well as outlined an alternate route for larger vessels that may not be able to make passage under the bridge with single leaf openings.

III. Discussion of Proposed Rule

The Loop Parkway Bridge will continue to operate under its regular operating schedule found in 33 CFR 117.799(f). However, this proposed rule will allow the bridge to operate under single leaf openings from September 15, 2023, through May 15, 2024. For vessels that are too large for single leaf openings, NYSDOT has set an alternate route. Vessels that can pass without requesting a bridge opening may do so. NYSDOT has reached phase 2 of the project which requires replacing the bridge deck. The reason for this request is to allow the project to progress while minimizing impact on mariners.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on these statutes and Executive orders.

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 proposed 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). This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability of vessels to still transit the bridge under singe leaf openings or may transit through an alternate route.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has 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 proposed rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this proposed rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material

received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0530 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

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

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

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

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. Section 117.799 is amended as follows:
■ a. Stay paragraph (f).
■ b. Add paragraph (j).
The addition reads as follows:

§ 117.799 Long Island, New York Inland Waterway from East Rockaway Inlet to Shinnecock Canal.

* * * * *

(j) The draw of the Loop Parkway Bridge across Long Creek, mile 0.7, shall operate on single leaf openings until May 15, 2024. The draw will open for commercial vessels engaged in commerce and shall open Monday thru Friday from 6:20 a.m. to 9:50 a.m. and 3:20 p.m. to 7:20 p.m. on signal at 20 and 50 minutes after the hour, and on signal at all other times. For all other vessels, the draw shall open on Monday through Friday from 6:20 a.m. to 7:20 p.m. on signal at 20 and 50 minutes after the hour, and the draw shall open on Saturday, Sunday, and Federal holidays from 7:20 a.m. to 8:20 p.m. on signal at 20 and 50 minutes after the hour, and on signal at all other times.

Dated: August 21, 2023.

J.W. Mauger,

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

[FR Doc. 2023–21753 Filed 9–28–23; 4:15 pm]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2023–0532]

RIN 1625–AA09

Drawbridge Operation Regulation; Sloop Channel, Nassau County, NY

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to temporarily modify the operating schedule that governs the Meadowbrook State Parkway Bridge, mile 12.8, across Sloop Channel, Nassau County, NY. The bridge owner, New York State Department of Transportation (NYSDOT), submitted a request to operate the bridge under single leaf openings to perform bridge deck replacement. We invite your comments on this proposed rulemaking.

DATES: Comments and relate material must reach the Coast Guard on or before November 2, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0532 using Federal Decision Making Portal at *https://www.regulations.gov.*

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

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Ms. Stephanie E. Lopez, First Coast Guard District, Project Officer, telephone 212–514–4335, email *Stephanie.E.Lopez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations [Delete/Add Any Abbreviations Not Used/Used in This Document]

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code
NYSDOT New York State Department of Transportation

II. Background, Purpose and Legal Basis

The Meadowbrook State Parkway Bridge across Sloop Channel, mile 12.8, Nassau County, NY, has a vertical clearance of 21 feet at mean high water and a horizontal clearance of 75.5 feet at mean high water. Waterway users include recreational and commercial vessels, including fishing vessels.

The existing drawbridge operating regulations are listed at 33 CFR 117.799(h). NYSDOT is requesting a temporary rulemaking to operate under single leaf openings while they perform bridge deck replacements. NYSDOT has reached out to local mariners and notified them of the proposed temporary rulemaking as well as outlined an alternate route for larger vessels that may not be able to make passage under the bridge with single leaf openings.

III. Discussion of Proposed Rule

The Meadowbrook State Parkway Bridge will continue to operate under its regular operating schedule found in 33 CFR 117.799(f). However, this proposed rule when made final would allow the

bridge to operate under single leaf openings until May 15, 2024. For vessels that are too large for single leaf openings NYSDOT has set an alternate route. Vessels that can pass without requesting a bridge opening may do so. NYSDOT has reached phase 2 of the project which requires replacing the bridge deck. The reason for this request is to allow the project to progress while minimizing impact on mariners.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on these statutes and Executive Orders.

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 proposed 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, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability of vessels to still transit the bridge under singe leaf openings or may transit through an alternate route.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). The Coast Guard has 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 proposed rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

V. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0532 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed

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

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

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

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; DHS Delegation No. 0170.1, Revision No. 01.3.

■ 2. Amend § 117.799 by:
■ a. Staying paragraph (h) until 3:30 p.m. on May 15, 2024.
■ b. Adding paragraph (k).

The addition to read as follows:

§ 117.799 Long Island, New York Inland Waterway from East Rockaway Inlet to Shinnecock Canal.

* * * * *

(k) The draw of the Meadowbrook State Parkway Bridge across Sloop Channel, mile 12.8, shall operate on single leaf openings until May 15, 2024. The draw will open for commercial vessels engaged in commerce and shall open Monday through Friday from 6:20 a.m. to 9:50 a.m. and 3:20 p.m. to 7:20 p.m. on signal at 20 and 50 minutes after the hour, and on signal at all other times. For all other vessels, the draw shall open on Monday thru Friday from 6:20 a.m. to 7:20 p.m. on signal at 20 and 50 minutes after the hour, and the draw shall open on Saturday, Sunday, and Federal holidays from 7:20 a.m. to 8:20 p.m. on signal at 20 and 50 minutes after the hour, and on signal at all other times.

Dated: August 21, 2023.

J.W. Mauger,

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

[FR Doc. 2023–21754 Filed 9–28–23; 4:15 pm]

BILLING CODE 9110–04–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 261

RIN 0596–AD57

Law Enforcement; Criminal Prohibitions

AGENCY: Forest Service, Agriculture.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Forest Service (Forest Service or Agency), United States Department of Agriculture, is proposing to revise the Forest Service's criminal prohibitions to enhance consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies. The Forest Service is proposing to streamline enforcement of criminal prohibitions in related to fire and use of vehicles on National Forest System roads and trails by eliminating the requirement to issue an order for enforcement.

DATES: Comments on the proposed rule must be received in writing by December 4, 2023.

ADDRESSES: Comments, identified by RIN 0596–AD57, may be submitted via one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for sending comments.
2. *Mail:* Director, Law Enforcement and Investigations Staff, Mail Stop 1140, 1400 Independence Avenue SW, Washington, DC 20250–1140.
3. *Hand Delivery/Courier:* Director, Law Enforcement and Investigations Staff, Room 1SC, 201 14th Street SW, Washington, DC.

Comments should be confined to issues pertinent to the proposed rule; should explain the reasons for any recommended changes; and should reference the specific section and wording being addressed, where possible. All timely comments, including names and addresses when provided, will be placed in the record and will be available for public review and copying. The public may review comments at the Office of the Director, Law Enforcement and Investigations Staff, Room 1SC, 201 14th Street SW, Washington, DC, during normal business hours. Visitors are encouraged to call ahead to 703–605–4730 to facilitate entry into the building. Comments may also be viewed on the Federal eRulemaking Portal at *https://www.regulations.gov.* In the search box, enter ''RIN 0596–AD57,'' and click the ''Search'' button.

FOR FURTHER INFORMATION CONTACT: Gene Smithson, Assistant Director—Investigations, Law Enforcement and Investigations Staff, 703–605–4730 or *wilmer.smithson@usda.gov.* Individuals who use telecommunication devices for the hearing impaired may call the Federal Relay Service at 800–877–8339 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background and Need

This proposed rule would revise certain criminal prohibitions in 36 CFR part 261, subpart A, to enhance consistency of the Forest Service's law enforcement practices with those of State and other Federal land management law enforcement agencies. In addition, this proposed rule would streamline enforcement of some of the criminal prohibitions found in 36 CFR part 261, subpart B, which are enforceable only through issuance of an order, by moving them to 36 CFR part 261, subpart A, which contains criminal prohibitions that are enforceable without issuance of an order.

Forest Service law enforcement personnel continue to encounter a significant volume of violations for simple possession of controlled substances and drug paraphernalia. Agency personnel routinely deal with under-age alcohol possession on National Forest System (NFS) lands. These violations pose a threat to the safety of visitors to NFS lands as well as to Forest Service personnel. This proposed rule would enhance the Forest Service's authority to address public safety issues by adding prohibitions relating to controlled substances, drug paraphernalia, and alcoholic beverages. These proposed prohibitions would enable the Forest Service to enforce more effectively violations on NFS lands for simple possession of controlled substances, possession of alcoholic beverages in violation of State law (for open containers or under-age

drinking), and furnishing alcoholic beverages to minors. The proposed rule also would authorize the Forest Service to enforce violations for the possession of drug paraphernalia if prohibited by State law. These proposed changes are intended to align the Forest Service's law enforcement practices more closely with those of State and local law enforcement agencies.

Additionally, the proposed rule would update the prohibitions to enhance protection of persons visiting and working on NFS lands from theft of personal property and from disorderly conduct by other visitors. The proposed rule would enhance enforcement of wildfire prevention prohibitions by moving them from 36 CFR part 261, subpart B, which requires issuance of an order, to 36 CFR part 261, subpart A, which does not, and by adding a prohibition banning exploding targets year-round. The proposed rule also would make other revisions such as updating the prohibitions relating to off-road vehicles and updating the penalty for violating the criminal prohibitions in 36 CFR part 261 consistent with current statutory law.

Proposed revisions to specific types of public safety prohibitions are discussed below.

Prohibition Relating to Controlled Substances

It is a violation of Federal law for a person knowingly or intentionally to possess controlled substances (21 U.S.C. 844(a)). Forest Service law enforcement officers enforce 21 U.S.C. 844(a) on NFS lands, and in some circumstances off these lands, under the National Forest System Drug Control Act of 1986 (16 U.S.C. 559b–559g). A violation of 21 U.S.C. 844(a) without aggravating factors is classified as a Class A misdemeanor. With aggravating factors, this type of violation is classified as a felony (18 U.S.C. 3559(a)).

Violations of 21 U.S.C. 844(a) require referral to the appropriate United States Attorney's Office for the filing of a complaint or information and prosecution before a United States District Court judge. Guidelines established by the United States Attorney's Office for prosecutions under 21 U.S.C. 844(a) are based upon the amount of the controlled substance involved in the violation. In many instances, violations for simple possession of a controlled substance on NFS lands are not prosecuted under 21 U.S.C. 844(a) because they involve small amounts that are insufficient to meet these prosecutorial guidelines.

The Forest Service's criminal prohibitions at 36 CFR part 261, subpart A, do not expressly prohibit the possession of controlled substances on NFS lands. To provide an alternative to proceeding under 21 U.S.C. 844(a), the Forest Service is proposing to revise 36 CFR part 261, subpart A, to prohibit knowingly or intentionally possessing a controlled substance in violation of Federal law. The proposed rule also would add a definition for the term ''controlled substance'' that tracks the definition of that term in the Controlled Substances Act (21 U.S.C. 801 *et seq.*).

With these changes, the possession of small amounts of a controlled substance could be handled through issuance of a notice of violation by a Forest Service law enforcement officer and prosecution before a United States magistrate judge and would be classified as a Class B misdemeanor. Forest Service law enforcement personnel would continue to refer cases involving larger amounts of controlled substances that meet prosecutorial guidelines to the appropriate United States Attorney's Office.

Prohibition Relating to Drug Paraphernalia

Possession of drug paraphernalia is not a violation of Federal law (see 21 U.S.C. 863(d)). Some States prohibit possession of drug paraphernalia only if it contains the residue of a controlled substance. Other States prohibit possession of drug paraphernalia even if it does not contain the residue of a controlled substance. The proposed rule would add a prohibition that would prohibit knowingly or intentionally possessing drug paraphernalia in either situation when it is in violation of State law.

Prohibitions Relating to Alcoholic Beverages

The Forest Service has limited authority in 36 CFR part 261 to address underage drinking and other violations of State law relating to alcoholic beverages, such as State laws prohibiting open containers of alcoholic beverages and furnishing alcoholic beverages to minors. The current authority is contained in 36 CFR 261.58(bb), which prohibits possession of an alcoholic beverage as defined by State law when enforced through issuance of an order issued under 36 CFR part 261, subpart B. The proposed rule would add two prohibitions relating to alcoholic beverages (possessing an alcoholic beverage in violation of State law and providing an alcoholic beverage to a minor in violation of State law) to 36 CFR part 261, subpart A. These changes would make the prohibitions generally applicable to NFS lands and enforceable without issuance of an order. These proposed changes are intended to allow the Forest Service to address more effectively the use of NFS lands at gatherings where alcoholic beverages are consumed by giving Forest Service law enforcement officers the same enforcement options as their State and local counterparts.

The prohibition in 36 CFR 261.58(bb) would be retained to allow the Forest Service to prohibit consumption of alcoholic beverages temporarily in specific areas of NFS lands when appropriate to protect public safety, such as at a large event, regardless of whether consumption of alcoholic beverages is in violation of State law.

Protection of Persons on NFS Lands

Both Federal and State laws apply to the national forests (16 U.S.C. 480). Generally, States enforce State laws, while Forest Service law enforcement personnel enforce Federal laws, including the criminal prohibitions in 36 CFR part 261, subparts A and C, and in orders issued under 36 CFR part 261, subpart B. In most cases, the Federal laws and prohibitions relate to the Agency's resource protection responsibilities. However, with the urbanization and development of areas near NFS lands, crimes against persons and personal property have become an increasing public safety concern.

The Forest Service cooperates with State and local law enforcement agencies in the execution of their responsibilities related to NFS lands. Under the Cooperative Law Enforcement Act of 1971 (16 U.S.C. 551a), the Forest Service has entered into reimbursable agreements with some State and local law enforcement agencies (usually a county sheriff's office) for the protection of persons and their property on NFS lands where these lands and facilities account for increased visitor use.

Over time, however, it has become evident that reimbursement through the cooperative law enforcement program alone cannot always provide for the appropriate level of protection. Many local law enforcement agencies find that their limited personnel, the remote location of NFS lands, and the seasonal nature of use those lands receive impede rapid response to crimes committed on NFS lands. When a person is victimized by theft of or damage to personal property on NFS lands—for example at a campsite or a trailhead parking lot—and State or local enforcement personnel are unable to respond, Forest Service law enforcement personnel have limited

authority to assist. The proposed rule would add a prohibition that would allow Forest Service law enforcement personnel to take appropriate action in response to theft of or damage to personal property on NFS lands.

To protect persons on NFS lands, the proposed rule also would revise the prohibitions relating to disorderly conduct. A significant increase in visitation to national forests and grasslands has coincided with an increase in incidents of public behavior that threatens the safety of others. Forest Service law enforcement personnel frequently encounter situations in which a person makes lewd or obscene comments to another person; follows another person around, including into a restroom, with no legitimate purpose and in a threatening manner; or engages in indecent exposure. The proposed rule would revise the disorderly conduct prohibitions in 36 CFR 261.4 to address these situations.

Traffic Prohibitions

The proposed rule would incorporate State traffic law in § 261.12 so that State traffic law is enforceable as Federal traffic law. Specifically, the proposed rule would incorporate two commonly cited violations of State traffic law: operating a motor vehicle without a valid license and operating a motor vehicle while under the influence of an alcoholic beverage or a controlled substance. The proposed rule also would incorporate a catch-all prohibition that would incorporate any other State traffic laws so that they are enforceable as Federal traffic law.

Prohibitions Relating to Prevention of Wildfire

Wildland fires, including catastrophic wildfires, have increased in frequency and severity on NFS lands. An accumulation of hazardous fuels combined with severe drought have resulted in extreme fire conditions and very large fires. Forest Service estimates indicate that more than 460 million acres of all vegetated lands are at moderate to high risk from uncharacteristically large wildfires, encompassing many wildland-urban interfaces with high densities of structures that intermingle with undeveloped wildlands. In 2022, more than 7.5 million acres burned in the United States, and more than 2,700 structures were destroyed, including 1,294 residences. These fires have long-term and sometimes irreversible consequences, including damage to watersheds that supply drinking water and damage to critical habitat for endangered species. The Forest Service also incurs significant annual costs related to wildland fire suppression.

This proposed rule would allow the Forest Service to take additional enforcement actions to prevent wildfires on NFS lands. The possession and use of fireworks or other pyrotechnic devices are not generally prohibited on NFS lands. However, they may be prohibited in areas specified in an order issued under 36 CFR 261.52(f). Typically, the Forest Service issues orders under 36 CFR 261.52(f) on a seasonal basis when the threat of fire is high. However, given the higher risk and greater severity of wildland fires, the Agency has determined that a year-round ban is necessary to protect NFS lands and resources, persons using those lands, and surrounding communities from the threat of catastrophic wildfire. The proposed rule would move these prohibitions to 36 CFR part 261, subpart A, so that they are enforceable anywhere on NFS lands during any season without issuance of an order under 36 CFR part 261, subpart B.

Prohibition Relating to Exploding Targets

Exploding targets—targets that explode when struck by a bullet—have become popular throughout the United States, and their use is increasing on NFS lands. Exploding targets can be purchased legally and are intended for use as a target for firearms practice. However, when detonated by a bullet, exploding targets often result in a fireball that can ignite vegetation and surrounding materials and spread to adjacent areas. A growing number of wildfires on NFS lands have been caused by exploding targets; from 2012 to 2022, multiple fires burned over 139,000 acres as result of exploding targets, costing taxpayers millions of dollars to suppress. Additionally, trash is often left behind after exploding targets are used, including undetonated targets, which present additional safety risks for visitors, employees, and firefighters.

Exploding targets are regulated by the Forest Service as explosives under the Agency's authority to issue orders banning the use of explosives in specified areas under 36 CFR 261.52(b). Because exploding targets present a significant fire hazard at any time of year, the Forest Service is proposing to add a generally applicable prohibition to 36 CFR 261.5 that does not require issuance of an order and that would ban possession as well as use of an exploding target on NFS lands.

Exploding targets generally consist of two separate chemical components (usually an oxidizer like ammonium nitrate and a fuel such as aluminum or another metal) that become a binary explosive when combined. The individual components, which often are pre-packaged together, are kept separate within individual containers for sale and transport. Kept separate, the components are not explosives. Combined, however, the components become explosive and thus are subject to Federal explosive laws and regulations. To avoid triggering Federal law until they are ready to be used and to minimize the risk of injury, the components are typically combined at the site where the exploding targets are going to be used. This proposed rule would ban the possession and use of an exploding target (the binary explosive that is created by combining the two components).

The Forest Service recognizes hunting and safe target shooting as valid uses of NFS lands. This proposed rule would not affect these valid uses.

Proposed Regulatory Revisions

A section-by-section description of the proposed rule follows.

Section 261.1b Penalty

The proposed rule would make a technical change to 36 CFR 261.1b, which governs penalties for violating a criminal prohibition in 36 CFR part 261, to make it consistent with current statutory law. The regulations at 36 CFR 261.1b refer to the penalty in 16 U.S.C. 551, which provides that a violation shall be punished by a fine of not more than $500, imprisonment for not more than six months, or both. Violations were classified as petty offenses.

The Comprehensive Crime Control Act of 1984 established categories of offenses based on the maximum amount of imprisonment for each offense (18 U.S.C. 3559). Offenses with a maximum term of six months of imprisonment, such as those offenses covered by 36 CFR part 261, are considered Class B misdemeanors. The Comprehensive Crime Control Act of 1984 also prescribes a range of fines for Class B misdemeanors, depending on specific circumstances associated with the violation, with a maximum fine of $5,000 for a person and $10,000 for an organization (18 U.S.C. 3571). The proposed revision reflects this statutory change and provides for exceptions when a statute establishing an offense expressly sets a different penalty.

Section 261.2 Definitions

The proposed rule would add six definitions to 36 CFR 261.2 for the terms ''alcoholic beverage,'' ''controlled

substance,'' ''exploding target,'' ''firework,'' ''pyrotechnic device,'' and ''recreation site.'' The proposed rule also would revise the definition of ''developed recreation site.''

The term ''alcoholic beverage'' would be defined to have the same meaning as under State law. This definition is consistent with the current use of the term in 36 CFR 261.58(bb).

The term ''controlled substance'' would be defined to have the same meaning as in the Controlled Substance Act (21 U.S.C. 801 *et seq.*).

The term ''exploding target'' would be defined to mean a binary explosive that is designed to explode when struck by a bullet. Exploding targets consist of two components that are combined to create the explosive. Individually, the parts are inert. However, when combined, they become explosive.

The term ''firework'' would be defined to have the same meaning as in 27 CFR 555.11. As defined in those regulations, the term ''firework'' means any composition or device that is designed to produce a visible or an audible effect by combustion, deflagration, or detonation and that meets the definition of ''consumer fireworks'' or ''display fireworks'' as defined by 27 CFR 555.11. This definition is consistent with the Forest Service's current interpretation of what constitutes a firework.

The term ''pyrotechnic device'' would be defined to have the same meaning as the term ''articles pyrotechnic'' in 27 CFR 555.11. As currently defined in those regulations, the term ''articles pyrotechnic'' means devices for professional use that are similar to consumer fireworks in chemical composition and construction but are not intended for consumer use. This definition is consistent with the Forest Service's current interpretation of what constitutes a pyrotechnic device.

This proposed rule would amend 36 CFR 261.2 by revising the definition of ''developed recreation site'' and adding a definition of ''recreation site'' to be consistent with the definitions of those terms in Chapter 50 of the Forest Service's Recreation Site Handbook, Forest Service Handbook 2309.13. Chapter 50 of the Recreation Site Handbook defines the terms ''developed recreation site'' and ''recreation site'' based on the scale of development at a site. Chapter 50 of the Recreation Site Handbook also contains a recreation site development scale showing the characteristics of each scale of development.

The term ''developed recreation site'' is currently defined in 36 CFR 261.2 as ''an area which has been improved or developed for recreation.'' The proposed definition of ''developed recreation site'' would be more specific than the current definition and would match the definition of that term in Chapter 50 of the Recreation Site Handbook. As defined in Chapter 50 of the Recreation Site Handbook, a developed recreation site is ''a recreation site that has a development scale of 3, 4, or 5 (sec. 50.5, ex. 01)''. Recreation sites with a development scale of 3, 4, or 5 range from moderate to extensive site development.

Additionally, the proposed rule would add a definition of ''recreation site'' to 36 CFR 261.2 that tracks the definition of that term in Chapter 50 of the Recreation Site Handbook. Chapter 50 of the Recreation Site Handbook defines the term ''recreation site'' as ''an area that is improved, developed, or otherwise authorized by the Forest Service for recreation and that has a development scale of 0, 1, 2, 3, 4, or 5 (sec. 50.5, ex. 01).'' Under this added definition, the term ''recreation site'' would cover a broader range of areas than the term ''developed recreation site'' and would include recreation sites with a development scale of 0, 1, or 2, which range from no to little site modification.

Currently, the term ''developed recreation site'' is used in the criminal prohibitions in 36 CFR part 261, subpart A, specifically, in 36 CFR 261.10(d)(1), (i), and (j) and 261.16. These prohibitions would continue to apply only to developed recreation sites, that is, to recreation sites that have a development scale of 3, 4, or 5. The prohibitions would not be broadened to apply to recreation sites with a development scale of 0, 1, or 2, which have little to no site modification, because the public may not have adequate notice that such a site exists, given the lack of development, and that a prohibition applies.

In contrast, the term ''recreation site'' would be substituted for ''developed recreation site'' each time the latter term appears in prohibitions designated by order in 36 CFR part 261, subpart B, specifically, in 36 CFR 261.52(d) and 261.58(b) and (d). Prohibitions designated by orders can be broader in scope and can cover recreation sites with a development scale of 0, 1, or 2 because orders specify the area to which they apply.

Section 261.4 Disorderly Conduct

The prohibitions in 36 CFR 261.4 pertain to disorderly conduct. This proposed rule would add a criminal intent element, or *mens rea,* that the violator acted intentionally or recklessly in committing the offense. To be cited for a violation of disorderly conduct, a person must have committed one of the acts described in paragraphs (a) through (c) with the intent to cause, or recklessly to create a substantial risk of causing, public alarm, nuisance, jeopardy, or violence. The criminal intent standard would require a showing that the violator knowingly intended to cause public alarm, nuisance, jeopardy, or violence by the prohibited acts or words. Alternatively, the reckless standard, which has a lesser *mens rea,* would require a showing that the violator was aware of, but consciously disregarded, the substantial risk that the prohibited acts or words would cause public alarm, nuisance, jeopardy, or violence.

This proposed rule also would revise the types of conduct that would constitute disorderly conduct when committed with the requisite *mens rea.* The current paragraph (a) prohibits only fighting. This proposed rule would add threatening or other violent behavior. This proposed rule also would revise paragraph (b) and would substitute it for current paragraphs (b) and (c), which cover ''fighting words,'' such as utterances that are likely to provoke violence or unlawful acts. Fighting words are not protected speech under the First Amendment. Revised paragraph (b) would cover fighting words by prohibiting ''making an utterance or performing an act . . . that is made or performed in a manner likely to inflict injury or to incite an immediate breach of peace.'' Because revised paragraph (b) also would cover an utterance or act that is obscene or threatening when committed with the intent to cause public alarm, nuisance, jeopardy, or violence, or recklessly create a risk thereof, revised paragraph (b) would address situations when a person (1) makes lewd or obscene comments short of solicitation to another person; (2) follows another person around, including into a restroom, with no legitimate purpose if done in a threatening manner; and (3) commits indecent exposure. This proposed rule also would redesignate paragraph (d) as paragraph (c) and would provide further instruction as to what constitutes unreasonable noise in violation of the disorderly conduct prohibition.

Section 261.5 Fire

The Forest Service proposes to add paragraphs (h), (i), and (j) to 36 CFR 261.5, which contains prohibitions relating to fire. The prohibitions in proposed paragraphs (h), (i), and (j) are currently enforceable only through

issuance of an order under 36 CFR 261.52. Moving these prohibitions to § 261.5 would make them generally applicable to NFS lands year-round and enforceable without issuance of an order.

Specifically, proposed paragraph (h) would prohibit possessing or using an exploding target or any kind of firework or other pyrotechnic device. The prohibition banning the possession or use of fireworks or other pyrotechnic devices is currently enforced in areas specified by an order issued under 36 CFR 261.52(f). The proposed rule would move this prohibition to 36 CFR part 261, subpart A, which would make it generally applicable to NFS lands year-round and enforceable without issuance of an order. The proposed rule also would add a prohibition to paragraph (h) that would ban the possession and use of exploding targets.

Proposed paragraph (i) would prohibit violating any State law concerning burning or fires or any State law whose purpose is to prevent or restrict the spread of fire. This prohibition is currently enforced in areas specified by an order issued under 36 CFR 261.52(k). The Forest Service may incorporate State law concerning burning or fires or any State law which is for the purpose of preventing or restricting the spread of fire in an order issued under § 261.52(k). Violations of these orders constitute violations of Federal law. The proposed rule would move this prohibition to 36 CFR part 261, subpart A, which would make it generally applicable to NFS lands year-round and enforceable without issuance of an order.

Proposed paragraph (j) would prohibit operating or using any internal or external combustion engine without a properly installed and maintained spark-arresting device that meets specified requirements. This prohibition is currently enforced in areas specified by an order issued under 36 CFR 261.52(j). The proposed rule would move this prohibition to 36 CFR part 261, subpart A, which would make it generally applicable to NFS lands year-round and enforceable without issuance of an order.

Section 261.9 Property

This proposed rule would add paragraph (j) to 36 CFR 261.9 to provide enforcement authority for theft by prohibiting damaging or removing without authorization any personal property belonging to another person.

Section 261.10 Occupancy and Use

This proposed rule would revise paragraphs (a) and (e), would remove paragraph (o), and would add paragraphs (o) through (s) to 36 CFR 261.10 relating to occupancy and use of NFS lands.

Paragraph (a) currently prohibits constructing, placing, or maintaining certain improvements on NFS lands or facilities without an authorization. Signs are not listed as a type of improvement that is prohibited without an authorization. This proposed rule would revise paragraph (a) to prohibit constructing, placing, or maintaining a sign on NFS lands or facilities without an authorization.

Paragraph (e) prohibits abandoning any personal property. Forest Service law enforcement personnel have encountered a noticeable increase in personal property, such as camping and other recreational equipment, being stored on NFS lands. Because the term ''abandon'' connotes relinquishing property without an intent to reclaim possession, the Forest Service needs a better tool to manage illegally stored personal property on NFS lands. This proposed rule would prohibit leaving personal property unattended for longer than 24 hours, except in locations where longer periods have been designated.

Paragraph (o) prohibits discharging or igniting a firecracker, rocket or other firework, or explosive into or within any cave. This prohibition is no longer necessary because it is covered by proposed paragraph (h) that would be added to § 261.5. Paragraph (p) in 36 CFR 261.10 would become paragraph (o).

Proposed paragraphs (p) and (q) would add prohibitions for simple possession of controlled substances and drug paraphernalia, respectively.

Proposed paragraph (r) would add a prohibition for possessing an alcoholic beverage in violation of State law. Under this proposed prohibition, Forest Service law enforcement personnel could issue a notice of violation for possession of alcohol by a minor or for possession of an open container in a vehicle, where prohibited by State law. Proposed paragraph (s) would add a prohibition for providing an alcoholic beverage to a minor in violation of State law.

Section 261.12 National Forest System Roads and Trails

The proposed rule would move the prohibition in 36 CFR 261.54(f), which prohibits operating a vehicle or motor vehicle carelessly, recklessly, or in a manner or at a speed that would endanger or be likely to endanger any person or property, to proposed paragraph (e) of 36 CFR 261.12, which contains prohibitions relating to NFS roads and NFS trails. Moving this prohibition to § 261.12 would make it generally applicable to NFS lands year-round and enforceable without issuance of an order. The proposed rule also would add a prohibition for operating a motor vehicle in violation of a posted sign or traffic control device.

Section 261.15 Use of Vehicles Off Roads

The proposed rule would amend 36 CFR 261.15, which pertains to off-road vehicle use on NFS lands. The proposed rule would revise paragraphs (e) and (g). Paragraph (e), which prohibits off-road vehicle use while under the influence of alcohol or another drug, would be updated to refer to the proposed defined terms in § 261.2, *i.e.,* ''alcoholic beverage'' and ''controlled substance.'' The terminology in paragraph (g), which prohibits careless and reckless driving, also would be updated without altering the substance of the prohibition.

Section 261.50 Orders

The United States Court of Appeals for the Ninth Circuit has interpreted 36 CFR 261.50 to allow only those persons holding the positions specified in 36 CFR 261.50(a) and (b), including persons acting in those positions, to issue orders under 36 CFR part 261, subpart B. *United States* v. *True,* 946 F.2d 682, 687 (9th Cir. 1991). The proposed rule would amend § 261.50(a) and (b) to expressly authorize the persons holding the positions specified in those paragraphs to delegate the authority to issue orders under 36 CFR part 261, subpart B, to officials acting in those positions or to their deputy. The proposed rule would amend § 261.50(a) and (b) to clarify that the authority of officials issuing an order is limited to areas over which those officials have delegated authority.

Section 261.52 Fire

This proposed rule would move the prohibitions in paragraphs (f), (j), and (k) to § 261.5, which would make the prohibitions generally applicable to NFS lands year-round and enforceable without issuance of an order.

Section 261.53 Special Closures

This proposed rule would amend 36 CFR 261.53 relating to special closures. The changes to the heading and introductory text of § 261.53 would clarify that this provision can be used to restrict use of an area, such as to close an area to a particular use, as well as to close an area in its entirety to all uses.

Section 261.54 National Forest System Roads

The proposed rule would move the prohibition in 36 CFR 261.54(f), which prohibits operating a vehicle or motor vehicle carelessly, recklessly, or in a manner or at a speed that would endanger or be likely to endanger any person or property, to proposed paragraph (e) of 36 CFR 261.12, which contains prohibitions relating to NFS roads and NFS trails. This revision would make the prohibition in 36 CFR 261.54(f) generally applicable to NFS lands year-round and enforceable without issuance of an order.

Section 261.58 Occupancy and Use

The authority to issue orders relating to occupancy and use of NFS lands is contained in 36 CFR 261.58. Paragraph (bb) prohibits possession of an alcoholic beverage as defined under State law, when enforced through issuance of an order. This proposed rule would revise paragraph (bb) to be consistent with the proposed definition of ''alcoholic beverage'' that would be added to § 261.2.

Regulatory Certifications

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will determine whether a regulatory action is significant as defined by E.O. 12866 and will review significant regulatory actions. OIRA has determined that this proposed rule is not significant as defined by E.O. 12866. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Agency has developed the proposed rule consistent with E.O. 13563.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), OIRA has designated this proposed rule as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

The proposed rule would streamline enforcement of criminal prohibitions in existing regulations by providing for enforcement without issuance of an order and enhance consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish servicewide administrative procedures, program processes, or instructions.'' The Agency's preliminary assessment is that this proposed rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

Regulatory Flexibility Act

The Forest Service has considered this proposed rule under the Regulatory Flexibility Act (5 U.S.C. 602 *et. seq.*). This proposed rule would not have any direct effect on small entities as defined by the Regulatory Flexibility Act. This proposed rule would not impose record-keeping requirements on small entities; would not affect their competitive position in relation to large entities; and would not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the Forest Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

Federalism

The Agency has considered this proposed rule under the requirements of E.O. 13132, *Federalism.* The Agency has determined that the proposed rule conforms with the federalism principles set out in this executive order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has concluded that this proposed rule would not have federalism implications.

Consultation and Coordination With Indian Tribal Governments

E.O. 13175, *Consultation and Coordination with Indian Tribal Governments,* requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. This proposed rule would streamline enforcement of criminal prohibitions in existing regulations by providing for enforcement without issuance of an order and enhance consistency of the Forest Service's law enforcement practices with those of State and other Federal land management agencies. The Agency has reviewed this proposed rule in accordance with the requirements of E.O. 13175 and has determined that this proposed rule would not have substantial direct effects on 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. Therefore, consultation and coordination with Indian Tribal governments is not required for this proposed rule.

No Takings Implications

The Agency has analyzed this proposed rule in accordance with the principles and criteria in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protect Property Rights.* The Agency has determined that the proposed rule would not pose the risk of a taking of private property.

Energy Effects

The Agency has reviewed this proposed rule under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.* The Agency has determined that this proposed rule would not constitute a significant energy action as defined in E.O. 13211.

Civil Justice Reform

The Forest Service has analyzed this proposed rule in accordance with the principles and criteria in E.O. 12988, *Civil Justice Reform.* After adoption of this proposed rule, (1) all State and local laws and regulations that conflict with this proposed rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to this proposed rule; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Agency has assessed

the effects of this proposed rule on State, local, and Tribal governments and the private sector. This proposed rule would not compel the expenditure of $100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Controlling Paperwork Burdens on the Public

This proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use and therefore would impose no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et. seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 6 CFR Part 261

Law enforcement, National forests.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend chapter II of title 36 of the Code of Federal Regulations as follows:

PART 261—PROHIBITIONS

■ 1. The authority citation for part 261 continues to read:

Authority: 7 U.S.C. 1011(f); 16 U.S.C. 460*l*–6d, 472, 551, 620(f), 1133(c)–(d)(1), 1246(i).

■ 2. Revise § 261.1b to read as follows:

§ 261.1b Penalty.

Unless otherwise provided by law, the punishment for violation of any prohibition in or order issued under this part shall be imprisonment of not more than six months or a fine in accordance with the applicable provisions of 18 U.S.C. 3571 or both.

■ 3. Amend § 261.2 by:

■ a. Adding in alphabetical order definitions for ''alcoholic beverage,'' and ''controlled substance'';

■ b. Revising the definition for ''developed recreation site''; and

■ c. Adding in alphabetical order definitions for ''exploding target,'' ''firework,'' ''pyrotechnic device,'' and ''recreation site.''

The additions and revisions read as follows:

§ 261.2 Definitions.

* * * * *

Alcoholic beverage means alcoholic beverage as defined by State law.

* * * * *

Controlled substance means a drug or other substance, its immediate precursor included in schedules I, II, III, IV, or V of section 202 of the Controlled Substance Act (21 U.S.C. 812), or a drug or other substance added to these schedules under the terms of the Act.

* * * * *

Developed recreation site has the same meaning as in Chapter 50 of Forest Service Handbook 2309.13.

* * * * *

Exploding target means a binary explosive consisting of two separate components (usually an oxidizer like ammonium nitrate and a fuel such as aluminum or another metal) that is designed to explode when struck by a bullet.

* * * * *

Firework has the same meaning as in 27 CFR 555.11 or a successor regulation.

* * * * *

Pyrotechnic device has the same meaning as the term ''articles pyrotechnic'' in 27 CFR 555.11 or a successor regulation.

* * * * *

Recreation site has the same meaning as in Chapter 50 of Forest Service Handbook 2309.13.

* * * * *

■ 4. Revise § 261.4 to read as follows:

§ 261.4 Disorderly conduct.

The following are prohibited when committed intentionally to cause, or recklessly to create a substantial risk of causing, public alarm, nuisance, jeopardy, or violence:

(a) Engaging in fighting or any threatening or other violent behavior.

(b) Making an utterance or performing an act that is obscene or threatening or that is made or performed in a manner that is likely to inflict injury or incite an immediate breach of peace.

(c) Making noise that is unreasonable considering the nature and purpose of the conduct, location, and time.

■ 5. Amend § 261.5 by adding paragraphs (h), (i), and (j) to read as follows:

§ 261.5 Fire.

* * * * *

(h) Possessing or using an exploding target or any kind of firework or other pyrotechnic device.

(i) Violating any State law concerning burning or fires or any State law that is for the purpose of preventing or restricting the spread of fire.

(j) Operating or using any internal or external combustion engine without a spark arresting device that is properly installed, maintained, and in effective working order in accordance with USDA Forest Service Standard 5100–1.

■ 6. Amend § 261.9 by adding paragraph (j) to read as follows:

§ 261.9 Property.

* * * * *

(j) Damaging or removing without authorization any personal property that belongs to another person.

■ 7. Amend § 261.10 by revising paragraphs (a), (e), (o), and (p), and adding paragraphs (q), (r), and (s) to read as follows:

§ 261.10 Occupancy and use.

The following are prohibited:

(a) Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communications equipment, sign, significant surface disturbance, or other improvement on National Forest System lands or facilities without a special use authorization, contract, approved plan of operations, or other written authorization when that written authorization is required.

* * * * *

(e) Leaving personal property unattended for longer than 24 hours, except in locations where longer periods have been designated.

(o) Use or occupancy of National Forest System lands or facilities without a special use authorization, contract, approved plan of operations, or other written authorization when that written authorization is required.

(p) Knowingly or intentionally possessing any controlled substance in violation of Federal law.

(q) Knowingly or intentionally possessing any drug paraphernalia in violation of State law.

(r) Possessing any alcoholic beverage in violation of State law.

(s) Providing any alcoholic beverage to a minor in violation of State law.

■ 8. Amend § 261.12 by adding paragraphs (e) through (i) to read as follows:

§ 261.12 National Forest System roads and National Forest System trails.

The following are prohibited:

* * * * *

(e) Operating a motor vehicle without a valid license as required by State law.

(f) Operating a motor vehicle while under the influence of an alcoholic beverage or a controlled substance in violation of State law.

(g) Operating a motor vehicle in violation of any State law other than those described in paragraph (e) or (f) of this section.

(h) Operating a vehicle or motor vehicle carelessly, recklessly, or in a manner or at a speed that would endanger or be likely to endanger any person or property.

(i) Operating a motor vehicle in violation of a posted sign or traffic control device.

■ 9. Amend § 261.15 by revising paragraphs (e) and (g) to read as follows:

§ 261.15 Use of vehicles off roads.

* * * * *

(e) While under the influence of an alcoholic beverage or a controlled substance in violation of State law.

* * * * *

(g) Carelessly, recklessly, or in a manner or at a speed that endangers or is likely to endanger any person or property.

* * * * *

■ 10. Amend § 261.50 by revising paragraphs (a) and (b) to read as follows:

§ 261.50 Orders.

(a) The Chief, each Regional Forester, each Experiment Station Director, the head of each administrative unit, their deputies, or persons acting in these positions may issue orders, consistent with their delegations of authority, that close or restrict the use of described areas by applying the prohibitions authorized in this subpart, individually or in combination.

(b) The Chief, each Regional Forester, each Experiment Station Director, the head of each administrative unit, their deputies, or persons acting in these positions may issue orders, consistent with their delegations of authority, that close or restrict the use of any National Forest System road or National Forest System trail.

* * * * *

■ 11. Revise § 261.52 to read as follows:

§ 261.52 Fire.

When provided by an order, the following are prohibited:

(a) Building, maintaining, attending, or using a fire, campfire, or stove fire.

(b) Using an explosive.

(c) Smoking.

(d) Smoking, except within an enclosed vehicle or building, at a recreation site, or while stopped in an area at least 3 feet in diameter that is barren or cleared of all flammable material.

(e) Entering or being in an area.

(f) Entering an area without any firefighting tool prescribed by the order.

(g) Operating an internal combustion engine.

(h) Welding or operating an acetylene or other torch with open flame.

■ 12. Amend § 261.53 by revising the title and introductory text to read as follows:

§ 261.53 Special closures or restrictions.

When provided by an order, it is prohibited to go into or be in any area which is closed or restricted for the protection of:

* * * * *

§ 261.54 [Amended]

■ 13. Amend § 261.54 by removing paragraph (f).

■ 14. Amend § 261.58 by revising paragraphs (b), (d), and (bb) to read as follows:

§ 261.58 Occupancy and use.

* * * * *

(b) Entering or using a recreation site or portion thereof.

* * * * *

(d) Occupying a recreation site with prohibited camping equipment prescribed by the order.

* * * * *

(bb) Possessing an alcoholic beverage.

* * * * *

Homer Wilkes,

Under Secretary, Natural Resources and Environment.

[FR Doc. 2023–21563 Filed 10–2–23; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 10

[Docket No. USCG–2021–0288]

RIN 1625–AC83

Exemption for Active-Duty Uniformed Service Members From Merchant Mariner Credentialing Fees

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to exempt certain members of the uniformed services from Merchant Mariner Credential (MMC) fees for the evaluation of an MMC application, the administration of an examination required for an MMC endorsement, and the issuance of an MMC. This proposal is in response to Executive Order 13860, ''Supporting the Transition of Active-Duty Service Members and Military Veterans Into the Merchant Marine,'' and section 3511 of the National Defense Authorization Act for Fiscal Year 2020. Under this proposal, members of the uniformed services would be exempt from paying fees for an MMC.

DATES: Comments and related material must be received by the Coast Guard on or before January 2, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2021–0288 using the Federal Decision Making Portal at *www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

Collection of information. Submit comments on the collection of information discussed in section VI.D of this preamble both to the Coast Guard's online docket and to the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget (OMB) using their website *www.reginfo.gov/public/do/PRAMain.* Comments sent to OIRA on the collection of information must reach OMB on or before the comment due date listed on their website.

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email Mr. James Cavo, U.S. Coast Guard Office of Merchant Mariner Credentialing; telephone 202–372–1205, email *James.D.Cavo@uscg.mil.*

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *www.regulations.gov.* To do so, go to

www.regulations.gov, type USCG–2021–0288 in the search box, and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *www.regulations.gov* Frequently Asked Questions web page. That FAQ page also explains how to subscribe for email alerts that will notify you when comments are posted or if a final rule is published. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

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

Public meeting. We do not plan to hold a public meeting, but we will consider doing so if we determine from public comments that a meeting would be helpful. We would issue a separate **Federal Register** notice to announce the date, time, and location of such a meeting.

II. Abbreviations

CATEX Categorical exclusion
CFR Code of Federal Regulations
CG–MMC U.S. Coast Guard Office of Merchant Mariner Credentialing
DHS Department of Homeland Security
GS General Schedule
MMC Merchant Mariner Credential
MMLD Merchant Mariner Licensing Documentation
NDAA 2020 National Defense Authorization Act for Fiscal Year 2020
NOAA National Oceanic and Atmospheric Administration
NMC National Maritime Center
OMB Office of Management and Budget
OPM Office of Personnel Management
RA Regulatory analysis
§ Section
STCW International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
USPHS U.S. Public Health Service
U.S.C. United States Code

III. Background

As described in title 46 of the Code of Federal Regulations (CFR), section 10.107, a Coast Guard-issued Merchant Mariner Credential (MMC) serves as a mariner's qualification document and certificate of identification. Mariners employed aboard most U.S. merchant vessels are required to hold a valid MMC.

As mandated by title 46 of the United States Code (U.S.C.), section 2110, and in accordance with the Independent Offices Appropriations Act (31 U.S.C. 9701), the Coast Guard has established fees associated with MMC applications, which are codified in table 1 to 46 CFR 10.219(a). There are three types of credentialing fees: an evaluation fee, an examination fee, and an issuance fee. The fee amount varies based on the individual credential transaction that an applicant seeks.

Evaluation fees for MMCs range from $50 to $100, and the applicant must pay the fee at the time an application is submitted to the Coast Guard. Examination fees range from $45 to $140, depending on the endorsement sought, and must be paid before the professional examination for an endorsement is taken.[1] If an applicant applies for an MMC with both a rating and an officer endorsement, the higher evaluation fee is charged. Issuance fees are $45 and must be paid before an MMC is issued.[2]

The original issuance of an MMC, as well as any subsequent credential transactions, such as increasing the scope of authority, raising the grade of authority, or renewing an MMC, all require a fee.[3] MMCs are valid for a period of 5 years and may be renewed at any time during the validity period of the credential and for 1 year after expiration.

Mariners typically seek additional endorsements after accruing the required sea service and completing required training. There are no fees associated with the issuance of mariner medical certificates or International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) endorsements.

The Coast Guard does not require a fee for MMC transactions if one of the following three conditions is met:

(1) The application is for a Document of Continuity, as specified in 46 CFR 10.219(e)(3).

(2) The credential is a duplicate of a credential lost in a shipwreck or other casualty under 46 CFR 10.229(c) and reflected in table 1 to § 10.219(a).

(3) The applicant qualifies for a ''no-fee'' Merchant Mariner Credential under 46 CFR 10.219(h).

Currently, an applicant only qualifies for a ''no-fee'' MMC if they are a volunteer for or an employee of an organization that is youth-oriented, not-for-profit, and charitable, 46 CFR 10.219(j). The holder of a ''no fee'' MMC is restricted to using vessels owned or operated by the sponsoring organization, 46 CFR 10.219(k).

In March 2019, Executive Order 13860, ''Supporting the Transition of Active-Duty Service Members and Military Veterans Into the Merchant Marine,'' directed the Coast Guard to waive the fees associated with MMC applications ''for active duty service members, if a waiver is authorized and appropriate.'' [4] The Executive Order applied only to members of the armed forces.

Subsequently, in December 2019, Congress enacted the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020).[5] Building upon Executive Order 13860, section 3511(c)(1) of the NDAA 2020 directed the Coast Guard to waive evaluation, examination, and issuance fees associated with MMCs, if a waiver is authorized and appropriate, not just for the armed forces (Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard), but for all ''members of the uniformed services on active duty.'' The uniformed services include the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) and the Commissioned Corps of the U.S. Public Health Service (USPHS) in addition to the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard.[6]

In accordance with Executive Order 13860 and section 3511 of the NDAA 2020, on May 26, 2020, the Coast Guard's Office of Merchant Mariner

[1] An *endorsement* is a ''statement of a mariner's qualifications.'' 46 CFR 10.107(b). The particular endorsement(s) on each mariner's MMC indicate what capacities they may serve in, such as a ''barge supervisor'' or a ''lifeboatman.'' *See id.;* 46 CFR 10.109(a)–(b).

[2] A *rating endorsement* is an annotation on an MMC that allows a mariner to serve in those capacities set out in 46 CFR 10.109(b). 46 CFR 10.107(b). *Officer endorsement* means an annotation on an MMC that allows a mariner to serve in the capacities listed in 46 CFR 10.109. *Id.*

[3] ''Increase in scope'' and ''raise of grade'' are defined at 46 CFR 10.107.

[4] E.O 13860, section 3, paragraph (a)(ii) (84 FR 8407 (Mar. 7, 2019)).

[5] Public Law 116–92, Dec. 20, 2019.

[6] Section 3511of the NDAA 2020 is codified as a note to 46 U.S.C. 7302; ''Uniformed services'' defined at 10 U.S.C. 101(a)(5).

Credentialing (CG–MMC) issued Policy Letter 02–20, ''Waiver of Fees Associated with Merchant Mariner Credential Applications for Active Duty Members of the Uniformed Services.'' [7] CG–MMC Policy Letter 02–20 provides guidance for the waiver of MMC fees for active duty members of the uniformed services. The policy provided a waiver of fees for mariners who provide documentation evidencing their eligibility for the fee waiver. This documentation may include active-duty orders or a letter from their command or personnel office on official letterhead that states the applicant is a current member of the uniformed services on active duty or a member of the Selected Reserve of the Ready Reserve of any of the armed forces or the Ready Reserve Corps of the USPHS.

IV. Legal Authority

Section 3511(c)(1) of the NDAA 2020 directed the Coast Guard to waive evaluation, examination, and issuance fees associated with MMCs for members of the uniformed services on active duty, if a waiver is authorized and appropriate. The Coast Guard has found that such a waiver is authorized and appropriate. Under 46 U.S.C. 2110(g), the Secretary of the Department of Homeland Security (DHS) may exempt a person from paying such a fee if the Secretary determines that it is in the public interest to do so. The Secretary has delegated this authority to the Coast Guard through article II, paragraph 92, subparagraph (a) of DHS Delegation No. 00170.1, Revision No. 01.3. The Coast Guard concludes that it is in the public interest to exempt members of the uniformed services (Army, Navy, Air Force, Marine Corps, Space Force, Coast Guard, Commissioned Corps of the NOAA, and Commissioned Corps of USPHS) on active duty; members of the Selected Reserve of the Ready Reserve of any of the armed forces (Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve); and the Ready Reserve Corps of the USPHS from fees associated with obtaining an MMC. As discussed in Executive Order 13860, it is the policy of the United States to establish and maintain an effective merchant marine and to provide sufficient support and resources to active duty and separating service members who pursue or possess MMCs. The goals of not requiring these fees are to: (1) help attract active-duty service members with the appropriate skills and expertise to obtain an MMC for employment in the maritime industry; (2) support U.S. national security requirements; and (3) provide meaningful, well-paying jobs to U.S. veterans.[8]

V. Discussion of Proposed Rule

The Coast Guard is proposing to amend 46 CFR 10.219 and codify this MMC fee waiver in the regulations. Specifically, the Coast Guard proposes to exempt members of the uniformed services on active duty, members of the Selected Reserve of the Ready Reserve of any of the armed forces (Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve), and the Ready Reserve Corps of the USPHS from paying evaluation, examination, or issuance fees for an MMC.

For purposes of this rule, ''uniformed services'' would have the same meaning as defined at 10 U.S.C. 101(a)(5): the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard, as well as members of the NOAA and USPHS Commissioned Corps. Members of the Selected Reserve of the Ready Reserve of a reserve component named in 10 U.S.C. 10101 and members of the Ready Reserve Corps of the USPHS would also be eligible for the exemption. (The NOAA Commissioned Corps does not have a reserve component.)

For members of the armed forces, ''active duty'' would have the same meaning as under 10 U.S.C. 101(d)(1). For members of the NOAA commissioned corps, ''active duty'' would have the same meaning as under 33 U.S.C. 3002(b)(1). For members of the USPHS Commissioned Corps, ''active duty'' would have the same meaning as ''active service'' under 42 U.S.C. 212(d). ''Selected Reserve'' would have the same meaning as under 10 U.S.C. 10143(a).

This fee exemption would be located in a new paragraph, paragraph (m), in 46 CFR 10.219.

VI. Regulatory Analysis

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. A summary of our analyses based on these statutes and Executive orders follows.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, OMB has not reviewed this rule.

The Coast Guard has developed an analysis of the costs and benefits of the proposed rule to assess its impacts. The regulatory analysis (RA) follows.

The rule is being proposed in response to two items. The first is section 3, paragraph (a)(ii) of Executive Order 13860, ''Supporting the Transition of Active-Duty Service Members and Military Veterans Into the Merchant Marine,'' signed March 4, 2019.[9] The second is section 3511(c)(1) of the NDAA 2020.[10]

For purposes of the analysis, this RA is presented in two parts. Part I examines the impacts of CG–MMC Policy Letter 02–20, which was issued on May 26, 2020.[11] Part II examines the impacts of the proposed rulemaking post the issuance of the CG–MMC Policy Letter 02–20. The policy letter and the proposed rulemaking cover different populations. The difference between the two populations arises from which components of the reserves are eligible for a waiver of fees under the policy letter and which would be eligible under this proposed rule. The policy letter covers all reservists on active duty currently and in the past. The proposed rulemaking, however, would cover only those reservists who are currently members of the Selected Reserve, as described in 10 U.S.C.

[7] CG–MMC Policy Letter 02–20 is available at *https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/MMC/CG-MMC-2%20Policies/CG-MMC-Policy-Letter-02-20.pdf.*

[8] Executive Order 13860, section 1.

[9] 84 FR 8407 (Mar. 7, 2019) (''With respect to National Maritime Center license evaluation, issuance, and examination, [the Coast Guard shall] take all necessary and appropriate actions to provide for the waiver of fees for active-duty service members.'').

[10] Public Law 116–92, Dec. 20, 2019.

[11] Section 5e of the policy letter. A copy of the policy letter can be found in the docket.

10143(a), or a reserve component named in 10 U.S.C. 10101, or the Ready Reserve of the USPHS. The in-scope population of the proposed rulemaking is a subset of that of the policy letter.

The Coast Guard does not have data on the number of Selected Reservists or Ready Reservists who were granted fee exemptions under the policy letter, nor does it have data on the number of the reservists who were granted fee exemptions while on active-duty status. Due to this lack of data, it is not possible to estimate the differences in the affected populations between the policy letter and the proposed rulemaking.[12] Therefore, the Coast Guard is treating the estimated difference as an unquantified impact of the proposed rule, though the Coast Guard explores potential cost savings effects in its analysis. Further discussion can be found below.

Since the policy letter and proposed rulemakings are implemented at different time periods (the policy letter was implemented in 2020, and the proposed rulemaking is expected to be implemented in 2024), two different baselines need to be examined. The first is that associated with the pre-policy baseline (covering 2020–2033), and the second is that associated with the proposed rulemaking baseline (covering 2024–2033). The pre-policy baseline analyzes the effects of the Policy Letter 02–20 published in 2020 which allowed certain eligible applicants to receive an MMC fee exemption. The pre-policy baseline estimates the costs and savings that applicants and the Coast Guard received as a result of the policy letter as well as the costs and savings from this proposed rulemaking. The second baseline, the proposed rulemaking baseline, estimates the costs and savings that would occur as the result of this proposed rulemaking only. However, since we are unable to determine the change in population there are no additional costs or savings that can be attributed to the proposed rulemaking baseline.

Table 1, below, provides a summary of all impacts from Policy Letter 02–20 and the proposed rulemaking on a per-applicant basis. Section 1a of that table discusses the impacts of the policy letter, and section 1b discusses those of the proposed rulemaking. The dollar figures are presented in both nominal and discounted terms (7 percent on an annualized basis) for a 10-year period.

TABLE 1a—SUMMARY OF THE IMPACTS OF POLICY LETTER 02–20

Category	Impacts
Applicability	46 U.S.C. 2110, Executive Order 13860, and NDAA 2020.
Affected Population	Members of the uniformed services (Army, Navy, Air Force, Space Force, Marine Corps, Coast Guard, Commissioned Corps of NOAA, Commissioned Corps of USPHS), including reservists and members of the National Guard, who are on active duty at the time of application, or are current members of the reserve forces and were previously on active duty.
Estimated Fee Waivers (annually)	The estimated number of fee waivers in the future is 622 (annually).
Labor costs for applicants to provide documentation of eligibility for an MMC fee exemption.	$9.87 per application. The 14-year documentation cost for the 622 yearly applicants is $85,948 (in total nominal dollars) and $61,468 and $6,139 annualized (discounted at 7%).
Labor costs to the Coast Guard to evaluate applicant's eligibility for MMC fee exemption.	$7.82 per application. The 14-year cost to the Coast Guard is $68,097 (in total nominal dollars) and $48,702 and $4,864 annualized (discounted at 7%).
Transfer payments (eliminated applicant's MMC fees paid to the Federal Government).	The mean estimated transfer is $159.38 per MMC. Over the 14-year period, the transfers are estimated at $1,387,881 (in total nominal dollars) and $992,601 and $99,134 on an annualized basis (discounted at 7%).
Unquantified benefits	May provide uniformed services members greater flexibility with respect to pursuing careers after leaving the uniformed services.

TABLE 1b—SUMMARY OF THE IMPACTS OF PROPOSED RULE

Category	Impacts
Applicability	46 U.S.C. 2110, Executive Order 13860, and NDAA 2020.
Affected Population	The proposed rulemaking covers only uniformed service members and reservists on active duty, members of the Selected Reserve, and members of the Ready Reserve Corps of the Public Health Service. The proposed rulemaking involves a narrower in-scope population, as Policy Letter 02–20 covers reservists currently on active duty as well as those who were on active duty in the past.
Estimated Fee Waivers (annually)	The number of fee waivers in the future is estimated, for purposes of our analysis, at 622 (annually). However, as the only change from Policy Letter 02–20 involves a potential decrease in the reservist population, the actual number may be smaller. Due to a lack of data, it is not possible to quantify this number.
Labor costs for applicants to provide documentation of eligibility for an MMC fee exemption.	$9.87 per application. There are no labor costs to the applicants to provide documentation as the proposed rulemaking codifies the already existing Policy Letter 02–20.
Labor costs to the Coast Guard to evaluate applicant's eligibility for MMC fee exemption.	$7.82 per application. There are no labor costs expected from the implementation of the proposed rulemaking as it codifies the already existing Policy Letter 02–20.
Transfer payments (eliminated applicant's MMC fees paid to the Federal Government).	Codifies MMC Fee Waiver. The mean estimated transfer is $159.38 per MMC. There are no transfer payments expected from the implementation of the proposed rulemaking as it codifies the already existing Policy Letter 02–20.

[12] Although the NMC has data on the aggregate number of applicants for the fee waiver, it does not have data on the applicants broken out by subcategories such as what service they are in (or were in) or their active or reserve status. Executive Order 13860 does not require the Coast Guard to collect this data. As a result, the Coast Guard does not collect it. In addition, the Department of Defense, as of when this proposed rule was written, did not publish data on the number of Selected Reservists or Ready Reservists who are currently on active duty or who were in the recent past.

TABLE 1b—SUMMARY OF THE IMPACTS OF PROPOSED RULE—Continued

Category	Impacts
Unquantified benefits	May provide increased clarity and transparency to the affected public as a published rule in the CFR as opposed to a standalone guidance document.[1]

Note: all dollar figures are rounded to the closest whole dollar.
[1] The proposed rulemaking also incorporates the greater flexibility with respect to pursuing careers. Due to the fact that this has already been achieved by the policy letter, independent of the proposed rulemaking, we only list the increased clarity and transparency obtained through the codification of the MMC Fee Waiver. These are the additional benefits obtained through the creation of the proposed rulemaking.

Part I. CG–MMC Policy Letter 02–20 (Pre-Policy Baseline)

A policy letter was published to immediately implement Executive Order 13860, section 3511(c)(1) of the NDAA 2020. The implementation of the policy letter had three impacts. The first impact is the time that applicants are required to provide documentation to show eligibility for the MMC fee exemption.[13] Prior to the implementation of the policy letter, applicants did not need to provide such documentation. The second impact involves the labor costs to the Coast Guard to evaluate documentation for eligibility of the fee exemption. Prior to the policy letter, the Coast Guard did not have to evaluate such documentation, so there was no cost to the Government. The third impact of the policy letter was in the form of transfer payments, which are monetary payments from one group to another that do not affect the total resources available to society. Prior to the implementation of the policy letter, the affected population were required to pay the MMC fees. Following publication of the Policy Letter, the Federal Government incurs the cost of those fees. These three factors comprise the effects of the of Policy Letter 02–20.

The population will be discussed in greater detail below in the ''Affected Population'' section of this RA.

Affected Population for Policy Letter 02–20

In accordance with Executive Order 13860 and section 3511 of the NDAA 2020, and the authority under 46 U.S.C. 2110(g), the Coast Guard waived MMC fees for members of the uniformed services (Army, Navy, Air Force, Marine Corps, Space Force, Coast Guard, and the Commissioned Corps of NOAA and the USPHS), including reservists and members of the National Guard, if they are currently on active duty at the time of application, or are a current member of the reserve forces and were previously on active duty.[14] The waiver was implemented through Policy Letter 02–20. This policy letter took effect on May 26, 2020. Data is available for all these categories of personnel except the Ready Reserve Corps of the USPHS. The Ready Reserve Corps of the USPHS was authorized and funded by the Coronavirus Aid, Relief and Economic Security Act and signed into law on March 27, 2020. It only began to accept applications in the fall of 2020.[15] With respect to the other groups mentioned above, the maximum potentially affected population is 2,145,035. This is the total number of personnel who may be eligible for an MMC fee exemption. A detailed breakdown of this population can be found below in Table 2.

TABLE 2—MAXIMUM TOTAL POTENTIALLY AFFECTED POPULATION BY POLICY LETTER 02–20

Service branch	Number	Source	Notes
Members of Uniformed Services			
Army	466,172	Defense Manpower Data Center (DMDC) website, (*https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports*, downloaded September 1, 2022). Downloaded from section ''military personal, Military and civilian personnel by service/agency by state/country, March 2022''.	This data is as of the quarter ending March 2022.[1]
Navy	340,390		
Air Force and Space Force.	329,257		
Marines	176,259		
Coast Guard	40,308		
Commissioned Corps of NOAA.	327	Information from NOAA, provided May 27, 2021.	
Commissioned Corps of USPHS.	6,100	Department of Health and Human Services website (*https://www.hhs.gov/about/news/2020/06/30/trump-administration-re-establishes-ready-reserve-corps-as-part-of-the-us-phs.html,* downloaded January 4, 2021).	
Total Active Uniformed Service Members.	1,358,813		

[13] Applicants must submit documentation consistent with CG–MMC Policy Letter 02–20 to show that they are eligible for the fee exemption. This may include a copy of active-duty orders citing Titles 10 or 14 of the United States Code or a letter from the relevant command or personnel office on official letterhead stating that the applicant is a current member of the uniformed services.

[14] The legal authority is discussed in greater detail in section III of this preamble, ''Background''.

[15] *https://www.usphs.gov/ready-reserve,* accessed June 20, 2023.

TABLE 2—MAXIMUM TOTAL POTENTIALLY AFFECTED POPULATION BY POLICY LETTER 02–20—Continued

Service branch	Number	Source	Notes
Members of Selected Reserve of the Ready Reserve			
Army Reserve	180,647	Defense Manpower Data Center (DMDC) website, (*https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports*, downloaded September 1, 2022). Downloaded from section "military personal, Military and civilian personnel by service/agency by state/country, March 2022".	This data is as of March 2022.[2]
Army National Guard of the U.S.	333,182		
Navy Reserve	56,017		
Air Force Reserve	69,697		
Air National Guard of the U.S.	106,964		
Marine Corps Reserves	33,607		
Coast Guard Reserves	6,108		
Commissioned Corps of USPHS (Ready Reserve).	N.A.[3]		
Space Force Reserve	0[4]		
Total Members of Selected Reserve of the Ready Reserve.	786,222		
Total Active Uniformed Service Members + Members of Selected Reserve of the Ready Reserve.	2,145,035		

[1] The table does not include personnel on temporary duty or deployed in support of contingency operations. The data is the latest available as of June 2022.
[2] Latest available data as of the search date, September 1, 2022.
[3] USPHS Ready Reserve was created in March 2020 and only started to take applications in the Fall of 2020.
[4] Space Force, as of September 1, 2022, does not have a reserve element.

Of the 2,145,035 eligible persons, only a small number applied for an MMC and received a fee waiver. Based on available data, 2020 through 2022 (inclusively), an average of 622 eligible persons were granted a waiver of MMC fees (per year). The Coast Guard assumes that, in the 10-year period following implementation of Policy Letter 02–20, an average of 622 persons will continue to annually request and receive a waiver of MMC fees.

MMC Fees To Be Exempted

Table 3 provides the MMC evaluation, examination, and issuance fees waived for qualifying individuals for the policy letter.[16] The column on the right side shows the aggregated evaluation, examination, and issuance fees for each type of credential transaction. The average fee for an MMC, as can be seen at the bottom of table 3, is $159.38.

TABLE 3—FEE FOR MMCS AND ASSOCIATED ENDORSEMENTS FROM TABLE 1 OF 46 CFR 10.219(a)

If you apply for	Evaluation, then the fee is . . .	Examination, then the fee is . . .	Issuance, then the fee is . . .	Total
MMC with officer endorsement:				
Original:				
Upper level 1	$100	$110	$45	$255
Lower level 2	100	95	45	240
Renewal	50	45	45	140
Raise of grade	100	45	45	190
Modification or removal of limitation or scope	50	45	45	140
Radio officer endorsement:				
Original	50	45	45	140
Renewal	50	n/a	45	95
Staff officer endorsements:				
Original	90	n/a	45	135
Renewal	50	n/a	45	95
MMC with rating endorsement:				
Original endorsement for ratings other than qualified ratings	95	n/a	45	140
Original endorsement for qualified rating	95	140	45	280
Upgrade or raise of grade	95	140	45	280
Renewal endorsement for ratings other than qualified ratings	50	n/a	45	95
Renewal endorsement for qualified rating	50	45	45	140
Modification or removal of limitation or scope	50	45	45	140

[16] Table 1 of 46 CFR 10.219(a).

TABLE 3—FEE FOR MMCS AND ASSOCIATED ENDORSEMENTS FROM TABLE 1 OF 46 CFR 10.219(a)—Continued

If you apply for	Evaluation, then the fee is . . .	Examination, then the fee is . . .	Issuance, then the fee is . . .	Total
STCW endorsement:				
Original	0	0	0	n/a
Renewal	0	0	0	n/a
Reissue, replacement, and duplicate	n/a	n/a	45	45
			Summation Statistics	
			Mean	$159.38
			Lower Bound	$45.00
			Upper Bound	$280.00
			Credential transaction types that require Fees.	16

Cost and Transfer Impacts of Policy Letter 02–20

As stated previously, there were three impacts of the policy letter. The first was that it resulted in a cost to applicants to provide the documentation needed to show eligibility for the MMC fee exemption. The second was the cost to the Coast Guard to process this documentation. The third was the transfer price associated with the costs of the fees being shifted from individual applicants to the Federal Government. The costs to applicants are discussed in detail in section (1), below. Costs to the Coast Guard are discussed in section (2). Section (3) discusses the combined costs to applicants and the Coast Guard, and section (4) details the transfer costs.

(1) Labor Costs to Applicants Providing Documentation Showing Eligibility for MMC Fee Waiver

Applicants for an MMC fee waiver, under Policy Letter 02–20, need to provide documentation to show eligibility. Examples of documentation include, but are not limited to, active-duty orders citing Titles 10 or 14 of the United States Code, a letter from the command or personnel office on official letterhead stating that the applicant is currently serving under Titles 10 or 14, or similar documentation. The applicant should submit the documentation with their application for an MMC.[17]

The National Maritime Center (NMC) estimates that it would take applicants 15 minutes to obtain eligibility documentation and include it with an MMC application.[18] [19] The Coast Guard estimates the mean hourly rate of active duty uniformed service members at $39.48 per hour.[20] The Coast Guard estimates the mean monthly pay of active duty uniformed service members at $6,865.77.[21] That figure, $6,865.77, is multiplied by 12 to obtain an annual figure of $82,389.24 ($6,865.77 × 12). To estimate hourly rates, the Coast Guard divides $82,389.24 by 2,087, which the Office of Personnel and Management (OPM) uses as the number of working hours in a year, per 5 U.S.C. 5504(b)(1). Hence, the Coast Guard estimates the average hourly rate of active-duty uniformed service members at $39.48[22] ($82,389.24 ÷ 2,087) and estimates the cost to this population to provide documentation showing eligibility for the fee waiver at $9.87 ((15 minutes ÷ 60 minutes) × $39.48 = $9.87). As the Coast Guard forecasts 622 applicants per year, the total nominal cost is estimated at $6,139 per annum (622 × $9.87 = $6,139.14, rounded to $6,139). Table 4 shows the estimated nominal cost over a 14-year period, including discounted and annualized figures. As the policy letter became effective in 2020, table 4 shows the estimated costs for the 14-year period covering 2020 through 2033 (the 14-year period following the implementation of the policy letter).[23] Table 4 is showing the pre-policy letter baseline. All dollar figures in Table 4, and all other tables in this regulatory analysis, are in 2021 terms unless otherwise stated.

[17] In order to provide maximum flexibility to applicants, for the proposed rulemaking the acceptable forms of documentation will be provided in updated guidance that the Coast Guard is planning to publish when a final rule is published.

[18] The NMC is responsible for receiving and evaluating MMC applications and issuing MMCs to qualified mariners.

[19] The Coast Guard, in its calculations, has assumed that applicants provide their own documentation as opposed to command personnel providing the documentation on their behalf. The Coast Guard does not have information on the breakdown between the two groups.

[20] This dollar figure for uniformed service members is provided in nominal terms, as opposed to a loaded rate (adjusted for benefits). This is due to the complexity of measuring and obtaining readily available data on the uniformed service members benefit compensation package. We compared civilian employees and uniformed service members and concluded that the comparison is not appropriate, since civilian employees and uniformed service members receive significantly different benefits. Uniformed personnel, for example, are provided full housing (or equivalent financial compensation), food or partial food stipend, full medical coverage for themselves and their families, significant educational benefits during their time in service and, upon completing terms of military service, pensions (for those who complete the requisite amount of service) complete moving expenses throughout their careers, and other benefits that are dependent upon an individual's assignment. By comparison, few employees in the private sector receive such benefits.

[21] We calculated this figure using the Jan. 2021 Monthly Basic Pay Table on the Department of Defense website, *https://militarypay.defense.gov/Portals/3/Documents/2021%20Pay%20Table%203%20percent%20-%20FINAL.pdf* (accessed Nov. 10, 2021), which in turn was found under ''active-duty pay'' at *https://militarypay.defense.gov/Pay/Basic-Pay/Active-Duty-Pay/*. In calculating this average, we excluded all zero cells in the table, as they are fields for which wages cannot exist. For example, it is not possible to obtain a 0–10 rating with fewer than 20 years of experience. Hence the zeros in the table for that rating, for years of experience under 20, were excluded from our calculations.

[22] Rounded to nearest whole cent.

[23] It should be noted that for the 3 years 2020–2022 (inclusively), we are implicitly applying our assumptions regarding in-scope population numbers and costs for the years 2022 and going forward. The same reasoning applies to analysis later on in this RA on the 2020–2022 periods examined for Policy Letter 02–20.

TABLE 4—LABOR COSTS TO IN-SCOPE APPLICANTS OF COMPLETING MMC FEE WAIVER DOCUMENTATION (POLICY LETTER 02–20 IMPACT) (PRE-POLICY LETTER IMPLEMENTATION BASELINE)

Year	Nominal	3%	7%
Year 1 (2020)	$6,139	$6,323	$6,569
Year 2 (2021)	6,139	6,139	6,139
Year 3 (2022)	6,139	5,960	5,737
Year 4 (2023)	6,139	5,787	5,362
Year 5 (2024)	6,139	5,618	5,011
Year 6 (2025)	6,139	5,454	4,683
Year 7 (2026)	6,139	5,296	4,377
Year 8 (2027)	6,139	5,141	4,091
Year 9 (2028)	6,139	4,992	3,823
Year 10 (2029)	6,139	4,846	3,573
Year 11 (2030)	6,139	4,705	3,339
Year 12 (2031)	6,139	4,568	3,121
Year 13 (2032)	6,139	4,435	2,917
Year 14 (2033)	6,139	4,306	2,726
Total	85,948	73,570	61,468
Annualized		6,139	6,139

(2) Labor Costs to the Coast Guard To Evaluate and Process Documentation Showing Eligibility for MMC Fee Waivers

Just as there are labor costs for applicants to submit documentation, there are labor costs to the Coast Guard to evaluate and process the documentation showing eligibility for an MMC fee waiver. The NMC estimates that the time to process the typical documentation is 10 minutes, or 0.17 hours (10 ÷ 60). The processing is performed by personnel holding positions at the government General Schedule (GS) pay scale of GS–07. According to Commandant Instruction 7310.1U, the hourly loaded rate for a GS–07 Coast Guard employee is $46.[24] Thus, the labor cost to the Coast Guard to process the eligibility documentation is $7.82 (0.17 hours × $46 per hour) per applicant. As stated previously, the Coast Guard assumes 622 applicants would receive a MMC fee waiver each year. Given this, the Coast Guard predicts it would spend $4,864 per year to evaluate and process documentation provided by applicants showing eligibility for fee exemptions (622 × $7.82 = $4,864.04, rounded to the nearest whole dollar). The Coast Guard estimates that the aggregate 14-year cost to the Government is $48,702, with an annualized figure of $4,864, discounted at 7 percent. These numbers can be seen in table 5.

TABLE 5—LABOR COSTS TO COAST GUARD TO EVALUATE ELIGIBILITY FOR MMC FEE WAIVER (POLICY LETTER 02–20 IMPACT) (PRE-POLICY LETTER IMPLEMENTATION BASELINE)

Year	Nominal	3%	7%
Year 1 (2020)	4,864	5,010	5,205
Year 2 (2021)	4,864	4,864	4,864
Year 3 (2022)	4,864	4,722	4,546
Year 4 (2023)	4,864	4,585	4,248
Year 5 (2024)	4,864	4,451	3,971
Year 6 (2025)	4,864	4,322	3,711
Year 7 (2026)	4,864	4,196	3,468
Year 8 (2027)	4,864	4,074	3,241
Year 9 (2028)	4,864	3,955	3,029
Year 10 (2029)	4,864	3,840	2,831
Year 11 (2030)	4,864	3,728	2,646
Year 12 (2031)	4,864	3,619	2,473
Year 13 (2032)	4,864	3,514	2,311
Year 14 (2033)	4,864	3,412	2,160
Total	68,097	58,291	48,702
Annualized		4,864	4,864

[24] Page two of enclosure 2 to Commandant Instruction 7310.1U (*https://www.uscg.mil/Portals/0/NPFC/docs/7310/CI_7310_1U.pdf?ver=2020-04-06-135219-117*).

(3) Aggregated Labor Costs of Applicants and the Coast Guard Associated With Documentation of Eligibility for an MMC Fee Waiver

The Coast Guard estimates the total costs related to the documentation of eligibility, for applicants and the Coast Guard (shown in tables 4 and 5), for the 14-year period following the implementation of the policy letter, in table 6. The estimated total costs to evaluate and process the documentation for the applicants and the Coast Guard for the 14-year period is $110,171, with an annualized cost of $11,003, discounted at 7 percent.

TABLE 6—TOTAL COSTS TO APPLICANTS AND COAST GUARD TO EVALUATE AND PROCESS DOCUMENTATION OF ELIGIBILITY FOR MMC FEE WAIVER (IMPACT OF POLICY LETTER 02–20) (PRE-POLICY LETTER IMPLEMENTATION BASELINE)

Year	Nominal	3%	7%
Year 1 (2020)	$11,003	$11,333	$11,773
Year 2 (2021)	11,003	11,003	11,003
Year 3 (2022)	11,003	10,683	10,283
Year 4 (2023)	11,003	10,372	9,611
Year 5 (2024)	11,003	10,069	8,982
Year 6 (2025)	11,003	9,776	8,394
Year 7 (2026)	11,003	9,491	7,845
Year 8 (2027)	11,003	9,215	7,332
Year 9 (2028)	11,003	8,947	6,852
Year 10 (2029)	11,003	8,686	6,404
Year 11 (2030)	11,003	8,433	5,985
Year 12 (2031)	11,003	8,187	5,593
Year 13 (2032)	11,003	7,949	5,228
Year 14 (2033)	11,003	7,717	4,886
Total	154,045	131,862	110,171
Annualized		11,003	11,003

(4) Elimination of Transfer Payments to Federal Government of Providing MMC Fee Waivers

Prior to the implementation of the policy letter, applicants had to pay evaluation, examination, and issuance fees to obtain an MMC.[25] The implementation of the policy letter eliminated this requirement for applicants eligible for a fee waiver. The elimination of the payment of MMC fees represents a loss of revenue to the Federal Government and an equal gain to eligible MMC applicants. This is referred to as a transfer payment. For those MMC fees that were eliminated by the policy letter, the Federal Government will face a shortfall in revenues. The revenues from those fees will need to be made up through alternative means (*i.e.,* increased taxes, new or increased fees for other services or similar sources of revenue or in some other manner). Thus, there would be no net social benefit or cost with respect to transfer payments.

As stated previously, the average annual number of uniformed service members who received a waiver of MMC fees between 2020 and 2022 (inclusively) was 622. The estimated average fee associated with the applications for these MMCs was $159 each.[26] For this population, the cost was $99,134 per year in nominal terms (622 × $159.38 = $99,134.36, rounded to the nearest whole number). Thus, for the 14 years after the implementation of the policy letter, the Coast Guard estimates transfer payments would total $992,601, with an annualized amount of $99,134, discounted at 7 percent. These estimates can be seen in table 7.

TABLE 7—TRANSFER PAYMENTS—ELIMINATED (IMPACT OF POLICY LETTER 02–20) (PRE-POLICY LETTER IMPLEMENTATION BASELINE)

Year	Nominal	3%	7%
Year 1 (2020)	$99,134	$102,108	$106,074
Year 2 (2021)	99,134	99,134	99,134
Year 3 (2022)	99,134	96,247	92,649
Year 4 (2023)	99,134	93,444	86,588
Year 5 (2024)	99,134	90,722	80,923
Year 6 (2025)	99,134	88,080	75,629
Year 7 (2026)	99,134	85,514	70,681
Year 8 (2027)	99,134	83,023	66,057
Year 9 (2028)	99,134	80,605	61,736
Year 10 (2029)	99,134	78,258	57,697
Year 11 (2030)	99,134	75,978	53,923
Year 12 (2031)	99,134	73,765	50,395
Year 13 (2032)	99,134	71,617	47,098
Year 14 (2033)	99,134	69,531	44,017
Total	1,387,881	1,188,027	992,601

[25] Listed in table 3 of this RA.

[26] This number is rounded to the closest whole number. The number can be found in table 3 of this RA.

TABLE 7—TRANSFER PAYMENTS—ELIMINATED (IMPACT OF POLICY LETTER 02–20) (PRE-POLICY LETTER IMPLEMENTATION BASELINE)—Continued

Year	Nominal	3%	7%
Annualized		99,134	99,134

Benefits of Policy Letter 02–20

The Coast Guard has identified one qualitative benefit of Policy Letter 02–20 stemming from the elimination of the MMC fees referred to in Executive Order 13860. The fee waiver may provide eligible uniformed service members greater flexibility with respect to pursuing careers after leaving the uniformed services.

Part II. Proposed Rule

The Coast Guard expects the proposed rulemaking to have an impact for two reasons. First, it would implement Policy Letter 02–20 in terms of required actions.[27] Second, the proposed rulemaking only covers a subset of the affected population of the policy letter. The proposed rulemaking covers Selected or Ready Reservists while the policy letter covered all reservists who were on active duty in the past. As a result, the proposed rule covers a smaller portion of the affected population than the policy letter. However, as discussed previously, there is no available data to accurately estimate this difference. The reason there is no available data is because the NMC only collects data, on those receiving the NMC fee exemptions, on an aggregate basis. The NMC only collects data on the number of those who receive the fee exemption. The NMC does not collect more detailed data such as what branch they are in or whether they are in the reserves or not. Due to the smaller number of eligible applicants, the Coast Guard surmises that, when compared to the policy letter, the proposed rule would result in a small cost savings to the applicant and the Coast Guard for no longer needing to provide and review the documentation for the fee waiver.

The following cost analysis discusses the impact of the difference in the reservist populations on the number of MMC applications. However, due to a lack of data, it is not possible to quantify the cost difference.

Affected Population for Proposed Rule

As the proposed rulemaking covers a narrower definition of reservists than Policy Letter 02–20, it may cover fewer than 622 persons per year. Due to a lack of data, the Coast Guard assumes that, for the proposed rulemaking, the number of applicants for MMC exemptions is 622.

Cost Analysis for Proposed Rule

Since the proposed rule covers a narrower population of reservists, it may decrease the number of MMC exemptions per year. Therefore, the Coast Guard assumes that the aggregate reduction in exemptions between the policy letter and the proposed rulemaking is unquantifiable and could be zero.[28] In other words, the proposed rulemaking may have no impact on the number of exemption requests.

If the number of applicants seeking exemptions under the proposed rulemaking is fewer than under the policy letter, there will be a decrease in the costs of the proposed rulemaking when compared to the costs of the policy letter. For every applicant that does not seek an exemption under the proposed rulemaking (as opposed to the policy letter), the proposed rule would result in a cost savings of $9.87 per applicant related to providing the necessary documentation, and a cost savings of $7.82, per applicant, for the Coast Guard related to reviewing that documentation. If the proposed rule results in any decrease in the number of individuals seeking an exemption from MMC fees, that amount would be $159 per applicant (the average MMC fee paid by an applicant).

As stated previously, the proposed rulemaking is codifying an already existing policy letter. The only differences between the policy letter and the proposed rulemaking is that the proposed rulemaking covers a subset of the reserve forces that the policy letter covers. Due to a lack of data regarding this potential difference it is not possible to estimate differences in costs or benefits. The lack of data also makes it impossible to even determine whether there actually is a difference in populations between the proposed rulemaking and the policy letter. If there is a difference between the policy letter and proposed rulemaking in populations, the costs and cost savings differences would amount to the figures cited in the previous paragraph on a per individual basis.

Benefits of the Proposed Rule

The Coast Guard believes the proposed rulemaking may reduce the burden on the affected public by increasing efficiency and transparency as a result of being in the Code of Federal Regulations, as opposed to being a standalone policy letter.[29]

Regulatory Alternatives Considered

In developing this proposed rule, the Coast Guard considered three alternatives to the proposed exemption.

The first alternative would be to not exempt the MMC fees listed in table 1 of 46 CFR 10.219(a), as shown in table 3 of this proposal. As this alternative would not fulfill the requirements of Executive Order 13860 or NDAA 2020, the Coast Guard rejected this alternative.

The second alternative would be to make no change to the user fee schedule for members of the uniformed services, but to establish an MMC fee reimbursement program for uniformed service members. Under this alternative, the population applying for MMCs would initially pay MMC fees and then file a request for reimbursement with their service in order to be compensated for the cost. Under this alternative, the fee compensation process would be a greater burden than the proposed rule's framework for eligible applicants, who would pay MMC fees out of pocket and then request compensation through their service. Filing a request for reimbursement would increase the amount of documentation applicants would be required to file and would add an administrative burden to the services in establishing and implementing reimbursement programs. The Coast Guard rejected this alternative.

The third alternative would be to extend the exemption only to the portion of the population consisting of members of the Selected Reserve of the

[27] This is as opposed to in-scope population. The issues regarding the in-scope population are discussed below.

[28] See the cost difference discussions between the proposed rulemaking and the policy letter in the ''Cost and Transfer Impacts of Cost Analysis of Policy Letter 02–20'' section of the RA.

[29] The proposed rulemaking would also incorporates greater flexibility with respect to pursuing careers. As this has already been achieved by issuance of the policy letter, independent of the proposed rulemaking, we only list the increased clarity and transparency that would be obtained through codification of the Coast Guard's MMC fee exemption policy through the proposed rulemaking.

Ready Reserve of any of the armed forces (Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve), and the Ready Reserve Corps of the USPHS who are on ''active duty,'' [30] while excluding those simply in an ''active status.'' [31] The Coast Guard rejected this alternative, as it does not best support the intent of Executive Order 13860 and NDAA 2020 to help attract active duty service members to obtain an MMC, and provide meaningful, well-paying jobs to U.S. veterans in support of U.S. national security requirements.

The Coast Guard believes that the intent of Executive Order 13860 and NDAA 2020 is best supported through a fourth alternative—extending the eligibility for MMC fee exemptions to members of the Selected Reserve of the Reserves of the Army, Navy, Air Force, Marines, Coast Guard and Space Force (such as Selected and Ready Reservists) and not limiting eligibility to only members of the uniformed services on active duty. This alternative best supports the intent of Executive Order 13860 and the NDAA 2020 by ensuring a wide range of service members who wish to pursue an MMC are provided support and by expanding the population eligible to receive an exemption from MMC fees, and ultimately resulting in a larger number of credentialed mariners available to support U.S national security requirements and provide meaningful, well-paying jobs to U.S. veterans.

B. Small Entities

Below are the small business entity impacts for Policy Letter 02–20 and for the proposed rulemaking on a separate basis.

Small Business Impacts of Policy Letter 02–20

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, the Coast Guard has considered whether Policy Letter 02–20 would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Policy Letter waived fees for the evaluation of an MMC application, the administration of a required examination, and the issuance of an MMC for members of the uniformed services. Since the impacts discussed above in the RA affect individuals and not business (firms), not-for-profit entities and State or Local governmental jurisdictions, the proposed rule would not impact small entities as defined by the Small Business Administration in 13 CFR 121.201. Based on this analysis, this proposed rule would not affect a substantial number of small entities.

Small Business Impacts of the Proposed Rulemaking

This proposed rulemaking codifies certain actions taken in the previously implemented Policy Letter 02–20. In addition, the population in the proposed rulemaking is defined more narrowly than in the policy letter. However, due to the fact that the proposed rulemaking, like the policy letter, only affects individuals and not business (firms), not-for-profit entities and State or Local governmental jurisdictions, the proposed rule would not impact small entities as defined by the Small Business Administration in 13 CFR 121.201. Based on this analysis, this proposed rule would not affect a substantial number of small entities.

For the aforementioned reasons, the Coast Guard certifies under 5 U.S.C. 605(b) that Policy Letter 02–20 and this proposed rule would not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment to the docket at the address listed in the **ADDRESSES** section of this preamble. In your comment, explain why you think it qualifies and how and to what degree this proposed rule would economically affect it.

C. Assistance for Small Entities

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

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).

D. Collection of Information

Policy Letter 02–20 called for a change to an existing collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

The information collection associated with Policy Letter 02–20 is the currently approved collection, OMB Control Number 1625–0040, ''Application for Merchant Mariner Credential (MMC), Application for Merchant Mariner Medical Certificate, Application for Merchant Mariner Medical Certificate for Entry Level Ratings, Small Vessel Sea Service Form, DOT/USCG Periodic Drug Testing Form, Disclosure Statement for Narcotics, DWI/DUI, and/or Other Convictions, Merchant Mariner Medical Certificate, Recognition of Foreign Certificate.'' In order to process the fee exemptions proposed in this rule, the Coast Guard would require eligible applicants for an MMC to provide documentation of their eligibility for a fee exemption.[32] In

[30] Active duty is defined here as under 10 U.S.C. 101(d)(1). Under that section it means ''full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.''

[31] All members of the Ready Reserve are in active status. Selected Reserves are only part of that group. Individual ready reserves are also active status.

[32] In order to provide maximum flexibility to applicants, for the proposed rulemaking the acceptable forms of documentation will be provided in updated guidance that the Coast Guard is planning to publish when a final rule is published.

addition, it would require the NMC to evaluate and process this documentation part of an evaluation for an MMC.

With respect to the proposed rulemaking, no new or additional documentation related to collection of information would be required (relative to the policy letter). The number of respondents may decrease from the policy letter. This is because the proposed rulemaking codifies what the policy letter currently requires in terms of collection of information documentation and applies to a potentially narrower in-scope population.

Title: Application for Merchant Mariner Credential (form CG–719B), Application for Medical Certificate (form CG–719K), Application for Medical Certificate, Short Form (form 719K/E), Small Vessel Sea Service Form (form CF–719S), DOT/USCG Periodic Drug Testing Form (form CG–719P), Disclosure Statement for Narcotics, DWI/DUI, and/or Other Convictions (form CG–719C).

OMB Control Number: 1625–0040.

Summary of the Collection of Information: The Coast Guard currently collects information from individuals seeking to obtain an MMC, renew an MMC, and obtain a merchant mariner medical certificate. Policy Letter 02–20 would require applicants who are members of the uniformed services (622 persons per year), and who wish to be exempted from MMC fees, to provide documentation of eligibility for the MMC fee exemption as part of an MMC application (form CG–719B).

As the proposed regulation only currently codifies current practices, regarding the collection of information, stated in Policy Letter 02–20 (and makes no changes to these requirements), as well as having between the same or fewer applicants than the MMC fee waivers, it would be expected to have no impact on the collection of information. The only reason for any reduction in documentation would be due to the fact that the proposed rulemaking covers a narrower in-scope definition than does the policy letter. However, there is no data available to the Coast Guard to determine how small the decrease would be or even, for that matter, if there even is one.

Need for Information: Title 46 CFR, section 10.217(a), requires MMC applicants to apply at one of the Coast Guard's 17 Regional Exam Centers, located nationwide or any other location designated by the Coast Guard. MMCs are established for individuals who are required to hold a credential under 46 U.S.C, subtitle II. The Coast Guard has the responsibility of issuing MMCs to applicants found qualified as to age, character, and habits of life, experience, professional qualifications, and physical fitness. The instruments contained within OMB Control No. 1625–0040 serve as a means for the applicant to apply for an MMC and a merchant mariner medical certificate.

Proposed Use of Information: The Coast Guard conducts this collection of information solely for the purposes of determining eligibility for issuance of an MMC in accordance with applicable statutes and regulations. This evaluation is performed on occasion, meaning as submitted by the respondents when they apply for an MMC. Applicants for an MMC must apply using the Form CG–719–B for an original MMC and every 5 years for renewal, or when seeking a new endorsement or a raise of grade of an existing endorsement. The Coast Guard evaluates the collected information to determine whether applicants are qualified to serve under the authority of the requested credential with respect to their professional qualifications and suitability.

Description of the Respondents: All applicants for an MMC, whether original, renewal, duplicate, raise of grade, or to add a new endorsement on a previously issued MMC, are included in this collection. The population covered by Policy Letter 02–20 includes the number of uniformed service members applying for MMCs who receive an exemption of MMC fees (622 annually). The population covered by the proposed rulemaking is expected to remain the same or be less, because the proposed rulemaking codifies the Policy Letter in terms of documentation requirements but applies to a narrower in-scope population.

Number of Respondents: The number of respondents from the policy letter are estimated at 622 per year. The proposed rule would either not increase the annual number of respondents or be expected to only decrease them.[33]

Frequency of Response: The frequency of response is once per year.

Burden of Response: The collection of information from both the policy letter and the proposed rule requires the population to spend 15 minutes (0.25 hours) to provide evidence of eligibility for an MMC fee exemption (622 persons per year), which would be submitted with the requisite Form CG–719B.

Estimate of Total Annual Burden: The Coast Guard estimates that the total annual burden, for the implementation of the policy letter, has increased by 156 ($0.25 \times 622 = 155.5$, rounded up to nearest whole number) hours.[34]

As the proposed rulemaking covers the same documentation and has a narrower definition with respect to in-scope population, it is expected to have either no impact on these hours or to reduce the burden level already existing under the policy letter.

As required by 44 U.S.C. 3507(d), we will submit a copy of this proposed rule to OMB for its review of the collection of information. We ask for public comment on the proposed collection of information to help us determine, among other things—

- How useful the information is;
- Whether the information can help us perform our functions better;
- How we can improve the quality, usefulness, and clarity of the information;
- Whether the information is readily available elsewhere;
- How accurate our estimate is of the burden of collection;
- How valid our methods are for determining the burden of collection; and
- How we can minimize the burden of collection.

If you submit comments on the collection of information, submit them to both the OMB and to the docket where indicated under **ADDRESSES**.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the Coast Guard could enforce the collection of information requirements in this proposed rule, OMB would need to approve the Coast Guard's request to collect this information.

E. Federalism

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

[33] Information collections normally list the total number of annual respondents. However, there is currently a periodic renewal under review at OMB, and another proposed rulemaking expected to change the number of annual respondents is expected to be submitted to OMB. Therefore, the total number of annual respondents is not included in this RA.

[34] As there is currently a periodic renewal under review at OMB, and another proposed rulemaking that is expected to change the total annual burden is expected to be submitted to OMB, it is not possible to list the total current annual burden.

preemption requirements described in Executive Order 13132. Our analysis follows.

It is well settled that States may not regulate in categories reserved for regulation by the Coast Guard. It is also well settled that all of the categories covered in 46 U.S.C. 3306, 3703, 7101, and 8101 (design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels), as well as the reporting of casualties and any other category in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, are within the field foreclosed from regulation by the States. *See United States* v. *Locke,* 529 U.S. 89, 99–101 (2000).

Additionally, for rules with federalism implications and preemptive effect, Executive Order 13132 specifically directs agencies to consult with State and local governments during the rulemaking process. If you believe this proposed rule would have implications for federalism under Executive Order 13132, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

F. Unfunded Mandates

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 million (adjusted for inflation) or more in any one year. Although this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

G. Taking of Private Property

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

H. Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform) to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this proposed rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This proposed rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

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

K. Energy Effects

We have analyzed this proposed rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (for example, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. This proposed rule would be categorically excluded under paragraphs L54 and L56 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. The categorical exclusion (CATEX) L54 pertains to regulations which are editorial or procedural; and CATEX L56 pertains to regulations concerning the training, qualifying, licensing, and disciplining of maritime personnel.

This proposed rule involves the fees for MMCs and associated endorsements. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 46 CFR Part 10

Penalties, Personally identifiable information, Reporting and recordkeeping requirements, Seamen.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 46 CFR part 10 as follows:

■ 1. The authority citation for part 10 is revised to read as follows:

Authority: 14 U.S.C. 503; 31 U.S.C. 9701; 46 U.S.C. 2101, 2103, 2104, 2110; 46 U.S.C. chapters 71, 73, and 75; 46 U.S.C. 7701, 8903, 8904, and 70105; Executive Order 10173; DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. Amend § 10.219 by adding paragraph (m) to read as follows:

§ 10.219 Fees.

* * * * *

(m) *Members of the uniformed services.* A qualified applicant under this subsection is exempt from paying evaluation, examination, or issuance fees for an MMC as described in (b)(2) of this section.

(1) For purposes of paragraph (m) of this section, *qualified applicant* means an individual who, at the time of submission of an application, is:

(i) A member of the uniformed services listed in 10 U.S.C. 101(a)(5) on active duty;

(ii) A member of the Selected Reserve, as described in 10 U.S.C. 10143(a), of a reserve component named in 10 U.S.C. 10101; or

(iii) A member of the Ready Reserve Corps of the Public Health Service established in 42 U.S.C. 204(a)(1).

(2) For purposes of paragraph (m)(1)(i) of this section:

(i) For the members of the armed forces, as defined in 10 U.S.C. 101(a)(4), active duty is defined by 10 U.S.C. 101(d)(1);

(ii) For the commissioned corps of the National Oceanic and Atmospheric Administration, active duty has the same meaning as found in 33 U.S.C. 3002(b)(1); and

(iii) For the members of the commissioned corps of the Public Health Service, active duty has the meaning defined in 42 CFR 21.72(f).

Dated: September 21, 2023.

W.R. Arguin,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Prevention Policy.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 4, 7, 10, 11, 12, 39, and 52

[FAR Case 2021–017; Docket No. FAR–2021–0017; Sequence No. 1]

RIN 9000–AO34

Federal Acquisition Regulation: Cyber Threat and Incident Reporting and Information Sharing

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to partially implement an Executive order on cyber threats and incident reporting and information sharing for Federal contractors and to implement related cybersecurity policies.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before December 4, 2023 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2021–017 to the Federal eRulemaking portal at *https://www.regulations.gov* by searching for ''FAR Case 2021–017''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2021–017''. Follow the instructions provided on the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2021–017'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite ''FAR Case 2021–017'' in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at *https://www.regulations.gov/faq*). To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Marissa Ryba, Procurement Analyst, at 314–586–1280 or by email at *Marissa.Ryba@gsa.gov.* For information pertaining to status, publication schedules, or alternate instructions for submitting comments if *https://www.regulations.gov* cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAR Case 2021–017.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to increase the sharing of information about cyber threats and incident information between the Government and information technology and operational technology service providers, pursuant to Executive Order (E.O.) 14028, Improving the Nation's Cybersecurity. The E.O. was signed by the President on May 12, 2021, and published in the **Federal Register** at 86 FR 26633 on May 17, 2021.

The E.O. is focused on improving the nation's cybersecurity, in part through increased protection of Government networks. As directed in sections 2(d) and 2(g)(ii) of the E.O., this proposed rule implements Office of Management and Budget (OMB) recommendations from section 2(b) of the E.O., and Cybersecurity and Infrastructure Security Agency (CISA) recommendations from section 2(g)(i) of the E.O. This proposed rule considers recommendations issued by the Department of Homeland Security (DHS) pursuant to section 8(b). CISA is an agency within DHS. Additionally, this proposed rule supports implementation of the National Cyber Strategy by strengthening and standardizing contract requirements for cybersecurity and by providing mechanisms to help ensure that entities or individuals that knowingly put U.S. information or systems at risk, by violating these cybersecurity requirements, are held accountable. Finally, this proposed rule implements OMB Memorandum M–21–07, Completing the Transition to internet Protocol Version 6 (IPv6), dated November 19, 2020.

Recent cybersecurity incidents such as those involving SolarWinds, Microsoft Exchange, and the Colonial Pipeline incident are a sobering reminder that U.S. public and private sector entities increasingly face sophisticated malicious cyber activity from both nation-state actors and cyber criminals. These incidents share commonalities, including insufficient cybersecurity defenses that leave public and private sector entities more vulnerable to incidents. The E.O. makes a significant contribution toward modernizing cybersecurity defenses by protecting Federal networks, improving information sharing between the U.S. Government and the private sector on cyber issues, and strengthening the United States' ability to respond to incidents when they occur. This proposed rule underscores that the compliance with information-sharing and incident-reporting requirements are material to eligibility and payment under Government contracts.

II. Discussion and Analysis

The following summarizes the proposed changes to the FAR:

FAR 2.101 currently defines *information and communication technology* as information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples include, but are not limited to, the following: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; websites; videos; and electronic documents. This definition was implemented in FAR case 2017–011 (August 11, 2021, 86 FR 44229, effective September 10, 2021). It has examples primarily aimed at section 508 of the

Rehabilitation Act of 1973. This FAR case proposes to change the term defined in FAR 2.101 to *information and communications technology (ICT)* and to provide additional examples not primarily aimed at section 508: *telecommunications services, electronic media, Internet of Things (IoT) devices, and operational technology.* This definition is also proposed to be updated to revise the term *software* to *computer software* to align with the previously defined term of *computer software* in 2.101.

The definition of *information system* currently appearing at 4.1901 is proposed to be moved to 2.101 with a slight revision to the statutory citation.

New definitions are proposed to be added for *IoT devices* (derived from section 2 of Pub. L. 116–207), *operational technology* (derived from NIST SP 800–160 vol. 2), *telecommunications equipment* (derived from DFARS subpart 239.74), and *telecommunications services* (derived from DFARS subpart 239.74). Additionally, these proposed definitions, except for IoT devices will be incorporated into the new clause. FAR Case 2021–019, Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems, which also implements sections of E.O. 14028, is proposing to add some of the same definitions.

FAR 7.105, Contents of written acquisition plans, is proposed to be updated to show the IPv6 coverage move to 39.106.

FAR 11.002, Policy at subparagraph (g) is proposed to be revised to point to the IPv6 coverage move.

FAR 12.202, Market research and description of agency need, is proposed to be updated to show the IPv6 coverage move.

FAR 39.001, Applicability, is proposed to be revised to explain that the exceptions and exemptions at subpart 39.2 only apply to subpart 39.2.

FAR 39.002, Definitions, is proposed to be updated to add the definition of *Supplier's declaration of conformity* as derived from NIST SP 500–281B.

FAR 39.101, Policy, is proposed to be updated to show the IPv6 coverage move.

FAR 39.106, Contract clause, is proposed to be replaced with a new section, internet Protocol version 6 (IPv6). Sections are added at 39.106–1, Policy and 39.106–2, Waiver of IPv6 requirements. This is a revision of coverage moved from FAR 11.002(g). (IPv6 is also covered in the new clause.)

A new section is proposed to be added at 39.107, Response to incident reports and requests for information or access.

The prescription for the contract clause at 52.239–1, Privacy or Security Safeguards, is proposed to be moved from 39.106 to 39.108 and designated paragraph (a). The prescription for the new contract clause at 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology, is proposed to be added at paragraph (b), and the prescription for the new solicitation provision at 52.239–AA, Security Incident Reporting Representation, is proposed to be added at paragraph (c).

The provision at 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services, is proposed to be revised to add definitions for information and communications technology, security incident and security incident reports. This provision is also proposed to be updated to require offerors to represent that they have submitted all security incident reports in a current, accurate and complete manner; and represent that they have required each lower-tier subcontractor under certain contracts to include the requirements of paragraph (f) of FAR clause 52.239–ZZ in their subcontract.

The clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Products and Commercial Services, is proposed to be revised to add the commercial product and service usage of the new clause 52.239–ZZ, including flow down to subcontracts.

The clause at 52.213–4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services), is proposed to be revised to add the commercial product and service usage of the new clause 52.239–ZZ, including flow down to subcontracts.

The prescription reference for the clause 52.239–1, Privacy or Security Safeguards, is proposed to be updated.

A new provision at FAR 52.239–AA, Security Incident Reporting Representation, is proposed to be added to require offerors to represent that they have submitted all security incident reports in a current, accurate and complete manner; and represent whether they have required each lower-tier subcontractor to include the requirements of paragraph (f) of FAR clause 52.239–ZZ in their subcontract.

A new clause at FAR 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology, is proposed to be added as required by section 2(a) of E.O. 14028. It establishes new definitions and coverage for: requests for security incident reporting; supporting incident response; cyber threat indicators and defensive measures reporting; and IPv6.

The clause at 52.244–6, Subcontracts for Commercial Products and Commercial Services, is proposed to be revised to add the subcontract flowdown prescription for commercial product and service usage of the new clause 52.239–ZZ.

a. Software Bills of Materials

This rule proposes a new requirement for contractors to develop and maintain a software bill of materials (SBOM) for any software used in the performance of the contract regardless of whether there is any security incident. SBOMs are described at section 10(j) of E.O. 14028. Further information is available at the website listed at paragraph (c)(3)(i) of 52.239–ZZ. These SBOMs can be critical in incident response, as they allow for prompt identification of any sources of a known vulnerability. Recognizing the potential impact of this requirement, DoD, GSA, and NASA welcome input on the following questions regarding anticipated impact of including a requirement to develop SBOMs:

- How should SBOMs be collected from contractors? What specific protections are necessary for the information contained within an SBOM?
- How should the Government think about the appropriate scope of the requirement on contractors to provide SBOMs to ensure appropriate security?
- What challenges will contractors face in the development of SBOMs? What challenges are unique to software resellers? What challenges exist regarding legacy software?
- What are the appropriate means of evaluating when an SBOM must be updated based on changes in a new build or major release?
- What is the appropriate balance between the Government and the contractor, when monitoring SBOMs for embedded software vulnerabilities as they are discovered?

b. CISA Engagement Services

The rule proposes requirements that will include access by and cooperation with CISA engagement services related to threat hunting and incident response. The requirements in this proposed rule provide mechanisms whereby such access and cooperation can be initiated by CISA. The primary purpose of this

interaction is providing visibility into systems to observe adversary activity, which helps CISA drive risk reduction. CISA engagement reports may contain recommendations regarding compromised systems.

It is expected that any action taken in response to such recommendations would only be taken after consultation between the contractor and the contracting agency, including both the requiring activity and the contracting officer.

c. Access to Contractor Information and Information Systems

Through operation of paragraph (c)(6) of the clause at FAR 52.239–ZZ, this proposed rule provides CISA, the Federal Bureau of Investigation (FBI) in the Department of Justice, and the contracting agency full access to applicable contractor information and information systems, and to contractor personnel, in response to a security incident reported by the contractor or a security incident identified by the Government, as required by the E.O.

DoD, GSA, and NASA welcome input on the following questions:

- Do you have any specific concerns with providing CISA, the FBI, or the contacting agency full access (see definition at 52.239–ZZ(a)) information, equipment, and to contractor personnel? Please provide specific details regarding any concerns associated with providing such access.
- For any specific concerns identified, are there any specific safeguards, including safeguards that would address the scope of full access or how full access would be provided, that would address your concerns while still providing the Government with appropriate access to conduct necessary forensic analysis regarding security incidents?
- Subparagraph (g)(i)(C) of section 2 of E.O. 14028 recognizes the need to identify appropriate and effective protections for privacy and civil liberties. Are there any specific safeguards that should be considered to ensure that these protections are effectively accomplished?

d. Compliance When Operating in a Foreign Country

The proposed rule requires contractors and subcontractors to report security incidents and take additional actions to support incident response. DoD, GSA, and NASA recognize that contractors operating in certain foreign countries may be subject to laws and regulations from those countries regarding what information and access can be provided to the U.S. Government.

For example, a vendor based in a foreign country may be part of the defense industrial base for that foreign country while also doing work for the U.S. Government as a subcontractor. Another example could be where a subcontractor produces an ICT product in a foreign country that prevents the supplier from sending information or data located in that foreign country to the U.S. Government.

DoD, GSA, and NASA are considering, for purposes of the final rule, options to address this issue.

DoD, GSA, and NASA welcome input on the following questions:

- Are there any specific situations you anticipate where your organization would be prevented from complying with the incident reporting or incident response requirements of FAR 52.239–ZZ due to country laws and regulations imposed by a foreign government? If so, provide specific examples that identify which requirements would be impacted and the reason that compliance would be prevented by the laws of a foreign government or operating environment within a foreign country.
- Do you anticipate situations where compliance with requirements in FAR 52.239–ZZ or alternative compliance methods (if added) would be prevented due to country laws and regulations imposed by a foreign government. If so, provide specific examples of when you expect such situations to occur, citing the authoritative source from the foreign government.

e. Security Incident Reporting Harmonization

The Government needs to be aware of compromises of its data and the systems operated on behalf of the Government as soon as possible. Because compromises of the ICT described in this proposed rule can sometimes undermine Government network resilience and agency missions, the proposed rule requires contractors to ''immediately and thoroughly investigate all indicators that a security incident may have occurred and submit information using the CISA incident reporting portal . . . within eight hours of discovery . . . [and to] update the submission every 72 hours thereafter until the Contractor, the agency, and/or any investigating agencies have completed all eradication or remediation activities.''

Timely incident reporting promotes the security and resilience of Government networks by facilitating rapid data analysis to promptly identify activity and actions of malicious actors, threats, and indicators of compromise. Recognizing that initial reports may not contain complete information, even incomplete early reports provide the Government an important opportunity to limit the extent of damage to its systems and data. Subsequent reporting throughout the lifecycle of the incident ensures the Government is able to take the full measure of appropriate actions.

Given the ubiquity of ICT in products and services, contractors may offer products and services to the Government that are subject to additional incident reporting requirements imposed by other contracts or regulatory regimes. When the same underlying systems are subject to inconsistent or contradictory incident reporting requirements—or where such requirements are duplicative but enforced differently by different counterparties or regulators—companies may focus more on compliance than on security, which can result in passing higher costs on to customers, including the Government.

DoD, GSA, and NASA recognize there are various reporting timeframes for cyber incidents across the Government and industry, including the Defense Federal Acquisition Regulation Supplement (DFARS) 252.204–7012, which requires reporting of the compromise of DoD controlled unclassified information (CUI) (only cyber incidents) within 72 hours of discovery; the Homeland Security Acquisition Regulation (HSAR), which requires contractors to report any cybersecurity incident that could affect CUI within eight hours (or one hour if it involves personally identifiable information); the Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA), currently the subject of a separate rulemaking process (see 6 U.S.C. 681b(b)), which states that a ''covered entity that experiences a covered cyber incident shall report the covered cyber incident to the Agency not later than 72 hours after the covered entity reasonably believes that the covered cyber incident has occurred''; and the National Industrial Security Program Operating Manual (NISPOM), which requires ''promptly'' reporting cyber incidents involving classified information (no specified time). The products and systems that contractors offer to the Federal Government may be subject to these and other incident reporting requirements.

DOD, GSA, and NASA welcome public comment on incident reporting harmonization, including answers to the following questions:

- *Timeline for reporting:* Are there specific situations you anticipate where your organization will be required to

report on different timelines in order to comply with the incident reporting requirements outlined in 52.239–ZZ, other Federal contract requirements, or other regulations promulgated under Federal law? How would your organization handle disparate cyber incident reporting timelines in other Federal Government contracting requirements or from other regulatory agencies?

- *Potential effect on incident response:* Incident response and associated reporting are often iterative processes, with system owners updating reports as a situation evolves and more data becomes available. What implications are there for your organization, including with respect to incident response, to meet disparate timelines for incident reporting?
- *Cost of providing ICT products and services:* How much, if at all, would you estimate that the initial reporting requirement described in this proposed rule could increase the price of the products or services your organization provides to the Federal Government?
- *Scope of the contract clause:* The proposed rule would require the new incident reporting clause to be included in all contracts involving ICT that are subject to the FAR, including those for commercially available off-the-shelf (COTS) items. This is broader in scope than, for instance, the DFARS clause. How would differences in scope between reporting requirements affect your organization's implementation of this clause?
- *Definition of incident:* The definition of ''security incident'' in the proposed rule incorporates the substantive provisions of the definition in 44 U.S.C. 3552, which has minor differences from with the definition of ''incident'' in Section 2209 of the Homeland Security Act of 2002 (as amended) and from the modified definition of ''covered incident'' used in CIRCIA, which is currently the subject of a separate rulemaking process, see 6 U.S.C. 681b(b). What, if any, additional implementation issues would your entity face complying with different definitions of an incident? How would your entity make the distinction between ''imminent jeopardy'' and ''actual jeopardy,'' and what effect could that have on the number of reported incidents that did not end up actually affecting confidentiality, integrity, and availability of information or an information system?

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items, or for Commercial Services

This rule proposes to add a new clause at FAR 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology. The clause is prescribed at FAR 39.108(b) for use in all contracts and solicitations. Contracting officers will be required to use the clause in solicitations and contracts below the simplified acquisition threshold, and for commercial products, including COTS items, and for commercial services.

IV. Expected Impact of the Rule

The purpose of this proposed rule is to partially implement E.O. 14028, Improving the Nation's Cybersecurity. Section 1 of the E.O. states: ''The United States faces persistent and increasingly sophisticated malicious cyber campaigns that threaten the public sector, the private sector, and ultimately the American people's security and privacy. The Federal Government must improve its efforts to identify, deter, protect against, detect, and respond to these actions and actors.''

As businesses store more of their and their Federal Government customers' data online, they are becoming increasingly vulnerable to cyber thieves. Dealing with online criminals increases cybersecurity costs, which ultimately is passed down to the Federal Government in the form of higher prices. Studies have shown several ways that a company's failure to protect valuable data can harm their customers. Among these are lost revenue, increased costs, stolen intellectual property, and operational disruption.

DoD, GSA, and NASA have performed a regulatory impact analysis (RIA) on this proposed rule. The total estimated public costs associated with this proposed FAR rule in millions calculated over a ten-year period (calculated at a 3-percent and 7-percent discount rate) are as follows:

Summary	Public (million)	Government (million)	Total (million)
Present Value (3 percent)	$8,644	$225	$8,869
Annualized Costs (3 percent)	1,013	26	1,039
Present Value (7 percent)	7,194	185	7,379
Annualized Costs (7 percent)	1,024	26	1,050

The following is a summary from the RIA of the specific compliance requirements and the estimated costs of compliance. The RIA includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this regulatory action, including the specific impact and costs for small businesses. It is available at *https://www.regulations.gov* (search for ''FAR Case 2021–017'' click ''Open Docket,'' and view ''Supporting Documents'').

This proposed rule will impact all contractors awarded contracts where ICT is used or provided in the performance of the contract. The Government does not have a way to track awards that may include ICT in support of the product or service being offered to the Government, so DoD, GSA, and NASA assume that 75 percent of all entities are awarded contracts that include some ICT. Of the 75 percent of entities awarded contracts with some ICT, it is assumed that 4 percent of those entities may have a reportable cyber incident.

The portions of this proposed rule that are related to cyber incident reporting, in some cases, are estimated to apply to a smaller percentage of the 4 percent of unique entities (*i.e.,* 10 percent, 20 percent, 40 percent, or 50 percent of the 4 percent) that have awards containing some ICT, because some compliance activities are only necessary if required by the Government. For example, it is assumed that 10 percent of the 4 percent will be required to provide access for additional information for forensic analysis, 20 percent of the 4 percent will be required to provide incident damage assessment information, 40 percent of the 4 percent will be required to submit malicious code samples, and 50 percent of the 4 percent will be required to develop, store, and maintain customization files and provide to the Government. The Government does not have precise quantifiable data that will represent Government requests related to the various compliance activities, but DoD,

GSA, and NASA have included these factors as assumptions based on subject matter expert input to reflect that the requirements will be variable depending on the Government's needs.

The primary cost impact of this proposed rule is that contractors awarded contracts that include ICT will be required to conduct the activities below in accordance with FAR clause 52.239–ZZ, as required.

Security Incident Reporting

Contractors awarded contracts that include ICT and experience a reportable security incident shall support security incident reporting by:

- Providing information regarding reportable incidents to the CISA incident reporting portal at *https://www.cisa.gov/report* and to affected agencies, to include providing any updates until eradication or remediation activities are completed;
- Conducting data preservation and protection and providing that information to the Government, if requested;
- Developing, storing, and maintaining customization files, and providing to the Government, if requested;
- Providing to the Government and any 3rd party authorized assessor all incident and damage assessment information, if the Government elects to conduct an incident or damage assessment;
- Submitting malicious code samples or artifacts to CISA using the form at *https://www.malware.us-cert.gov* within 8 hours of discovery and isolation of the malicious software. Note that the response time for reporting security incidents is 8 hours; and
- Providing access to additional information or equipment necessary for forensic analysis, upon request by the Government, and time to cooperate with the Government on ensuring effective incident response, corrections, or fixes and time to confirm validity of request from CISA and/or the FBI and notifying the contracting officer.

Security Incident Preparation

In addition, regardless of whether a reportable security incident occurs, contractors for which the clause is prescribed will be required to conduct the preparation and maintenance activities described below.

Contractors awarded contracts that include ICT shall support cyber incident reporting, should an incident occur in the future, by:

- Providing and maintaining a software bill of materials (SBOM);
- Subscribing to the automated indicator sharing (AIS) capability or successor technology during the performance of the contract; and
- Sharing cyber threat indicators and recommended defensive measures in an automated fashion using AIS during the performance of the contract.

IPv6 Implementation

In addition, contractors for which the clause is prescribed will also be required to complete the following IPv6 implementation activities, as required.

The United States Government is transitioning to deliver its information services, operate its networks, and access the services of others using only IPv6 (see OMB Memorandum M–21–07, Completing the Transition to internet Protocol Version 6 (IPv6), dated November 19, 2020). Contractors awarded contracts that include ICT products and services that use internet protocols will implement IPv6 by:

- Providing IPv6 capabilities required (see USGv6 Profile NIST SP 500–267B) support the Government's transition to IPv6 (OMB Memorandum M–21–07);
- Documenting the IPv6 capabilities provided by submitting a corresponding supplier's declaration of conformity, in accordance with the USGv6 Test Program (see NIST SP 500–281A); and
- Developing and providing an IPv6 Implementation Plan to the Government that details how the contractor plans to incorporate applicable required capabilities recommended in the current version of NIST SP 500–267B into products and services provided to the Government, for contracts for which the agency CIO has approved a waiver of the IPv6 requirements above.

Benefits of This Proposed Rule

The theft of intellectual property and sensitive information from all U.S. industrial sectors due to malicious cyber activity threatens economic security and national security. The Council of Economic Advisors estimates that malicious cyber activity costs the U.S. economy between $57 billion and $109 billion in 2016. Over a ten-year period, that burden would equate to an estimated $570 billion to $1.09 trillion dollars in costs. The purpose of this proposed rule is to protect the nation's economic and national security which can result in long-term economic and national security impacts.

Furthermore, the purpose of this proposed rule is to partially implement Executive Order (E.O. 14028, Improving the Nation's Cybersecurity. E.O. 14028 states:

''The United States faces persistent and increasingly sophisticated malicious cyber campaigns that threaten the public sector, the private sector, and ultimately the American people's security and privacy. The Federal Government must improve its efforts to identify, deter, protect against, detect, and respond to these actions and actors. The Federal Government must also carefully examine what occurred during any major cyber incident and apply lessons learned. But cybersecurity requires more than government action. Protecting our Nation from malicious cyber actors requires the Federal Government to partner with the private sector. The private sector must adapt to the continuously changing threat environment, ensure its products are built and operate securely, and partner with the Federal Government to foster a more secure cyberspace. In the end, the trust we place in our digital infrastructure should be proportional to how trustworthy and transparent that infrastructure is, and to the consequences we will incur if that trust is misplaced.

Incremental improvements will not give us the security we need; instead, the Federal Government needs to make bold changes and significant investments in order to defend the vital institutions that underpin the American way of life. The Federal Government must bring to bear the full scope of its authorities and resources to protect and secure its computer systems, whether they are cloud-based, on-premises, or hybrid. The scope of protection and security must include systems that process data (information technology (IT)) and those that run the vital machinery that ensures our safety (operational technology (OT)).

It is the policy of my Administration that the prevention, detection, assessment, and remediation of cyber incidents is a top priority and essential to national and economic security. The Federal Government must lead by example. All Federal Information Systems should meet or exceed the standards and requirements for cybersecurity set forth in and issued pursuant to this order.''

IPv6 is the next-generation internet protocol, designed to replace version 4 (IPv4) that has been in use since 1983. The global demand for IP addresses has grown exponentially with the ever-increasing number of users, devices, and virtual entities connecting to the internet, resulting in the exhaustion of readily available IPv4 addresses. A full transition to IPv6 is the only viable option to ensure future growth and innovation in internet technology and services.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action under section 3(f)(1) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, as amended by E.O. 14094, Modernizing Regulatory Review, and, therefore, was subject to review under Section 6(b) of E.O. 12866.

VI. Regulatory Flexibility Act

This proposed rule, when finalized, may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. An Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to revise the FAR to increase the sharing of information about cyber threats and incident information between the Government and information technology and operational technology service providers, pursuant to Executive Order 14028, Improving the Nation's Cybersecurity (the E.O.). The E.O. was signed by the President on May 12, 2021, and published in the **Federal Register** at 86 FR 26633 on May 17, 2021.

The E.O. is focused on improving the nation's cybersecurity, in part through increased protection of Federal Government networks. This proposed rule would implement sections 2(d) (implementing OMB recommendations from section 2(b)) and 2(g)(ii) (implementing CISA recommendations from section 2(g)(i)) of the E.O., including consideration of the recommendations issued by the DHS pursuant to section 8(b). Additionally, this proposed rule would implement related cybersecurity policy in OMB Memorandum M–21–07, Completing the Transition to internet Protocol Version 6 (IPv6), dated November 19, 2020.

Recent cybersecurity incidents such as those involving SolarWinds, Microsoft Exchange, and the Colonial Pipeline incident are a sobering reminder that U.S. public and private sector entities increasingly face sophisticated malicious cyber activity from both nation-state actors and cyber criminals. These incidents share commonalities, including insufficient cybersecurity defenses that leave public and private sector entities more vulnerable to incidents. The E.O. makes a significant contribution toward modernizing cybersecurity defenses by protecting Federal networks, improving information-sharing between the U.S. Government and the private sector on cyber issues, and strengthening the United States' ability to respond to incidents when they occur.

The objective is to implement sections 2(d) and 2(g)(ii), of Executive Order 14028. Promulgation of the FAR authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

The proposed rule may affect a portion of entities that contract with the Federal Government. Based on data obtained from the Federal Procurement Data System for fiscal years 2019 through 2021, an average of 94,035 entities, of which 61,797 are small entities, were awarded Federal contracts. It is assumed that 75 percent of the 94,035 entities awarded contracts are awarded contracts with some ICT, or 70,526 entities, of which 46,348 are small business entities. Portions of this proposed rule would apply to the 70,526 entities, including the 46,348 small business entities.

In addition, DoD, GSA, and NASA estimate that portions of the proposed rule will apply to different percentages of the 70,526 entities depending on how often the Government requests the data and information associated with each requirement.

The proposed rule would institute compliance requirements for contractors to implement requirements to support incident response and to submit information on all reportable incidents involving a product or service provided to the Government that includes ICT, or the information system used in developing or providing the product or service.

The Government has no way to know how often a particular requirement will impact the public, except for estimates of 4 percent for cyber incident reporting and 40 percent for malware submission based on historical data, but the Government otherwise assumes the impact for other activities will occur for 10 percent, 20 percent, or 50 percent of the entities that have contract awards containing ICT for which there is a reportable cyber incident. The portions of this proposed rule that are related to cyber incident reporting, in some cases, are estimated will apply to a smaller percentage of the 4 percent of unique entities (*i.e.,* 10 percent, 20 percent, 40 percent, or 50 percent of the 4 percent) that have awards containing some ICT, because some compliance activities are only necessary if required by the Government. For example, it is assumed that 10 percent of the 4percent will be required to provide access for additional information for forensic analysis, 20 percent of the 4 percent will be required to provide incident damage assessment information, 40 percent of the 4 percent will be required to submit malicious code samples, and 50 percent of the 4 percent will be required to develop, store, and maintain customization files, and provide to the Government. The Government does not have precise quantifiable data that will represent Government requests related to the various compliance activities but DoD, GSA, and NASA have included these factors as assumptions to reflect that the requirements will be variable depending on the Government's needs.

This proposed rule will establish safeguards that will increase the sharing of information about cyber threats and incident information between the Government and information technology and operational technology service providers.

The proposed rule includes reporting or recordkeeping requirements. The following are compliance requirements of the proposed rule:

(a) Regulatory familiarization.

(b) 52.239–ZZ, paragraph (b), for contractors to support security incident reporting including: providing information regarding reportable incidents to CISA at *https://www.cisa.gov/report,* and to affected agencies, and any updates until eradication or remediation activities are completed.

(c) 52.239–ZZ, paragraph (c)(1), for contractors to support incident response by conducting data preservation and protection and providing to the Government, if requested.

(d) 52.239–ZZ, paragraph (c)(2), for contractors to support incident response by developing, storing, and maintaining customization files, and providing to the Government, if requested.

(e) 52.239–ZZ, paragraph (c)(3), for contractors to support incident response by developing and maintaining a software bill of materials (SBOM) and providing or providing access to the SBOM (and its updates) to the Government.

(f) 52.239–ZZ, paragraph (c)(4), for contractors to support incident response by providing to the Government and any 3rd party authorized assessor all incident and damage assessment information identified in clause paragraphs (c)(1)–(3), if the Government elects to conduct an incident or damage assessment.

(g) 52.239–ZZ, paragraph (c)(5), for contractors to support incident response by, if applicable, submitting malicious code samples or artifacts to CISA using the form at *https://www.malware.us-cert.gov* within 8 hours of discovery and isolation of the malicious software.

(h) 52.239–ZZ, paragraph (c)(6), for contractors to support incident response by providing access (see (c)(6)(i)) to additional information or equipment necessary for forensic analysis, upon request by the Government, and time to cooperate with the Government on ensuring effective incident response, corrections, or fixes, and time (see (c)(6)(ii)) to confirm validity of request from CISA by contacting the CISA Hotline and notifying the contracting officer.

(i) 52.239–ZZ, paragraph (d)(1), for contractors to support incident response by subscribing to the Automated Indicator Sharing (AIS) capability or successor technology during the performance of the contract.

(j) 52.239–ZZ, paragraph (d)(2), for contractors to support incident response by sharing cyber threat indicators and recommended defensive measures in an automated fashion using AIS during the performance of the contract.

(k) 52.239–ZZ, paragraph (e) for contractors to support incident response by implementing delta capabilities required for moving to IPv6 for ICT products and services using internet protocol (capabilities in NIST SP 500–267B).

(l) 52.239–ZZ, paragraph (e) for contractors to provide a corresponding supplier's declaration of conformity in accordance with the USGv6 Test Program (see NIST SP 500–281A).

(m) 52.239–ZZ, paragraph (e) for contractors, for which the agency CIO has approved a waiver of IPv6 requirements, to

develop and provide an IPv6 Implementation Plan to the Government that details how the contractor plans to incorporate applicable mandatory capabilities recommended in the current version of NIST SP 500–267B into products and services provided to the Government.

(n) 52.239–AA, paragraph (b) for offerors to represent that they have submitted all security incident reports in a current, accurate and complete manner; and represent that they have required each lower-tier subcontractor to include the requirements of paragraph (f) of FAR clause 52.239–ZZ in their subcontract.

The proposed rule would not duplicate, overlap, or conflict with any other Federal rules.

There are no available alternatives to the proposed rule identified to accomplish the desired objective of the E.O. 14028.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2021–017), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501–3521) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat Division has submitted a request for approval of a new information collection requirement concerning incident and threat reporting and incident response requirements to the Office of Management and Budget.

The annual reporting burden is estimated as follows:

A. Public Burden for This Collection of Information

(1) Submitting information regarding reportable incidents to be included in the CISA incident reporting portal at *https://www.cisa.gov/report.*

DoD, GSA, and NASA estimate that providing this information will take 4 hours applied to 2,821 entities, of which 1,854 are small business entities. The number of entities are assumed based on an assumption that 75 percent of all entities awarded contracts (94,035) are awarded contracts with some ICT, and of that 75 percent, it is assumed that 4 percent of the entities will have a reportable cyber incident for which this information collection activity applies.

Number of respondents: 2,821.
Responses per respondent: 4.
Total annual responses: 11,284.
Hours per response: 4.
Total burden hours: 45,136.

(2) Preserving data resulting from data preservation activities and conducting data preservation activities.

It is estimated that this activity will take 7.5 hours to preserve data and conduct data preservation activities applied to 2,821 entities, of which 1,854 are small business entities, or 4 percent of the 75 percent of entities impacted by this portion of the proposed rule.

Number of respondents: 2,821.
Responses per respondent: 1.
Total annual responses: 2,821.
Hours per response: 7.5.
Total burden hours: 21,158.

(3) Developing and maintaining customization files.

It is estimated that this activity will take 5 hours to develop and maintain customization files applied to 35,263 entities, of which 23,174, are small business entities, or 50 percent of the 75 percent of entities impacted by this portion of the proposed rule.

Number of respondents: 35,263.
Responses per respondent: 1.
Total annual responses: 35,263.
Hours per response: 5.
Total burden hours: 176,315.

(4) Developing and providing a software bill of materials (SBOM), if required.

It is estimated that this activity will take 80 hours to develop and maintain an SBOM applied to 70,526 entities, of which 46,348 are small business entities, or the 75 percent of entities impacted by this portion of the proposed rule.

Number of respondents: 70,526.
Responses per respondent: 1.
Total annual responses: 70,526.
Hours per response: 80.
Total burden hours: 5,642,080.

(5) Providing incident and damage assessment information, if requested.

It is estimated that this activity will take 2 hours to submit the preserved data and images, the SBOM, if requested, and the customization files applied to 564 entities, of which 371 are small business entities, or 20 percent of 4 percent of the 75 percent of entities impacted by this portion of the proposed rule.

Number of respondents: 564.
Responses per respondent: 1.
Total annual responses: 564.
Hours per response: 2.
Total burden hours: 1,128.

(6) Providing malicious code samples or artifacts, if available.

It is estimated that this activity will take 0.5 hours to share the malicious code samples or artifacts, applied to 1,128 entities, of which 742 are small business entities, or 40 percent of 4 percent of the 75 percent of entities impacted by this portion of the proposed rule.

Number of respondents: 1,128.
Responses per respondent: 1.
Total annual responses: 1,128.
Hours per response: 0.5.
Total burden hours: 564.

(7) Sharing threat indicator information.

It is estimated that this activity will take 1 hour per week to share the threat indicator information, or 52 hours per year, applied to 70,526 entities, of which 46,348 are small business entities to be shared via the Automated Indicator Sharing (AIS), of 75 percent of entities, which are impacted by this portion of the proposed rule.

Number of respondents: 70,526.
Responses per respondent: 1.
Total annual responses: 70,526.
Hours per response: 52.
Total burden hours: 3,667,352.

(8) Developing a supplier's declaration of conformity (regarding IPv6) and providing, if required.

It is estimated that this activity will take 8 hours applied to 70,526 entities, of which 46,348 are small business entities, or 75 percent of entities impacted by this portion of the proposed rule.

Number of respondents: 70,526.
Responses per respondent: 1.
Total annual responses: 70,526.
Hours per response: 8.
Total burden hours: 564,208.

(9) Developing and providing an IPv6 Implementation Plan, if required.

It is estimated that to develop and provide an IPv6 Implementation Plan, if required, will take 20 hours applied to 705 entities, of which 463 are small business entities, or 1 percent of 75 percent of entities impacted by this portion of the proposed rule.

Number of respondents: 705.
Responses per respondent: 1.
Total annual responses: 705.
Hours per response: 20.
Total burden hours: 14,100.

The total public burden is below:
Number of respondents: 254,880.
Responses per respondent: 1.0332.
Total annual responses: 263,343.
Hours per response: 38.47.
Total hours: 10,132,040.

B. Request for Comments Regarding Paperwork Burden

Submit comments on this collection of information no later than December 4, 2023 through *https://www/*

regulations.gov and follow the instructions on the site. All items submitted must cite OMB Control No. 9000–XXXX, Incident and Threat Reporting and Incident Response Requirements. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.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.*

Public comments are particularly invited on:

- The necessity of this collection of information for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility;
- The accuracy of the estimate of the burden of this collection of information;
- 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 respondents, including the use of automated collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control Number 9000–XXXX, Incident and Threat Reporting and Incident Response Requirements, in all correspondence.

List of Subjects in 48 CFR Parts 1, 2, 4, 7, 10, 11, 12, 39, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1, 2, 4, 7, 10, 11, 12, 39, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 4, 7, 10, 11, 12, 39, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106 amend in the table following the introductory text, by adding in numerical order, entry for ''52.239–ZZ'' and its corresponding OMB Control Number ''9000–XXXX'' to read as follows.

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment	OMB control No.
* * * * *	
52.239–ZZ	9000–XXXX
* * * * *	

* * * * *

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 3. Amend section 2.101 in paragraph (b)(2) by—

■ a. Removing the definition ''Information and communication technology (ICT)''; and adding the definition ''Information and communications technology (ICT)'' in its place; and

■ b. Adding in alphabetical order the definitions ''Information system'', ''Internet of Things (IoT) devices'', ''Operational technology'', ''Telecommunications equipment'', and ''Telecommunications services''.

The revision and additions read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Information and communications technology (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; telecommunications services; customer premises equipment; multifunction office machines; computer software; applications; websites; electronic media; electronic documents; Internet of Things (IoT) devices; and operational technology.

* * * * *

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502(8)). Information resources, as used in this definition, includes any ICT.

* * * * *

Internet of Things (IoT) *devices* means, consistent with section 2 paragraph 4 of Public Law 116–207, devices that—

(1) Have at least one transducer (sensor or actuator) for interacting directly with the physical world, have at least one network interface, and are not conventional information technology devices, such as smartphones and laptops, for which the identification and implementation of cybersecurity features is already well understood; and

(2) Can function on their own and are not only able to function when acting as a component of another device, such as a processor.

* * * * *

Operational technology means programmable systems or devices that interact with the physical environment (or manage devices that interact with the physical environment). These systems or devices detect or cause a direct change through the monitoring and/or control of devices, processes, and events. Examples of operational technology include industrial control systems, building management systems, fire control systems, and physical access control mechanisms (NIST SP 800–160 vol 2).

* * * * *

Telecommunications equipment means equipment used to transmit, emit, or receive signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

Telecommunications services means services used to transmit, emit, or receive signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

* * * * *

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

■ 4. Amend section 4.1202 by adding paragraph (a)(35) to read as follows:

4.1202 Solicitation provision and contract clause.

(a) * * *

(35) 52.239–AA, Security Incident Reporting Representation.

* * * * *

4.1901 [Amended]

■ 5. Amend section 4.1901 by removing the definition ''Information system''.

PART 7—ACQUISITION PLANNING

7.103 [Amended]

■ 6. Amend section 7.103 by removing from paragraph (q) ''information and communication technology'' and adding ''information and communications technology'' in its place.

■ 7. Amend section 7.105 by revising paragraph (b)(5)(iii) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(5) * * *

(iii) For ICT acquisitions using internet Protocol, discuss whether the requirements documents include the internet Protocol Version 6 (IPv6) requirements specified in 39.106–1 or a waiver of these requirements has been granted by the agency's Chief Information Officer in accordance with 39.106–2.

* * * * *

PART 10—MARKET RESEARCH

10.001 [Amended]

■ 8. Amend section 10.001 by removing from paragraph (a)(3)(ix) ''information and communication technology'' and adding ''information and communications technology'' in its place.

PART 11—DESCRIBING AGENCY NEEDS

■ 9. Amend section 11.002 by—

■ a. Removing from paragraph (f)(1)(i) ''information and communication technology'' and adding ''information and communications technology'' in its place; and

■ b. Revising paragraph (g).

The revision reads as follows:

11.002 Policy.

* * * * *

(g) For information on internet Protocol Version 6 (IPv6) see 39.106.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 10. Amend section 12.202 by—

■ a. Removing from paragraph (d) ''information and communication technology'' and adding ''information and communications technology'' in its place; and

■ b. revising paragraph (e).

The revision reads as follows:

12.202 Market research and description of agency need.

* * * * *

(e) When acquiring information technology using internet Protocol, agencies must include the appropriate internet Protocol version 6 (IPv6) compliance requirements in accordance with 39.106 and 39.108.

PART 39—ACQUISITION OF INFORMATION AND COMMUNICATIONS TECHNOLOGY

■ 11. The heading for part 39 is revised to read as set forth above.

■ 12. Amend section 39.000 by revising paragraph (b) to read as follows:

39.000 Scope of part.

* * * * *

(b) Information and communications technology (ICT), as well as supplies and services that use ICT (see 2.101(b)).

■ 13. Amend section 39.001 by revising the first sentence in paragraph (a), and paragraph (b) to read as follows:

39.001 Applicability.

* * * * *

(a) ICT, as well as supplies and services that use ICT, which includes information technology, Internet of Things (IoT) devices (*e.g.,* connected appliances, wearables), and operational technology, by or for the use of agencies except for acquisitions of information technology for national security systems. * * *

(b) ICT by or for the use of agencies or for the use of the public. When applying the policy in subpart 39.2, see the exceptions at 39.204 and exemptions at 39.205.

■ 14. Amend section 39.002 by adding in alphabetical order the definition ''Supplier's declaration of conformity'' to read as follows:

39.002 Definitions.

* * * * *

Supplier's declaration of conformity means a standardized format to document the USGv6 capabilities supported by a specific product or set of products and provides traceability back to the accredited laboratory that conducted the tests (see NIST SP 500–281B).

■ 15. Amend section 39.101 by revising paragraph (d) to read as follows:

39.101 Policy.

* * * * *

(d) When acquiring information and communications technology (ICT) using internet Protocol, agencies must include the appropriate internet Protocol version 6 (IPv6) compliance requirements in accordance with 39.106.

* * * * *

■ 16. Revise section 39.106 and add sections 39.107 and 39.108 to read as follows:

39.106 internet Protocol version 6 (IPv6).

39.106–1 Policy.

ICT products and services must conform, at a minimum, to the IPv6 mandatory capabilities in the current version of the USGv6 Profile (National Institute of Standards and Technology (NIST) SP 500–267B) or, if the agency Chief Information Officer (CIO) grants a waiver, provide for a product/service-specific IPv6 implementation plan (see 39.106–2(c)). See Office of Management and Budget (OMB) Memorandum M–21–07, Completing the Transition to internet Protocol Version 6 (IPv6), dated November 19, 2020.

39.106–2 Waiver of IPv6 requirements.

(a) The agency's CIO may grant a waiver for any of the IPv6 mandatory capabilities specified in 39.106–1.

(b) The contracting officer shall coordinate with the requiring activity to verify if the agency CIO has waived any IPv6 mandatory capabilities, in accordance with agency procedures.

(c) If a waiver has been granted by the agency's CIO, the contracting officer shall include that fact in the solicitation and also include a request for documentation from offerors detailing explicit plans, including timelines, to incorporate the IPv6 mandatory capabilities in NIST SP 500–267B.

39.107 Response to incident reports and requests for information or access.

(a) If the contracting officer receives a notice of a request for access to contractor information or equipment from the Cybersecurity and Infrastructure Security Agency (CISA), the Federal Bureau of Investigation (FBI), or the contractor, the contracting officer shall—

(1) Acknowledge the request, though acknowledgment is not a required condition to trigger contractor response pursuant to clause 52.239–ZZ(c)(6);

(2) Facilitate the request, including through coordination, as appropriate, with the requiring activity, senior agency official for privacy, agency chief information security officer, agency legal counsel, and any other agency officials identified in the notification requirement;

(3) Document the contract file to reflect the access request and any access granted pursuant to the request; and

(4) If notified by CISA or the FBI that retention of records pursuant to

paragraph (c)(1)(ii) of 52.239–ZZ is necessary beyond 180 days, the contracting officer shall instruct the contractor to retain such records as necessary.

(b) If the contracting officer receives a request from CISA, the agency CIO or Chief Information Security Officer, or the relevant program office for access to a software bill of materials as provided under paragraph (c)(3) of 52.239–ZZ, the contracting officer shall provide such access in a timely manner in accordance with agency procedures.

(c) If the contracting officer receives a notification that an incident report has been filed by a contractor pursuant to paragraph (b)(1) of 52.239–ZZ, the contracting officer shall—

(1) Notify the requiring activity;

(2) If the affected contract is an indefinite delivery contract, notify any contracting officers that placed orders under the contract; and

(3) Follow any additional agency procedures.

39.108 Solicitation provision and contract clauses.

(a) The contracting officer shall insert a clause substantially the same as the clause at 52.239–1, Privacy or Security Safeguards, in solicitations and contracts for information technology that require security of information technology, and/or are for the design, development, or operation of a system of records using commercial information technology services or support services.

(b) The contracting officer shall insert the clause at 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology, in all solicitations and contracts.

(c) The contracting officer shall insert the provision at 52.239–AA, Security Incident Reporting Representation, in all solicitations.

■ 17. The heading for subpart 39.2 is revised to read as follows:

Subpart 39.2—Information and Communications Technology Accessibility

39.201 [Amended]

■ 18. Amend section 39.201 by removing from paragraph (a) ''information and communication technology'' and adding ''information and communications technology'' in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 19. Amend section 52.204–8 by revising the date of the clause and adding paragraph (c)(1)(xxvi) to read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (DATE)

* * * * *

(c)(1) * * *

(xxvi) 52.239–AA, Security Incident Reporting Representation. This provision applies to all solicitations.

* * * * *

■ 20. Amend section 52.212–3 by—
■ a. Revising the date of the provision;
■ b. Removing from the introductory text ''(c) through (v)'' and adding ''(c) through (w)'' in its place;
■ c. In paragraph (a), adding in alphabetical order the definitions ''Information and communications technology'', ''Security incident'', and ''Security incident reports'';
■ d. Removing from paragraph (b)(2) ''*Offeror to identify the applicable paragraphs at (c) through (v)*'' and adding ''*Offeror to identify the applicable paragraphs at (c) through (w)*'' in its place; and
■ e. Adding paragraph (w).

The revision and additions read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Products and Commercial Services.

* * * * *

Offeror Representations and Certifications—Commercial Products and Commercial Services (DATE)

* * * * *

(a) * * *

Information and communications technology has the meaning given in paragraph (a) of FAR clause 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology.

* * * * *

Security incident has the meaning given in paragraph (a) of FAR clause 52.239–ZZ.

Security incident reports means the submission of information on security incidents as required by paragraphs (b)(1) through (b)(3) of FAR clause 52.239–ZZ.

* * * * *

(w) *Security Incident Reporting Representation.*

(1) The Offeror represents that it has submitted in a current, accurate, and complete manner, all security incident reports required by current existing contracts between the Offeror and the Government.

(2) Under current existing contracts between the Offeror and the Government where information and communications technology is used or provided in the performance of a subcontract, the Offeror represents that it has required each first tier subcontractor to:

(i) Notify the Offeror within 8 hours of discovery of a security incident, as required by paragraph (f) of FAR clause 52.239–ZZ; and

(ii) Require the next lower tier subcontractor to include the requirement to notify the prime Contractor and next higher tier subcontractor within 8 hours of discovery of a security incident, and include this reporting requirement and continued flow down requirement in any lower tier subcontracts, in this and other executive agency contracts, as required by paragraph (f) of FAR clause 52.239–ZZ.

* * * * *

■ 21. Amend section 52.212–5 by—
■ a. Revising the date of the clause;
■ b. Redesignating paragraphs (b)(63) and (64) as paragraphs (b)(64) and (65), and adding a new paragraph (b)(63);
■ c. Redesignating paragraph (e)(1)(xxiv) as paragraph (e)(1)(xxv), and adding a new paragraph (e)(1)(xxiv);
■ d. In Alternate II:
■ i. Revising the date of Alternate II; and
■ ii. Redesignating paragraph (e)(1)(ii)(W) as paragraph (e)(1)(ii)(X), and adding a new paragraph (e)(1)(ii)(W).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (DATE)

* * * * *

(b) * * *

__(63) 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology (DATE) (E.O. 14028).

* * * * *

(e)(1) * * *

(xxiv) 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology (DATE) (E.O. 14028). Flow down required in accordance with paragraph (f) of FAR clause 52.239–ZZ.

* * * * *

Alternate II (DATE) * * *

* * * * *

(e)(1) * * *

(ii) * * *

(W) 52.239–ZZ, Incident and Threat Reporting and Incident Response

Requirements for Products or Services Containing Information and Communications Technology (DATE) (E.O. 14028). Flow down required in accordance with paragraph (f) of FAR clause 52.239–ZZ.

■ 22. Amend section 52.213–4 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (a)(2)(vii) ''(SEP 2023)'' and adding ''(DATE)'' in its place; and

■ c. Redesignating paragraph (b)(1)(xxi) as paragraph (b)(1)(xxii) and adding a new paragraph (b)(1)(xxi).

The revision and addition read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (DATE)

* * * * *

(b) * * *

(1) * * *

(xxi) 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology (DATE) (E.O. 14028). (Applies to all solicitations and contracts.)

* * * * *

52.239–1 [Amended]

■ 23. Amend section 52.239–1 by removing from the introductory text ''39.106'' and adding ''39.108(a)'' in its place.

■ 24. Add sections 52.239–AA and 52.239–ZZ to read as follows:

52.239–AA Security Incident Reporting Representation.

As prescribed in 39.108(c), insert the following provision:

Security Incident Reporting Representation (DATE)

(a) *Definitions.* As used in this provision: *Information and communications technology,* and *Security incident* have the meanings given in paragraph (a) of FAR clause 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology.

Security incident reports means the submission of information on security incidents as required by paragraphs (b)(1) through (b)(3) of FAR clause 52.239–ZZ.

(b) *Representation.*

(1) The Offeror represents that it has submitted in a current, accurate, and complete manner, all security incident reports required by current existing contracts between the Offeror and the Government.

(2) Under current existing contracts containing FAR clause 52.239–ZZ between the Offeror and the Government where information and communications technology is used or provided in the performance of a subcontract, the Offeror represents that it has required each first tier subcontractor to—

(i) Notify the Offeror within 8 hours of discovery of a security incident, as required by paragraph (f) of FAR clause 52.239–ZZ; and

(ii) Require the next lower tier subcontractor to include the requirement to notify the prime Contractor and next higher tier subcontractor within 8 hours of discovery of a security incident, and include this reporting requirement and continued flow down requirement in any lower tier subcontracts, in this and other executive agency contracts, as required by paragraph (f) of FAR clause 52.239–ZZ.

(End of provision)

52.239–ZZ Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology.

As prescribed in 39.108(b), insert the following clause:

Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology (DATE)

(a) Definitions. As used in this clause—

Active storage means storing data in a manner that facilitates frequent use and ease of access.

Cold data storage means storing data in a manner that minimizes costs while still allowing some level of access and use.

Computer software

(1) Means—

(i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Cyber threat indicators, in accordance with 6 U.S.C. 1501, means information that is necessary to describe or identify—

(1) Malicious reconnaissance, including anomalous patterns of communications that appear to be transmitted for the purpose of gathering technical information related to a cybersecurity threat or security vulnerability;

(2) A method of defeating a security control or exploitation of a security vulnerability;

(3) A security vulnerability, including anomalous activity that appears to indicate the existence of a security vulnerability;

(4) A method of causing a user with legitimate access to an information system or information that is stored on, processed by, or transiting an information system to unwittingly enable the defeat of a security control or exploitation of a security vulnerability;

(5) Malicious cyber command and control;

(6) The actual or potential harm caused by an incident, including a description of the information exfiltrated as a result of a particular cybersecurity threat;

(7) Any other attribute of a cybersecurity threat, if disclosure of such attribute is not otherwise prohibited by law; or

(8) Any combination thereof.

Defensive measures means an action, device, procedure, signature, technique, or other measure applied to an information system or information that is stored on, processed by, or transiting an information system that detects, prevents, or mitigates a known or suspected cybersecurity threat or security vulnerability. The term ''defensive measures'' does not include a measure that destroys, renders unusable, provides unauthorized access to, or substantially harms an information system or information stored on, processed by, or transiting such information system not owned by the private entity operating the measure; or by another entity or Federal entity that is authorized to provide consent and has provided consent to that private entity for operation of such measure (6 U.S.C. 1501(7)).

Eradication means eliminating or resolving the mechanisms, components, and cause(s) of the incident, (such as deleting malware and disabling breached user accounts), as well as identifying all affected hosts within information systems and mitigating all exploited vulnerabilities.

Event means any observable occurrence in a system or network.

Full access means, for all contractor information systems used in performance, or which support performance, of the contract—

(1) Physical and electronic access to—

(i) Contractor networks,

(ii) Systems,

(iii) Accounts dedicated to Government systems,

(iv) Other infrastructure housed on the same computer network,

(v) Other infrastructure with a shared identity boundary or interconnection to the Government system; and

(2) Provision of all requested Government data or Government-related data, including—

(i) Images,

(ii) Log files,

(iii) Event information, and

(iv) Statements, written or audio, of contractor employees describing what they witnessed or experienced in connection with the contractor's performance of the contract.

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. Government-related data does not include—

(1) A contractor's business records (*e.g.,* financial records, legal records) that do not incorporate Government data, or

(2) Data such as operating procedures, software coding or algorithms that are not uniquely applied to the Government data.

Information and communications technology (ICT) means information

technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; telecommunications services; customer premises equipment; multifunction office machines; computer software; applications; websites; electronic media; electronic documents; Internet of Things (IoT) devices; and operational technology.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502(8)). Information resources, as used in this definition, includes any ICT.

Operational technology means programmable systems or devices that interact with the physical environment (or manage devices that interact with the physical environment). These systems or devices detect or cause a direct change through the monitoring and or control of devices, processes, and events. Examples include industrial control systems, building management systems, fire control systems, and physical access control mechanisms (NIST SP 800–160).

Security incident means actual or potential occurrence of the following—

(1) Any event or series of events, which pose(s) actual or imminent jeopardy, without lawful authority, to the integrity, confidentiality, or availability of information or an information system; or constitutes a violation or imminent threat of violation of law, security policies, security procedures, or acceptable use policies;

(2) Any malicious computer software discovered on an information system; or

(3) Transfer of classified or controlled unclassified information onto an information system not accredited (*i.e.,* authorized) for the appropriate security level.

Software bill of materials (SBOM) means a formal record containing the details and supply chain relationships of various components used in building software.

Supplier's declaration of conformity means a standardized format to document the USGv6 capabilities supported by a specific product or set of products and provides traceability back to the accredited laboratory that conducted the tests (see NIST SP 500–281B).

Telecommunications equipment means equipment used to transmit, emit, or receive signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

Telecommunications services means services used to transmit, emit, or receive signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

Telemetry means the automatic recording and transmission of data from remote or inaccessible sources to an information system in a different location for monitoring and analysis. Telemetry data may be relayed using radio, infrared ultrasonic, cellular, satellite or cable, depending on the application.

(b) *Security incident reporting.*

(1)(i) The Contractor shall submit a CISA Incident Reporting Form on all security incidents involving a product or service provided to the Government that includes information and communications technology, or the information system used in developing or providing the product or service, to the Cybersecurity and Infrastructure Security Agency (CISA) in the Department of Homeland Security using the CISA Incident Reporting System. The CISA Incident Reporting System, along with information on types of incidents, can be found here: *https://www.cisa.gov/report.*

(ii) Consistent with applicable laws, regulations, and Governmentwide policies, CISA will share the information reported with any contracting agency potentially affected by the incident or by a vulnerability revealed by the incident and other executive agencies responsible for investigating or remediating cyber incidents, such as the Federal Bureau of Investigation (FBI), and other elements of the intelligence community.

(2) The Contractor shall also notify the Contracting Officer, and the contracting officer (or ordering officer) of any agency which placed an affected order under this contract, that an incident reporting portal has been submitted to CISA.

(3) The Contractor shall immediately and thoroughly investigate all indicators that a security incident may have occurred and submit information using the CISA incident reporting portal pursuant to paragraphs (b) and (c) of this clause within 8 hours of discovery that a security incident may have occurred and shall update the submission every 72 hours thereafter until the Contractor, the agency, and/or any investigating agencies have completed all eradication or remediation activities. Security incidents involving specific types of information (*e.g.,* controlled unclassified information, classified information) may require additional reporting that is separate from the requirements of this clause.

(4) In the event the Contractor suspects a compromise of a communications or messaging platform, the Contractor should avoid use of such potentially compromised means to provide notification(s) or otherwise communicate information about a security incident and associated response activities.

(c) *Supporting incident response.*

(1) *Data preservation and protection.*

(i) The Contractor shall collect, and preserve for at least 12 months in active storage followed by 6 months in active or cold storage, available data and information relevant to security incident prevention, detection, response and investigation within information systems used in developing or providing ICT products or services to the Government. This data includes, but is not limited to, network traffic data, full network flow, full packet capture, perimeter defense logs (firewall, intrusion detection systems, intrusion prevention systems), telemetry, and system logs including, but not limited to, system event logs, authentication logs, and audit logs. Upon request by the Contracting Officer, the Contractor shall promptly provide this data and information to the Government.

(ii) When the Contractor has discovered that a security incident may have occurred on an affected information system, the Contractor shall immediately preserve and protect images of all known affected information systems and all available monitoring/packet capture data. Following submission of a security incident report pursuant to paragraph (b) of this clause, or receipt of a request for access pursuant to paragraph (c)(6) of this clause, such images and data shall be retained for the longer of—

(A) 180 days from the submission of the report or receipt of the request;

(B) Any longer period required under paragraph (c)(1)(i) of this clause; or

(C) If instructed to retain such images and data beyond 180 days by the Contracting Officer, until the Contractor is notified by the Contracting Officer that retention is no longer required.

(2) *Customization files.* The Contractor shall develop, store, and maintain throughout the life of the contract and for at least 1 year thereafter an up-to-date collection of customizations that differ from manufacturer defaults on devices, computer software, applications, and services, which includes but is not limited to configuration files, logic files and settings on web and cloud applications for all information systems used in developing or providing an ICT product or service to the Government. Upon request by the Contracting Officer, or consistent with paragraph (c)(6) of this clause, the Contractor shall provide the cognizant program office/requiring activity, CISA and/or the FBI, with a copy of the current and historical customization files, and notice to the Contracting Officer that such information has been shared and with whom it has been shared.

(3) *Software bill of materials (SBOM).*

(i) The Contractor shall maintain, and upon the initial use of such software in the performance of this contract, provide or provide access to the Contracting Officer a current SBOM for each piece of computer software used in performance of the contract. Each SBOM shall be produced in a machine-readable, industry-standard format and shall comply with all of the minimum elements identified in Section IV of The Minimum Elements for a Software Bill of Materials (the current version at the time of solicitation) published by the Department of Commerce at *https://www.ntia.doc.gov/report/2021/minimum-elements-software-bill-materials-sbom,* except for frequency which is addressed in paragraph (c)(3)(ii) of this clause. These minimum elements establish the baseline technology and practices for the provisioning of a SBOM that enable computer software transparency, capturing both the technology and functional operation.

(ii) If a piece of computer software used in the performance of the contract is updated

with a new build or major release, the contractor must update the computer SBOM in paragraph (c)(3)(i) of this clause to reflect the new version of the computer software and provide (or provide access to) the updated SBOM to the Contracting Officer. This includes computer software builds to integrate an updated component or dependency.

(iii) If an SBOM has been provided to the contracting officer at the basic contract level, the SBOM does not need to be provided to the contracting officer for each order.

(4) *Incident and damage assessment activities.* If the Government elects to conduct an incident or damage assessment regarding a security incident, the Contractor shall promptly provide to the Government, and any independent third party specifically authorized by the Government, all information identified in paragraphs (c)(1), (c)(2), and (c)(3) of this clause.

(5) *Malicious computer software.* If the Contractor discovers and isolates malicious computer software in connection with a security incident, the Contractor shall submit malicious code samples or artifacts to CISA using the appropriate form at *https://www.malware.us-cert.gov* within 8 hours of discovery and isolation of the malicious computer software in addition to required incident reporting pursuant to paragraph (b) of this clause.

(6) *Access, including access to additional information or equipment necessary for forensic analysis.*

(i) Upon request by the Contracting Officer, CISA or the FBI, in response to a security incident reported in accordance with paragraph (b)(1) of this clause, or in response to a CISA or FBI access request based on an identified security incident, the Contractor shall first validate any CISA or FBI access request according to the procedures in (c)(6)(ii) of this clause, and then respond to any requests for access from the contracting agency, CISA, and the FBI within 96 hours with available information identified in paragraphs (c)(1), (c)(2), and (c)(3) of this clause, as well as access to additional information or equipment that is necessary to conduct a forensic analysis.

(A) Consistent with applicable laws, regulations, and Governmentwide policies that limit or prohibit access to data, this includes full access and cooperation for all activities determined by the contracting agency, CISA, and the FBI to:

(*1*) Ensure an effective incident response, investigation of potential incidents, and threat hunting activity, including supporting cloud and virtual infrastructure; and

(*2*) Coordinate with CISA, the FBI, and the contracting agency to develop and implement corrections, fixes or other mitigations for discovered vulnerabilities and exploits.

(B) This also includes timely access to Contractor personnel involved in the performance of the contract.

(ii) Prior to responding to a request from CISA or the FBI for information or access under this clause, the Contractor shall:

(A)(*1*) For requests from CISA, confirm the validity of the request by contacting CISA Central at *report@cisa.gov* or (888) 282–0870,

(*2*) For requests from the FBI, confirm the validity of the request by contacting the FBI field office identified by the requestor using contact information from *https://www.fbi.gov/contact-us/field-offices;* and

(B) Immediately notify the Contracting Officer and any other agency official designated in the contract in writing of receipt of the request. Provision of information and access to CISA and the FBI under this clause shall not be delayed by submission of this notification or awaiting acknowledgement of its receipt.

(d) *Cyber threat indicators and defensive measures reporting.* The Contractor shall either—

(1) Subscribe to the Automated Indicator Sharing (AIS) (*https://www.cisa.gov/ais*) capability or successor technology during the performance of the contract. The Contractor shall share cyber threat indicators and recommended defensive measures, to include associated tactics, techniques, and procedures, if available, when such indicators or measures are observed on information and communications technology used in performance of the contract or provided to the Government, in an automated fashion using this medium during the performance of the contract. Contractors submitting cyber threat indicators and defensive measures through AIS will receive applicable legal protections (see 6 U.S.C. 1505) in accordance with the Cybersecurity Information Sharing Act of 2015, Procedures and Guidance; or

(2) During the performance of the contract, participate in an information sharing and analysis organization or information sharing and analysis center with the capability to share indicators with AIS or successor technology and that further shares cyber threat indicators and recommended defensive measures submitted to it with AIS, during the performance of the contract. The Contractor shall share cyber threat indicators and recommended defensive measures, when such indicators or measures are observed on information and communications technology used during performance of the contract or provided to the Government, with the ISAO or ISAC during the performance of the contract, in addition to required incident reporting pursuant to paragraph (b) of this clause. Contractors submitting cyber threat indicators and defensive measures through an ISAO or ISAC will receive applicable legal protections in accordance with the Cybersecurity Information Sharing Act of 2015 Procedures and Guidance.

(e) *Internet Protocol version 6 (IPv6).*

(1) This paragraph (e) applies to—

(i) Any ICT using internet protocol provided to the Government, and

(ii) Any interfaces exposed to the Government from a Contractor information system using internet protocol.

(2) The Contractor shall comply with all applicable mandatory capabilities specified in the current version of the USGv6 Profile (NIST Special Publication 500–267B) (see Office of Management and Budget (OMB) Memorandum M–21–07, Completing the Transition to Internet Protocol Version 6 (IPv6) dated November 19, 2020) and provide to the Contracting Officer a copy of or access to the corresponding supplier's declaration of conformity in accordance with the USGv6 Test Program (see NIST SP 500–281A).

(3) The agency may have granted a waiver to this paragraph (e). If so, elsewhere in this contract the waiver will be identified along with any conditions (see FAR 39.106–2).

(f) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts where ICT is used or provided in the performance of the subcontract, including subcontracts for the acquisition of commercial products or services. All references to the Contractor are applicable to all subcontractors. The Contractor shall require subcontractors to notify the prime Contractor and next higher tier subcontractor within 8 hours of discovery of a security incident.

(End of clause)

■ 25. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Redesignating paragraph (c)(1)(xxi) as paragraph (c)(1)(xxii) and adding a new paragraph (c)(1)(xxi).

The revision and addition read as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (DATE)

* * * * *

(c)(1) * * *

(xxi) 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology (Date) (E.O. 14028), if flow down is required in accordance with paragraph (f) of FAR clause 52.239–ZZ.

* * * * *

[FR Doc. 2023–21328 Filed 10–2–23; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAR Case 2021–009; Docket No. FAR–2021–0010; Sequence No. 1]

RIN 9000–AO26

Federal Acquisition Regulation: Protests of Orders Set Aside for Small Business

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal

Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration to update and clarify requirements associated with size and/or socioeconomic status protests in connection with multiple-award contract set-asides and reserves and orders placed under multiple-award contracts.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before December 4, 2023 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2021–009 to the Federal eRulemaking portal at *https://www.regulations.gov* by searching for ''FAR Case 2021–009''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2021–009''. Follow the instructions provided on the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2021–009'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite ''FAR Case 2021–009'' in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at *https://www.regulations.gov/faq*). To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Dana Bowman, Procurement Analyst, at 202–803–3188 or by email at *dana.bowman@gsa.gov,* for clarification of content. For information pertaining to status, publication schedules, or alternate instructions for submitting comments if *https://www.regulations.gov* cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAR Case 2021–009.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement regulatory changes made by the Small Business Administration (SBA), in its final rules published in the **Federal Register** on October 2, 2013 (78 FR 61113), October 16, 2020 (85 FR 66146), and on November 29, 2022 (87 FR 73400). SBA added clarifying language at 13 CFR 121.1004 to specify when size protests must be submitted for the set aside or reserve of a multiple-award indefinite-delivery indefinite-quantity (IDIQ) contract and for orders that are set-aside for small business under an unrestricted multiple-award IDIQ contract, except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract in accordance with FAR 8.405. In addition, in its final rule published on October 16, 2020, SBA amended 13 CFR 126.801, 13 CFR 125.28 (now at 13 CFR 134.1004), and 13 CFR 127.603 to authorize socioeconomic protests for set-aside orders for HUBZone, SDVOSB, or EDWOSB/WOSB concerns placed under a multiple-award IDIQ contract this is not partially or totally set aside or reserved for that particular socioeconomic category. SBA's rule also clarified the SBA entities that may file a size protest in connection with a particular procurement. In addition, SBA's final rule published on November 29, 2022 (87 FR 73400) amended its regulations to remove references to the SDVOSB program at 13 CFR part 125 and relocate them to 13 CFR part 128 and 13 CFR part 134.

II. Discussion and Analysis

This rule proposes to modify FAR subpart 19.3 to implement SBA's final rule as follows:

—Modify FAR 19.302(a)(2) to add a reference to SBA's regulations at 13 CFR 121.1001(a)(1) to clarify the entities that may file a protest in connection with a particular procurement;

—Modify FAR 19.302(d)(1) to implement SBA's regulations at 13 CFR 121.1004(a)(2) to specify when size protests are due for partial set asides and reserves of multiple-award contracts and orders that are set aside under an unrestricted multiple-award contract, with the exception of orders and blanket purchase agreements placed under Federal Supply Schedule contracts;

—Modify FAR 19.306, 19.307, and 19.308 to implement SBA's regulations at 13 CFR 126.801(d), 13 CFR 134.1004(a), and 127.603(c), respectively, to specify when protests are due for orders placed under multiple-award contracts where the contracting officer requested rerepresentation;

—Modify FAR 19.306, 19.307, and 19.308 to implement SBA's regulations at 13 CFR 126.801(d), 13 CFR 134.1004(a), and 13 CFR 127.603(c), respectively, to specify when protests are due for orders that are set aside for HUBZone small business concerns, service-disabled veteran-owned small business concern (SDVOSB), and economically disadvantaged women-owned small business concerns and women-owned small business concerns under a multiple-award contract that is not itself partially or totally set-aside or reserved for the particular concern. This does not apply to orders and blanket purchase agreements placed under Federal Supply Schedule contracts.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), or for Commercial Services

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses.

IV. Expected Impact of the Rule

This proposed rule implements SBA's final rules issued on October 2, 2013, (78 FR 61113), October 16, 2020, (85 FR 66146) and November 29, 2022 (87 FR 73400) to update and clarify regulations regarding size and socioeconomic status protests associated with orders placed under multiple-award contracts, with the exception of orders and blanket purchase agreements placed under Federal Supply Schedule contracts in accordance with FAR 8.405. This proposed rule will allow contracting officers, SBA, and interested parties to protest the size of a concern for partial set asides and reserves of multiple-award contracts and orders that are set aside under multiple-award contracts. The proposed rule will allow contracting officers, SBA, and interested parties to protest the socioeconomic status of a HUBZone small business concern, an economically disadvantaged women-owned small businesses and women-owned small businesses, or a service-disabled veteran-owned small business concern for orders set aside for one of these socioeconomic categories when placed against a multiple-award contract that is not partially or totally set aside or reserved for that socioeconomic category. This proposed rule will also allow contracting officers, SBA, and interested parties to protest an order placed against a multiple-award contract where the contracting officer requested rerepresentation for the order. This proposed rule is expected to help

contracting officers and interested parties to understand the requirements for filing size and socioeconomic status protests for orders placed under multiple-award contracts. Given that this proposed rule clarifies protest requirements and reduces ambiguities for small business entities and procuring activities, any impact is expected to be beneficial to both Government, contractors, and offerors. Any cost to the Government is not expected to be significant.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612, because this proposed rule clarifies size and socioeconomic protest requirements associated with multiple-award contracts and is expected to assist both small entities and the Government in submitting a timely protest. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration (SBA) in its final rules dated October 2, 2013 (78 FR 61113), October 16, 2020(85 FR 66146), and November 29, 2022(87 FR 73400). This rule proposes to update and clarify requirements associated with size and socioeconomic status protests related to partial set asides and reserves of multiple-award indefinite-delivery indefinite-quantity (IDIQ) contracts, and protests related to orders placed against multiple-award IDIQ contracts with the exception of blanket purchase agreements and orders placed under Federal Supply Schedule contracts.

The objective of this proposed rule is to implement SBA's final rules published on October 2, 2013 (78 FR 61113), October 16, 2020 (85 FR 66146), and November 29, 2022 (87 FR 73400) to clarify the requirements for size and/or socioeconomic status protests for orders placed against multiple-award IDIQ contracts. This proposed rule clarifies the timelines for an interested party to submit a size protest for a partial set aside or reserve of a multiple-award IDIQ contract and for an order placed under a multiple-award IDIQ contract. In addition, this rule clarifies when a socioeconomic status protest of a set-aside order placed under a multiple-award IDIQ contract where the socioeconomic status of the set-aside differs from that of the underlying contract, or the reserve or set aside portion of the underlying contract (*e.g.,* small business set aside multiple-award IDIQ contract where an order is further set aside for SDVOSB concerns). This proposed rule does not apply to orders and blanket purchase agreements placed under Federal Supply Schedule contracts. Promulgation of FAR regulations is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113. The legal basis for this rule is SBA's regulations at 13 CFR 126.801, 13 CFR 127.603, 13 CFR 121.1001, and 13 CFR 134.1004 as amended by the three SBA final rules.

This proposed rule will impact small businesses that are or may become multiple-award IDIQ contract holders and that may be awarded orders under multiple-award IDIQ contracts. According to the Federal Procurement Data System (FPDS), in the last three fiscal years (FYs), agencies set aside orders under unrestricted multiple-award IDIQ contracts as follows: 6,509 in FY 2019; 7,392 in FY 2020; and 7,251 in FY 2021; for an average of 7051 per fiscal year. According to FPDS, in the last three fiscal years, agencies further set aside orders under set aside multiple-award IDIQ contracts as follows: 8,403 in FY 2019; 9,470 in FY 2020; and 10,034 in FY 2021; for an average of 9,302 per fiscal year. According to FPDS, in the last three fiscal years contracting officers required rerepresentation for orders as follows: 363 in FY 2019; 470 in FY 2020; and 530 in FY 2021; which averages out to 454 per fiscal year. According to FPDS, in the last three fiscal years, agencies further set aside orders for a socioeconomic category under the set aside portion of a multiple-award IDIQ contract, where the socioeconomic category differs from the underlying multiple-award IDIQ contract, as follows: 43 in FY 2019; 41 in FY 2020; and 37 in FY 2021; for an average of 40 per fiscal year. This averages out to approximately 4,212 total orders to which this rule may apply per fiscal year. Although we can estimate the number of set aside orders that may be affected by this rule, it is not possible to estimate the number of small entities that may be affected by potential protests as a result of this rule.

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2021–009) in correspondence.

VII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Part 19

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 19 as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for 48 CFR part 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

■ 2. Amend section 19.302 by—

■ a. Removing from the end of the second sentence of paragraph (a)(2) ''or the SBA.'' and adding ''or SBA. (See 13 CFR 121.1001(a).'' in its place; and

■ b. Revising paragraph (d).

The revision reads as follows:

19.302 Protesting a small business representation or rerepresentation.

* * * * *

(d) In order to affect a specific solicitation, a protest must be timely. SBA's regulations on timeliness are contained in 13 CFR 121.1004. SBA's regulations on timeliness related to protests of disadvantaged status are contained in 13 CFR 124, Subpart B.

(1) To be timely, a protest by any concern or other interested party must be received by the contracting officer by the close of business of the fifth business day after-

(i) Bid opening for sealed bid acquisitions; or

(ii) Receipt of the special notification from the contracting officer (see 15.503(a)(2)) that identifies the apparently successful offeror for negotiated acquisitions, including-

(A) Partial set-asides and reserves of multiple-award IDIQ contracts; and

(B) Orders that are set-aside under an unrestricted multiple-award IDIQ contract (except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and paragraph (d)(5) of this section)); or

(iii) Receipt of notification using other communication means when written notification is not required.

(2) A protest may be made orally if it is confirmed in writing and received by the contracting officer within the 5-day period or by letter postmarked no later than 1 business day after the oral protest.

(3) A protest may be made in writing if it is delivered to the contracting officer by hand, mail, facsimile, email, express or overnight delivery service.

(4) Except as provided in paragraph (d)(6) of this section, a protest filed by the contracting officer or SBA is always considered timely whether filed before or after award.

(5) A protest under a Multiple Award Schedule will be timely if received by SBA at any time prior to the expiration of the contract period, including renewals.

(6) A protest filed before bid opening, or notification to offerors of the selection of the apparent successful offeror, will be dismissed as premature by SBA.

* * * * *

■ 3. Amend section 19.306 by revising paragraph (e)(1)(ii) and adding paragraph (e)(1)(iii) to read as follows:

19.306 Protesting a firm's status as a HUBZone small business concern.

* * * * *

(e) * * *

(1) * * *

(ii) For negotiated acquisitions, by the close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror, including—

(A) Orders placed under multiple-award indefinite-delivery indefinite-quantity (IDIQ) contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 126.801(d)(1)); and

(B) Orders set aside for HUBZone small businesses under multiple-award IDIQ contracts that are not partially or totally set aside or reserved for HUBZone small business concerns (see 13 CFR 126.801(d)(1)), except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and 19.302(d)(5)); or

(iii) Receipt of notification using other communication means when written notification is not required.

* * * * *

■ 4. Amend section 19.307 by—

■ a. Removing from paragraph (e)(1)(i) ''(in sealed bid acquisitions); or'' and adding ''for sealed bid acquisitions; or'' in its place;

■ b. Revising paragraph (e)(1)(ii); and

■ c. Adding paragraph (e)(1)(iii).

The revision reads as follows:

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

* * * * *

(e) * * *

(1) * * *

(ii) To be received by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror for negotiated acquisitions, including—

(A) Orders placed under multiple-award IDIQ contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 134.1004(a)(3)(ii)); and

(B) Orders set aside for service-disabled veteran-owned small businesses under multiple-award IDIQ contracts that are not partially or totally set aside or reserved for service-disabled veteran-owned small business concerns (see 13 CFR 134.1004(a)(3)(i)), except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and 19.302(d)(5)); or

(iii) Receipt of notification using other communication means when written notification is not required.

* * * * *

■ 5. Amend section 19.308 by—

■ a. Removing from paragraph (e)(1)(i) ''(in sealed bid acquisitions); or'' and adding ''for sealed bid acquisitions; or'' in its place;

■ b. Revising paragraph (e)(1)(ii); and

■ c. Adding paragraph (e)(1)(iii).

The revision reads as follows:

19.308 Protesting a firm's status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

* * * * *

(e) * * *

(1) * * *

(ii) To be received by the close of business by the fifth business day after notification by the contracting officer of the apparent successful offeror for negotiated acquisitions including—

(A) Orders placed under multiple-award IDIQ contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 127.603(c)(1)); and

(B) Orders set aside for EDWOSB or WOSB concerns under multiple-award IDIQ contracts that are not partially or totally set aside or reserved for EDWOSB or WOSB concerns (see 13 CFR 127.603(c)(1)), except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and 19.302(d)(5)); or

(iii) Receipt of notification using other communication means when written notification is not required.

* * * * *

[FR Doc. 2023–21317 Filed 10–2–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2023–0158; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BG40

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for Short-Tailed Snake

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the short-tailed snake (*Lampropeltis extenuata*), a snake species from peninsular 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 short-tailed snake. 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 short-tailed snake as a threatened species with a rule issued under section 4(d) of the Act (''4(d) rule''). If we finalize this rule as proposed, 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 December 4, 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 17, 2023.

ADDRESSES: *Written comments:* 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–2023–0158, 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–2023–0158, 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 on the Service's website at *https://www.fws.gov/office/florida-ecological-services/library* and at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2023–0158.

FOR FURTHER INFORMATION CONTACT: Lourdes Mena, Classification and Recovery Division Manager, U.S. Fish and Wildlife Service, Florida Ecological Services Office, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256–7517; telephone: 352–749–2462. 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 rule, please see the ''rule summary document'' in docket FWS–R4–ES–2023–0158 on *https://www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act (16 U.S.C. 1531 *et seq.*), 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 short-tailed snake meets the Act's 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 short-tailed snake as a threatened species with a rule issued 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 short-tailed snake is a threatened species due to the following threats: loss and degradation of habitat from urbanization and other historical and ongoing land use changes (such as agriculture and mining) and lack of habitat management (such as lack of prescribed fire in an ecosystem-appropriate interval). The effects of climate change are also likely to exacerbate the impact of other threats on the short-tailed snake.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary), to the maximum extent prudent and determinable, to designate critical habitat concurrent with listing. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

We determined that designating critical habitat for the short-tailed snake is prudent but not determinable. We will coordinate with partners to obtain data sufficient to perform the required analysis of the impacts to inform our critical habitat designation. When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

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) The reasons why any habitat should or should not be determined to be critical habitat for the short-tailed snake as provided by section 4 of the Act, including physical or biological features within the areas that are occupied or specific areas outside the geographic areas that are occupied that are essential for the conservation of the species.

(5) Whether we should consider evaluating populations of the short-tailed snake as distinct population segments.

(6) Information on regulations that may be necessary and advisable to provide for the conservation of the short-tailed snake and that we can consider in developing a 4(d) rule for the species; in particular, we seek information concerning the extent to which we should include any of the Act's section 9 prohibitions in the 4(d) rule or whether we should consider any additional exceptions from the prohibitions in the 4(d) rule.

(7) Whether the measures outlined in the proposed 4(d) rule are necessary and advisable for the conservation of the short-tailed snake. We particularly seek comments concerning:

(a) Whether we should include a provision excepting incidental take resulting from habitat management activities that maintain or restore short-tailed snake habitat including implementation of prescribed fire, actions to reduce the threat of invasive species including feral hogs, or other activities that result in more suitable habitat conditions for the species.

(b) Whether we should include a provision excepting incidental take from silviculture practices and forestry activities that follow best management practices and how those practices should be described including spatial or temporal restrictions or determents, or additional best management practices.

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, and section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific 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 the publication of 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

On July 11, 2012, the Service received a petition from the Center for Biological Diversity and six individual petitioners, requesting that we list 53 species of reptiles and amphibians, including the short-tailed snake, as endangered or threatened species under the Act (CBD 2012, entire). On September 18, 2015, we published in the **Federal Register** (80 FR 56423) a 90-day finding that the petition contained substantial information indicating that listing the short-tailed snake may be warranted. This document constitutes our 12-month finding on the July 11, 2012, petition to list the short-tailed snake under the Act.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the short-tailed snake. The SSA team was composed of Service biologists and contracted assistance, 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 in listing actions under the Act, we solicited independent scientific review of the information contained in the short-tailed snake SSA report. We sent the SSA report to six independent peer reviewers and received three responses. Results of this structured peer review process can be found at

https://www.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 recommendations regarding the effects of temperature, impacts of feral hogs and silvicultural practices implemented without best management practices, and other editorial suggestions. 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.

1. Proposed Listing Determination

Background

A thorough species description and review of the taxonomy, habitat and life history, and historical and current range and distribution of the short-tailed snake is presented in the SSA report (Service 2021, pp. 5–8).

The short-tailed snake is a small colubrid (the most common family of snakes) with an average length ranging from 31–53 centimeters (cm) (12–21 inches (in)) that occurs in xeric uplands (*e.g.,* sandhill, scrub, and xeric hammock) associated with central ridge formations in central peninsular Florida. Prior to 2000, the species was known to occur in 17 Florida counties. It has been documented in 11 of those counties since 2000.

Information regarding the short-tailed snake's natural history, life history, and habitat use is limited. The short-tailed snake is a fossorial species (*i.e.,* it lives primarily underground) that requires loose, well-drained, sandy soils associated with xeric uplands that include an open canopy of widely spaced trees and shrubs with ample areas of exposed soils. These habitat features allow the species to burrow and live underground. The short-tailed snake requires sufficient prey that includes small snakes, such as the Florida crowned snake (*Tantilla relicta*); the Florida worm lizard (*Rhineura floridana*); and skink species. Each of the species' populations needs a sufficient number of individuals within habitat patches of adequate area and quality, and all the populations need connectivity for genetic exchange. Connectivity requires suitable habitat that is relatively unfragmented by roads and characterized by wide, undisrupted habitat corridors. Unfragmented habitat allows for long-distance dispersal over time (generations) that could contribute to the maintenance of gene flow across the range. A lack of periodic gene flow between populations can exacerbate impacts of various stressors and reduce the genetic diversity necessary for adaptation. Dispersal of individual short-tailed snakes is not well known; however, long-distance dispersal (greater than 5 kilometers (km) (3.1 miles (mi))) is likely rare (Enge 2021a, pers. comm.; Moler 2021, pers. comm.). Movement across areas of unsuitable habitat is thought to be limited to 1 km (0.6 mi).

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 short-tailed snake 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, which we then used 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–2023–0158 on *https://www.regulations.gov* and at *https://www.fws.gov/office/florida-ecological-services/library*.

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, to assess the species' overall viability and the risks to that viability. We analyze these factors both individually and cumulatively to determine the current condition of the species and project the future condition of the species under several plausible future scenarios.

Species Needs

We assessed the best available information to identify the physical and biological needs to support all life stages for the short-tailed snake. We identified the specific ecological needs for individuals to survive and reproduce, as well as needs to support viable populations (see table 1, below). Much of the life history and habitat needs of the short-tailed snake are unknown or assumed to be similar to genus or family characteristics. We determined the main elements essential to the survival and reproductive success of short-tailed snake individuals: sandy soils, cover, and adequate prey. Populations require the same elements as individuals, and connectivity between populations is important for breeding and dispersal, even though individuals are otherwise limited in longer distance movements.

TABLE 1—THE ECOLOGICAL REQUISITES FOR SURVIVAL AND REPRODUCTIVE SUCCESS OF SHORT-TAILED SNAKE INDIVIDUALS AND POPULATIONS

Life stage	Survival and reproductive requisites	Resource function (BFSD) [1]	Description
Egg, Juvenile, Adult	Sandy soils	All	Supports burrowing and fossorial characteristics.
Juvenile, Adult	Cover	All	Provides refuge from predation, creates needed microclimate conditions; supports prey species. The type of habitat and cover used changes seasonally.
Juvenile, Adult	Adequate prey	F	Adult [2]: Small snakes (*e.g.*, Florida crowned snake) and lizards. Juvenile [2]: unknown, but likely invertebrates.
Adult	Connectivity between suitable habitats.	B, D	Supports genetic exchange.

[1] The function of each resource or circumstance is indicated (Breeding—B; Feeding—F; Sheltering—S; Dispersal—D).
[2] Juveniles are snakes less than 30 centimeters (cm) in length, and adults are those 30 cm or longer.

Factors Influencing Species Viability

The following discussion provides a summary of the primary factors that affect or may affect the current and future condition of the short-tailed snake. The best available information indicates that the loss and degradation of habitat from urbanization and other land use changes, such as agriculture and mining, is the primary threat to the species. Below, we address this primary threat and the individual and cumulative effects of potential threats, while also considering conservation measures that may provide protections to the species.

Urbanization

Human population growth in an area leads to increased commercial and residential development. Population growth in Florida is not evenly distributed, and predicted land use change from undeveloped (*e.g.,* agriculture and natural areas) to developed is most significant in central Florida (Carr and Zwick 2016, p. 5). Between 1980 and 2020, all Florida counties within the known range of the short-tailed snake have experienced significant growth in human populations, with the largest increases occurring in Hernando, Lake, Gilchrist, and Orange Counties (331, 250, 212, and 201 percent, respectively), and this growth is expected to continue in the future, with increases ranging between 1 and 70 percent by 2045. The largest increases are anticipated in Highlands, Lake, Orange, and Pasco Counties within the species' range (70, 46, 39, and 32 percent, respectively) (Florida Office of Economic and Demographic Research (FEDR) 2020, entire).

Compared to historical conditions, Florida's xeric upland natural communities are extensively reduced, altered, and, in many areas, isolated. This is particularly evident in longleaf pine-dominated sandhills and scrub communities on the ridges of central Florida and the Gulf Coast of Florida (Kautz et al. 1993, p. 141; Enge et al. 2003, p. 11; Kautz et al. 2007, p. 21). In 1987, sandhills covered approximately 2.4 percent of Florida, which reflects an 88 percent loss from an estimated coverage of 20 percent in 1936. Scrub communities declined 59 percent in coverage during the same period (Kautz et al. 1993, p. 143). In a 14-year period from 1989 to 2003, 11 percent of sandhill and 10 percent of scrub natural communities were lost to urbanization or other land uses, with 4 percent of each of these habitats lost to agriculture (Kautz et al. 2007, p. 19). Future losses of sandhill and scrub habitats where the short-tailed snake occurs are expected as Florida's human population continues to increase and development expands (Carr and Zwick 2016, entire).

Road construction and expansion and the resulting traffic associated with urbanization and development can cause direct mortality of short-tailed snakes. Although road mortality affects individuals and populations of short-tailed snakes adjacent to roads, individual short-tailed snakes typically move short distances, making it more likely that individuals immediately adjacent to roads would be susceptible to vehicular mortality, particularly during seasonal periods of high surface activity (Florida Fish and Wildlife Conservation Commission (FWC) 2011, p. 5; FWC 2013, p. 5). Most short-tailed snake populations are not adjacent to roadways, and given the species' mostly short-distance movements, effects of roads are likely limited. We primarily focus our analyses on the threat of habitat fragmentation from roads. Observed short-tailed snake mortality on roadways indicates that roads may act as a barrier to dispersal. Roads are prominent features of urbanized and developing areas and contribute to the isolation and fragmentation of snake populations even when road use is avoided by snakes. As urbanization and development increase, snakes may be more likely to attempt road crossings as pressures to disperse increase, habitat patch sizes decrease, and urban edge to habitat area ratios increase (Breininger et al. 2004, 2011, and 2012, entire).

Urbanization also creates conditions favorable to the establishment and spread of nonnative, invasive species in areas adjacent to and nearby short-tailed snake habitat. Nonnative, invasive plants have the potential to alter and degrade natural communities and influence short-tailed snakes through habitat degradation. Sandhills in some areas of the species' range are impacted by the invasion of the nonnative cogon grass (*Imperata cylindrica*). Predation from nonnative species, such as red imported fire ants (*Solenopsis invicta*), feral hogs (*Sus scrofa*), and domestic dogs (*Canis lupus familiaris*) and cats (*Felis catus*), is known to cause direct mortality to reptiles and likely impacts short-tailed snake individuals or populations. Short-tailed snakes occur in areas of urbanization where suitable, connected habitat remains. However, we do not have information on whether the species can persist in urbanized areas where suitable habitat has been altered or information on the long-term trend of the species' occurrences in urbanized areas (FWC 2013, p. 5; Enge 2021a, pers. comm.).

In sum, urbanization impacts many wildlife species through the loss and fragmentation or degradation of habitat (including encroachment, succession, and invasive species), increased road mortality, increased human persecution, and increased predation by domestic animals (such as feral and free-roaming cats and dogs). While research is lacking to quantify the effects of urbanization on the short-tailed snake, continued urbanization is expected to continue to drive habitat loss and degradation in the species' range. Highly urbanized areas are not likely to support healthy populations of the short-tailed snake (Enge et al. 2003, p. 11; Enge 2016, p. 4; FWC 2019, p. 3); however, this species has been observed in subdivisions within xeric uplands that retain some natural ground cover components likely to support populations of prey species, such as the Florida crowned snake (Campbell and Moler 1992, p. 153; FWC 2013, p. 24; FWC 2019, p. 2). There are also records of short-tailed snake observations from roadways, carports, woodsheds, foundation excavations, driveways, yards (*e.g.,* pools), and within a home in a developed area (Krysko et al. 2019, pp. 473–475; FWC 2020, unpaginated; Enge 2021b, pers. comm.).

Land Use and Management

Short-tailed snakes are unlikely to maintain viability in areas affected by the removal of native landcover, reduction of prey, or the alteration of soil characteristics (*e.g.,* loose, sandy soil) required for fossorial species. Therefore, changes in land use and management impact short-tailed snakes at the individual level and, to some degree, at the population level as discussed further below.

Agriculture

Agriculture is a significant portion of Florida's economy, and agricultural land use includes cattle grazing, improved pasture, row cropping, and citrus and hay production. Between 1989 and 2003, the intensification of agricultural land use in central Florida was notable, particularly the conversion of natural and semi-natural land cover types to agriculture (Kautz et al. 2007, pp. 21–22). As of 2020, approximately 24 percent of Florida (3.9 million hectares (ha) (9.7 million acres (ac))) was in agricultural production, consisting of 47,400 commercial farms (*e.g.,* cropland and ranchland) with an average farm size of 205 acres (USDA 2022, unpaginated). A large portion of the short-tailed snake's range includes areas of improved pasture and cropland/pasture landcover types. The level of

historical impacts of these cover types and associated land uses on the short-tailed snake are uncertain, but likely reduced the availability and connectivity of suitable upland habitat. The stressor of agriculture is expected to be ongoing and affect the species in the future, but to a lesser extent as much of the prime upland agricultural land has already been developed. Within the range of the short-tailed snake, conversion to cropland is projected to make up small proportion of the projected habitat loss (2 to 3 percent) (Service 2021, p. 64).

The high, dry natural communities needed by the short-tailed snake also are favorable for citrus production (Campbell and Moler 1992, p. 152). Approximately 262,000 ha (648,000 ac) of citrus are identified within the range of the short-tailed snake. While the presence of citrus groves results in habitat loss (Florida Natural Areas Inventory (FNAI) 2001, p. 2), it is possible that short-tailed snakes can persist in groves where pockets of natural cover and soil conditions are present or where higher quality habitat is adjacent. Additionally, overall citrus production has declined over the last 19 years in Florida, with citrus-bearing grove area declining from more than 750,000 acres in 2000 to around 381,000 acres in 2020, primarily due to losses associated with disease (Court et al. 2021, pp. 4, 23) and pressure from residential and commercial development. Citrus groves have been converted to residential and commercial development within the range of the species and the potential for future conversion of citrus land to development exists, as does the potential for citrus groves to lie fallow. Although we do not have information to spatially or temporally project the extent and magnitude of citrus grove conversion, the impact on the species is expected to be negative where short-tailed snakes occur in citrus groves that are converted to more urbanized landscapes.

Mining

Mining occurs in the range of the short-tailed snake and contributes to localized habitat fragmentation and loss. Phosphate, limestone, sand, gravel, and heavy minerals are mined extensively in Florida, and these practices are expected to continue. Mining activities include the removal of vegetation. The top 15 to 30 feet of earth (*e.g.,* overburden) is removed, followed by extraction of the mineral or ore-bearing layer that often contains a heavy sand component (Florida Department of Environmental Protection (FDEP) 2021, unpaginated). Mining practices in general remove vegetation, alter soil profiles, and destroy habitat (Volk et al. 2017, p. 58), and areas where these practices occur no longer support the short-tailed snake. Within the range of the species, mining of sand and gravel is expected to continue into the future with some additional mining of limestone, phosphate, and heavy minerals in the short-tailed snake's range. Although mining may affect the habitat and individuals or populations of short-tailed snake, the loss of suitable habitat due to mining practices rangewide is expected to be limited (1 to 2 percent of expected suitable habitat loss).

While sand mining is likely to continue to increase with urbanization (sand is the principal component in concrete and glass building materials), expansion of sand mining in some counties (*e.g.,* Lake County) is restricted (Beiser 2019, p. 3; Silvas 2021, unpaginated). In addition, the Green Swamp area within Polk and Lake Counties is designated as an ''Area of Critical State Concern,'' a designation that provides protections to valuable hydrologic functions in the area (FDEP 2020, unpaginated). Phosphate mines occupy more than 182,108 ha (450,000 ac) within the State, and phosphate mining occurs on the margin of the known range of the short-tailed snake, with the largest phosphate mines within the short-tailed snake's range occurring in Polk and Hillsborough Counties. Although we do not have information that mining practices have resulted in the extirpation of short-tailed snake occurrences, areas within the short-tailed snake's range that have been mined using earth removal techniques do not meet the species' life-history requirements and are not expected to support the species.

Silviculture

Many areas of natural and planted pine and hardwood forests in Florida are managed for the production of a wide variety of forest products. The State has approximately 7 million ha (17 million ac) of forestland, representing 50 percent of its total land area; approximately two-thirds of these forestlands are in private ownership (Florida Department of Agriculture and Consumer Services (FDACS) 2021, p. 8). Forestlands managed for timber and other forest products are most typically represented by pine plantations (*e.g.,* pineland cover type). A comparison of pineland cover type between 1989 and 2003 shows a loss of some pineland areas to urbanization but otherwise minimal change in overall extent (Kautz et al. 2007, pp. 18–19, 22). Projected future increases in silvicultural land uses are expected to impact an additional 2,100 ha (5,200 ac) of short-tailed snake habitat as calculated using data derived from the FOREcasting SCEnarios of Land Use Change model (FORE–SCE; described in chapter 5 of the SSA report (Service 2021, pp. 58–60)).

Little is known about the impacts of silvicultural activities (*e.g.,* thinning, clear cuts, site treatments, selected tree species, tree densities, and rotation length) on the short-tailed snake. Typically, forest management practices in working forests incorporate best management practices. Although some management activities may cause short-term habitat degradation, many management regimes may also enhance short-tailed snake habitat (*e.g.* long rotation, frequent fire return intervals).

Habitat Management

Habitat management practices incompatible with the short-tailed snake's needs include absent or infrequent fire management; mechanical activities that disturb soil; and management objectives that favor heavy shrub layers, closed canopy conditions, or excessive leaf litter accumulations. These activities have the potential to alter or degrade short-tailed snake habitat. The best available information indicates that these threats are acting at the population level and impacting the overall species (Service 2021, pp. 30–32).

Effects of Climate Change

The primary climate-related threat to the short-tailed snake is alteration and loss of habitat. Sea level rise in coastal areas will displace the human population to higher elevation areas. This displacement will potentially exacerbate habitat destruction for upland species, such as the short-tailed snake, through further urbanization and development.

Vegetation communities representative of short-tailed snake habitat (*e.g.,* sandhill, scrub, and xeric hammock) are expected to respond to rising temperatures, variable precipitation patterns, and subsequent alteration to fire regimes with a shift in natural community structure over time (U.S. Federal Government 2021, unpaginated). Additionally, there likely will be a more limited burn window for fire management due to rising temperatures and declining fuel moisture, particularly during the growing season (Kupfer et al. 2020, pp. 774–775). A more limited burn window may result in less prescribed fire

(habitat management) implemented in short-tailed snake habitat, leading to detrimental succession and more closed canopy and accumulated leaf litter conditions.

Natural fire return intervals associated with short-tailed snake habitat vary among natural community types, with the fire frequency in intact sandhill communities in Florida ranging between 1 and 3 years (FNAI 2010, pp. 9, 47). The fire return frequency in scrub natural community variants (*e.g.,* oak scrub, rosemary scrub, and sand pine scrub) ranges between 3 and 70 years with the longer intervals being associated with sand pine scrub (FNAI 2010, pp. 9, 51). In the absence of naturally occurring fires, active habitat management actions (such as the application of prescribed fire, mechanical vegetation management, and herbicide use) are necessary for the restoration, maintenance, and conservation of these communities. In sandhill communities, the germination and/or flowering of fire-dependent plant species (*e.g.,* longleaf pine, wiregrass) would be impacted by the changes in fire frequency and timing (Shappell and Koontz 2015, p. 351; Baruzzi et al. 2021, p. 7). Additionally, a reduction or lack of prescribed fire as a result of a reduced burn window coupled with increased evapotranspiration rates from increased temperatures could lead to excessive accumulations of fuel and result in more frequent and intense wildfires. Direct mortality from high-intensity fires in scrub habitat are a concern of species' experts (Enge 2021a, pers. comm.); high-intensity fires could become more prevalent with the expected effects of climate change.

Rising temperatures and shifting precipitation patterns can alter short-tailed snake habitat independent of alterations to the fire regime. Drought and heat stress caused by increased temperatures can promote insect outbreaks and plant mortality. In pine communities, such as sandhills, higher winter air temperatures promote over-wintering success in southern pine beetle larvae, and higher annual air temperatures can result in more generations of the southern pine beetle per year (Hain et al. 2011, pp. 16–17). Additionally, severe drought stress reduces resin production in coniferous trees and greatly increases the susceptibility of trees to beetle infestation. Nonnative, invasive species (*e.g.,* cogon grass, red imported fire ant) are often more tolerant of drought and heat stress. The nonnative species' ranges are expected to expand with climate change, increasing their potential to alter and degrade short-tailed snake habitat (Chen et al. 2014, p. 5; Hamidavi et al. 2021, p. 383).

Climate change could also have more direct impacts on short-tailed snakes. As a fossorial species, extreme weather events and associated flooding events can cause direct mortality (*e.g.,* drowning) of individuals. Additionally, climate change could alter the distribution and abundance of preferred prey species, as well as alter substrate and soil conditions that may become unsuitable (*e.g.,* too wet or too dry) or unavailable (*e.g.,* flooded) for short-tailed snakes. Poor habitat conditions, including altered soil conditions or limited prey items, may cause individuals of the species to experience reduced fitness, mating and clutch failure, and increased risk of predation. Catastrophic flooding has the potential to displace or extirpate local populations, making recolonization difficult in fragmented landscapes (Tupy 2021, pers. comm.). Additionally, the sex of offspring is often determined by nest temperature for many reptile species. It has not been documented if sex determination is temperature-dependent for the short-tailed snake. If the species' sex determination is temperature-dependent, increasingly warming temperatures have the potential to skew sex ratios, resulting in low reproductive rates, inbreeding depression, or both (Mitchell and Janzen 2010, p. 131; Tupy 2021, pers. comm.).

Additional Considerations

Small, Isolated Populations

Short-tailed snake occurrence records indicate patchy and fragmented distribution in suitable upland habitats (*e.g.,* sandhills, scrub, and xeric hammock) in peninsular Florida. The available information indicates the species does not occur in large populations, and the apparently small populations may be inherent to the species based on its life-history characteristics and needs. In many species, small population size along with population isolation often leads to reduced genetic diversity as a result of inbreeding, which, in turn, results in increased susceptibility to disease and parasites, reduced reproductive fitness, reduced evolutionary potential, and reduction in the overall ability to withstand stochastic events (Frankham 1995, p. 309; Frankham 2005, pp. 132–135). These deleterious effects associated with small population size can exacerbate the negative influences of habitat degradation and further impact resiliency. However, there is no genetic information available to suggest that small population is currently influencing short-tailed snake viability.

Collection and Intentional Killing

As with all snakes, humans kill snakes maliciously or out of fear, and these losses can contribute to population declines (FWC 2011, p. 5). Short-tailed snake interactions with humans are more likely where the snake is found in residential areas with sufficient groundcover but are limited compared to interactions with species active in the daytime (the fossorial nature of the short-tailed snake means it rarely appears above ground and does so even more rarely during the day) (FWC 2011, p. 4). The best available information does not indicate that illegal collection of short-tailed snakes for pets is occurring or that there are impacts to the species from intentional killing.

Cumulative and Synergistic Effects

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

Below, we summarize the known conservation measures and existing regulatory mechanisms affecting the short-tailed snake or its habitat (Service 2021, pp. 38–40).

Existing Protections

The short-tailed snake is listed by the State of Florida as a threatened species, and, as such, no person may take (*e.g.,* harm or harass), possess, or sell short-tailed snakes or parts of their nests or eggs without a permit (Florida Administrative Code, chapter 68A–27) (FWC 2016, p. 78; FWC 2021, p. 7, 11). Additionally, through the above-referenced State rule, the FWC has incorporated species' conservation measures and developed permitting guidelines to provide information on the species' range and intentional and incidental take (FWC 2019, entire).

Through the tracking of permits involving the short-tailed snake, we are aware of the occurrences and level of take of the species in Florida.

Land Protection and Stewardship

Short-tailed snake habitat occurs on lands in public and private ownership with varying levels of habitat management. An estimated 48 percent of potential short-tailed snake habitat (*e.g.,* habitat identified as suitable for the species in an FWC habitat suitability model (Enge et al. 2016, entire); for more information on habitat modeling, see Service 2021, pp. 18–19) occurs on protected lands under Federal, State, or local government ownership or lands subject to conservation easements. Protected lands are less likely to experience threats associated with urbanization and other land uses (*e.g.,* agriculture, mining, and intensive silviculture that does not implement best management practices) than lands in private ownership. In addition, protected lands are often more likely to receive increased habitat management compared to private lands.

The short-tailed snake occurs on Federal lands (*e.g.,* Ocala National Forest), in State parks, in preserves and geological sites (*e.g.,* Wekiwa Springs, Ichetucknee Spring, San Felasco Hammock, Devil's Millhopper) (Hammerson 2016, pp. 10–11), and in State forests (*e.g.,* Withlacoochee) where land management occurs in accordance with area management plans. Habitat management on military installations (*e.g.,* Avon Park Air Force Range), in National Forests (*e.g.,* Ocala National Forest), and in National Wildlife Refuges (*e.g.,* Lake Wales Ridge National Wildlife Refuge) is implemented in accordance with integrated natural resources management plans (INRMP), forest plans, and comprehensive conservation plans, respectively. Although management plans do not manage specifically for short-tailed snake, habitat management actions including control of invasive plants and application of prescribed fire at appropriate intervals in sandhill and scrub habitats are expected to benefit the species' habitat and short-tailed snakes that occur in the area (USAF Park INRMP 2004, pp. 61–62, 68; USDA 2017, pp. 7, 14). Additionally, short-tailed snake habitat occurs in county and city parks and preserves.

Not all habitat management practices implemented on protected lands benefit the short-tailed snake (*e.g.,* silviculture that does not implement best management practices or improperly implements best management practices) (Hammerson 2016, pp. 10–11).

Conservation Measures on Private Lands

Privately owned lands account for approximately 52 percent (259,674 ha (641,668 ac)) of short-tailed snake habitat. In Florida, the FWC's Landowner Assistance Program provides technical and financial assistance to private landowners to implement conservation practices for wildlife on their lands (FWC 2013, p. 14). The Service's Partners for Fish and Wildlife (PFW) program provides similar incentives to private landowners for the conservation of wildlife and associated habitat. Where conservation practices occur in sandhill and scrub habitat within the short-tailed snake's range, benefits to the species are expected. Between 2010 and 2021, the PFW program alone funded approximately 3,400 ha (8,500 ac) of habitat restoration and management projects in sandhill and scrub communities within the species' range.

In 2015, FDACS and FWC collaboratively developed Florida's Agriculture Wildlife Best Management Practices for State Imperiled Species to promote sound agricultural land use and natural resource conservation and to reduce the potential for incidental take of State-imperiled species (FDACS 2015, p. ii). As of 2021, approximately 28 landowners in counties where the short-tailed snake occurs submitted notices of intent to implement conservation practices on approximately 172,004 ha (425,031 ac) of privately owned land (FDACS 2020, p. 1). The spatial information needed to assess the overlap of the area where the conservation practices will occur and short-tailed snake populations is not available. Therefore, we are not able to accurately project the extent to which these best management practices will influence the short-tailed snake or its habitat, but nonetheless encourage the implementation of conservation actions in silviculture and agriculture in Florida.

Current Condition

For the purposes of the SSA, we delineated analysis units based on the FWC's habitat suitability index (HSI) (Enge et al. 2016, pp. 12–15, 17–20), historical and current species' occurrences, and barriers to dispersal and movement. We included contiguous habitat within 5 km (3.1 mi) of occurrence records. A total of 245 records (136 historical (pre-2000) and 109 recent (2000–2021)) for the short-tailed snake were provided by FWC (FWC 2020, unpaginated) and were used to build the HSI. New records (*e.g.,* 2021) conveyed to the Service during the SSA process were manually added to this database; these very recent records are included in the summary of records presented here. We also relied on FWC's HSI to delineate the extent and condition of suitable habitat within the range of the short-tailed snake. Some areas of identified suitable habitat contain very few records of occurrence; however, we rely on identified suitable habitat in our analysis and note that lack of occurrences may not preclude presence given the species' highly cryptic and fossorial nature and its small size, as well as the lack of established survey methods.

The delineation process resulted in 19 analysis units, with 8 units containing only historical (pre-1973) records and categorized as likely extirpated (see figure 1, below). We also identified 30 analysis units that contain only suitable habitat with no occurrence records, and we categorized these as unknown status. We do not include these units in our analysis but identified them in the delineation process to inform potential future conservation or recovery efforts. We conducted our analyses of current and future condition on the 11 delineated current analysis units and the 8 likely extirpated units.

To assess the current viability of the short-tailed snake, we considered the species' life-history needs and habitat requirements. Population estimates for the short-tailed snake are not available, but assessments of short-tailed snake habitat loss and degradation note a greater than 30 percent decline in the overall area of suitable habitat from approximately 1989 to 2003 (FWC 2011, p. 10). Our assessment of current species' resiliency includes the best available information regarding the species' population characteristics and the condition of the physical environment where the species occurs. We made qualitative assessments of the current resiliency of each analysis unit by evaluating a demographic factor (combined occupancy and timing of records) and four habitat factors (fragmentation, habitat quantity, habitat quality, and extent of protected lands) (see table 2, below). The occupancy factor categorizes each of the 245 occurrence records based on number of records in the analysis unit and the timing of those records as an indication of our confidence that the record represents continued presence of the species. Road density refers to the density of primary and secondary roads in a unit and addresses the level of fragmentation of the habitat by the threat of roads and associated mortality. Habitat quality includes the current area of habitat ranked as either moderate or

high quality in the existing FWC HSI model and serves as a baseline for future projections (change in habitat metrics from current condition). We remove currently urbanized areas from the HSI as fossorial species can be driven to the surface in unsuitable habitat (*e.g.,* concrete pads, human dwellings, roadways, areas with significant root structure), resulting in observations in largely unsuitable areas. Therefore, we expect metrics related to habitat are the most appropriate to assess current condition and provide a necessary baseline for future condition projections. We anticipate the protected lands in a unit have preserved habitat conditions in the past, affecting short-tailed snake resiliency, and are expected to provide a reduced level of threat of urbanization and development.

TABLE 2—DEMOGRAPHIC AND HABITAT RESILIENCY FACTORS USED TO ASSESS CURRENT RESILIENCY FOR SHORT-TAILED SNAKE ANALYSIS UNIT

[Each analysis unit was scored as high (4), medium (3), low (2), or very low (1) for each population factor and habitat factor]

Parameter	Condition categories			
	Very low (1)	Low (2)	Moderate (3)	High (4)
Demographic Factors				
Occupancy	Likely extirpated or unknown.	One or more records pre-2000, or a single record 2000–2021.	One or more records 2000–2010 and a single record 2011–2021.	Records 2000–2011 and records 2011–2021.
Habitat Factors				
Road Density (km of roads/1,960 ha).	More than 0.5	0.5–0.31	0.3–0.11	Less than or equal to 0.1.
Habitat Quantity (ha)	Less than 10,000	10,000–50,000	50,001–100,000	More than 100,000.
Habitat Quality (percent of unit area).	Less than 50 of area in moderate or high condition.	50–69	70–89	Greater than or equal to 90.
Protection (percent of unit area).	Less than 5	5–24	25–50	Greater than 50.

We developed resiliency condition scores for each short-tailed snake analysis unit to assess the species' current condition across its range. We weighted the demographic factor equally with the combined four habitat factors to reflect the importance of species presence and the lack of available information regarding the species' precise requirements for optimal habitat condition.

In our assessment of current viability, 2 of 11 analysis units exhibit high resiliency, 4 analysis units exhibit moderate resiliency, 4 analysis units exhibit low resiliency, and 1 exhibits very low resiliency (see figure 1, below). The two highly resilient analysis units occur in the central portion of the known range with one moderately resilient unit interposed. Analysis units exhibiting low or very low current resiliency generally occur in the periphery of the range. Moderate and highly resilient analysis units comprise 379,804 ha (938,516 ac), or 76 percent (31 and 45 percent, respectively), of the total current habitat extent. The proportion of protected lands (lands in public ownership or management or in conservation easements) varies across the analysis units. The highest proportion of protected lands occurs in Units 1 and 3, with 53 and 17 percent of rangewide protected lands, respectively (see table 3, below). Therefore, Units 1 and 3, combined, include approximately 70 percent of the rangewide protected lands, and these units exhibit high current resiliency.

TABLE 3—ANALYSIS UNITS, RESILIENCY, AREAL EXTENT OF HABITAT, THE PROPORTION OF THE OVERALL SPECIES' RANGE EACH UNIT REPRESENTS, AND THE PROPORTION OF RANGEWIDE PROTECTED LANDS THAT OCCUR IN EACH UNIT

Unit No.	Name	Resiliency score	Total habitat (ha)	Percentage of range (percent)	Percentage of rangewide protected lands (percent)
7	Bell Ridge and Sante Fe River	Moderate	57,652	11	3
4	Brooksville Ridge North	Moderate	64,801	13	4
3	Brooksville Ridge South	High	85,215	17	17
12	Fairfield Hills NE	Moderate	7,141	1	2
14	Fairfield Hills NW	Very Low	5,667	1	0
22	Hillsborough River NW	Moderate	155	0	0
6	Lake Wales Ridge South	Low	47,138	9	6
10	Manatee River	Low	10,921	2	2
1	Mount Dora Ridge	High	139,348	28	53
8	Ocala Hill	Moderate	25,492	5	2
5	Trail Ridge	Low	59,631	12	10
15	Unnamed	Extirpated	*37		
30	Unnamed	Extirpated	*72		
31	Unnamed	Extirpated	*11		

TABLE 3—ANALYSIS UNITS, RESILIENCY, AREAL EXTENT OF HABITAT, THE PROPORTION OF THE OVERALL SPECIES' RANGE EACH UNIT REPRESENTS, AND THE PROPORTION OF RANGEWIDE PROTECTED LANDS THAT OCCUR IN EACH UNIT—Continued

Unit No.	Name	Resiliency score	Total habitat (ha)	Percentage of range (percent)	Percentage of rangewide protected lands (percent)
45	Tarpon Springs	Extirpated	*1		
47	St. Petersburg	Extirpated	*0		
48	Unnamed	Extirpated	*0		
49	Unnamed	Extirpated	*0		
2	Unnamed	Extirpated	*0		
Total			503,161	100	100

Note: Total numbers may not sum due to rounding.
*Habitat in likely extirpated analysis units is not included in the total identified suitable habitat.

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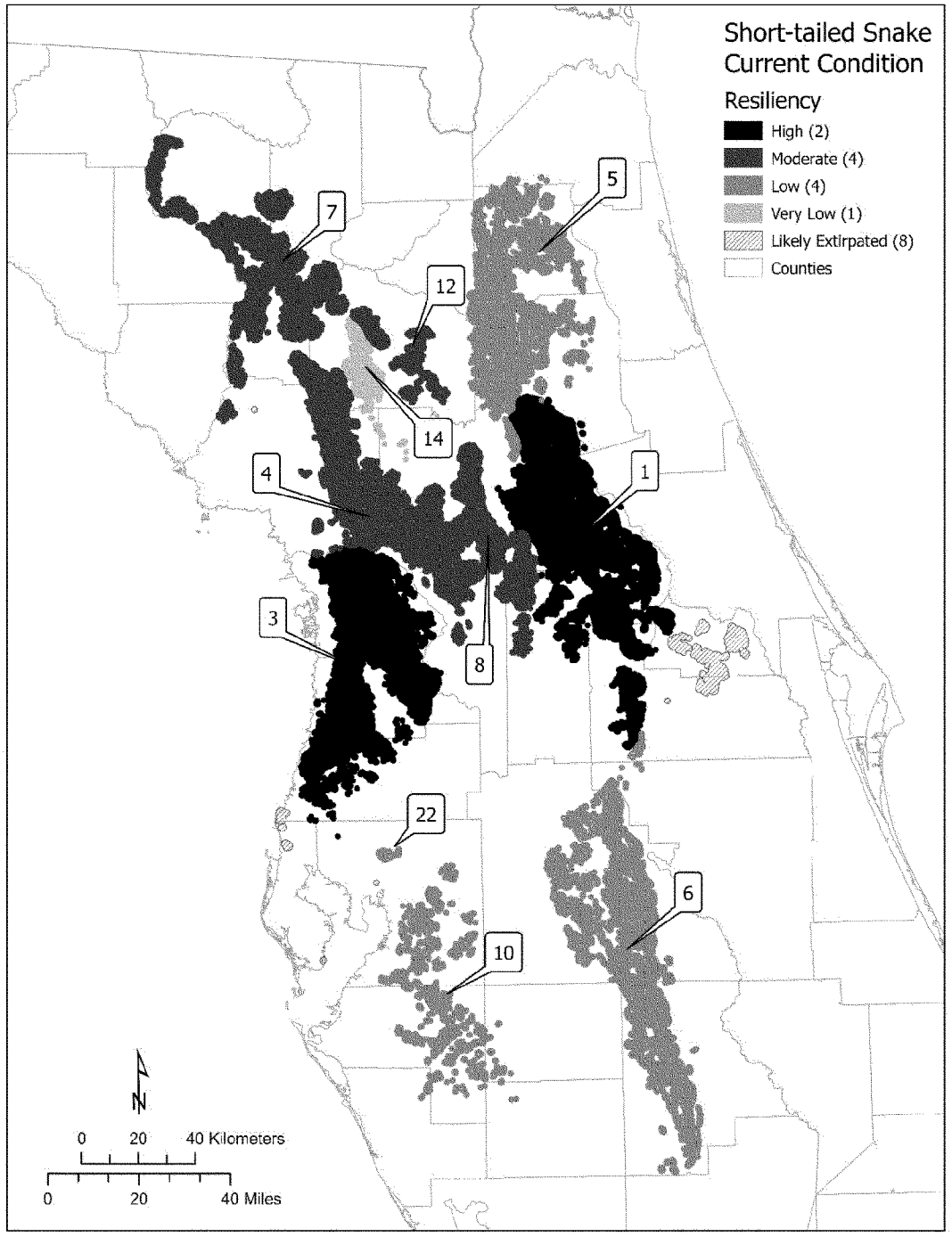

Figure 1. Distribution of 19 short-tailed snake analysis units and current resiliency class. The 11 delineated units with suitable habitat and occurrences since 1973 are numbered, and the 8 delineated units with pre-1973 occurrences are categorized as "likely extirpated" for the purposes of our analysis.

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To gauge the extent of suitable habitat rangewide, we also assessed the relative proportion of suitable habitat as identified in the FWC HSI (Service 2021, pp. 18–19). Rangewide, 45 percent of the area in the 11 delineated current analysis units (*i.e.,* not including the 8 likely extirpated units) was identified as being highly suitable in the FWC HSI. Additionally, 31 percent of analysis unit area was moderately suitable, 23 percent was in a low suitability class, and 1 percent was in a very low suitability class. The proportion of suitable habitat in each analysis unit was assessed as a parameter in our current resiliency analysis, but rangewide, 76 percent of identified habitat is highly or moderately suitable for the species based on the FWC model.

Current Redundancy and Representation

Species-level redundancy for the short-tailed snake is likely reduced from historical levels due to range contraction. However, 6 of 11 units are in moderate or high current resiliency, and units are distributed across the historical and current range of the species. We have determined that current redundancy is moderate and sufficient to support species' viability. Current representation for the species is also likely reduced from historical levels due to range contraction and loss of populations. The short-tailed snake occurs in a variety of ecological habitats (*e.g.,* sandhill, scrub, and xeric hammock) and is characterized by morphologically distinct groupings. Although information regarding genetic variation in the species is limited, we expect that the distributional and morphological variation is indicative of the species' ability to adapt to changing environmental condition (adaptive capacity). We have determined that species-level current representation for the short-tailed snake is also moderate and sufficient to support current species' viability.

Future Condition

We assessed the short-tailed snake's future viability under three future scenarios. We modeled these scenarios at 2050 and 2070 based on confidence in models and projections of factors influencing the species' viability, and certainty in predictions of the species' response to those factors. In addition, these timesteps encompass several estimated lifespans of the species (estimated at 10 years, generation time of 6 years), giving the species sufficient time to respond to impacts to reproduction, genetic effects, and fragmentation of habitat.

Changes from the current habitat condition are expected in the future from urbanization and development and from conversion of suitable habitat to less suitable landcover use (*i.e.,* cropland and mining). We anticipate those changes to habitat condition will impact the resiliency of the short-tailed snake. We lack demographic data for the short-tailed snake and are unable to project future demographic condition based on the available occurrence records for the species. We evaluated projected changes to two habitat factors (habitat quality and habitat quantity) and the species' likely responses to those changes. To project the threat of urbanization and impacts to short-tailed snake, we used the SLEUTH model (SLEUTH is an acronym for the spatial inputs used in the model, which are slope, land cover, excluded regions, urban land cover, transportation, and hill shade) to determine the probability of urbanization. Areas with a higher probability of being developed (we selected 90 percent) will likely be urbanized under even the lowest impact scenario (almost sure to be developed), while areas with a lower probability of urbanization (20 percent) are expected to be developed under a high impact scenario. Similarly, we used the FORE–SCE model to project land use in the future, specifically landcover types that are most likely to exclude occurrences of short-tailed snake (cropland and mining). The two FORE–SCE projection storylines incorporated in our analysis include the A2 storyline (reflective of representative concentration pathway (RCP) 8.5 and a higher emissions scenario) and B2 (reflective of RCP 4.5 and a lower emissions scenario) (Nakićenović et al. 2000, entire; Sohl et al. 2014, entire). To encompass a range of plausible climate change scenarios, we provide a high and low climate change-related land use projection based on the RCP 8.5/special report emissions scenario (SRES) A2 and RCP 4.5/SRES B1 scenarios, respectively. In presenting this range, our purpose is to provide bounds on the range of plausible outcomes, and we do not imply that an outcome in the middle of the range is the most likely outcome. For each of our time points (years 2050 and 2070) in the low and moderate development scenario we assess SRES B1 and assess SRES A2 under the high development scenario. To project habitat quality and quantity in the future, we recalculated the areas of suitable habitat in each analysis unit by removing from the current condition those areas projected to be urbanized or to be converted into cropland or mining use.

We weighted the factor of habitat quantity to account for expected increases in road density related to urbanization. This resulted in a weight of 2 for habitat quantity compared to 1 for habitat quality. We categorized resiliency class using the same scale as the current resiliency analysis. The three future scenarios included: (Scenario A) low development, (Scenario B) moderate development, and (Scenario C) high development (Table 4). The species' representation and redundancy were predicted under the three future scenarios and two timesteps by assessing the resiliency, number, and distribution of short-tailed snake analysis units across the species' range.

TABLE 4—THREE PLAUSIBLE FUTURE SCENARIOS USED TO PROJECT SHORT-TAILED SNAKE RESILIENCY AND THE LEVELS OF HABITAT QUANTITY AND HABITAT QUALITY FACTORS IN EACH SCENARIO

Resiliency factor (weight)	Scenario A: low development	Scenario B: moderate development	Scenario C: high development
Habitat Quantity (2)	Habitat removed from current habitat suitability index based on: Greater than or equal to 90 percent probability of urbanization (SLEUTH). Conversion to cropland or mining (FORE–SCE SRES B1).	Habitat removed from current habitat suitability index based on: Greater than or equal to 50 percent probability of urbanization (SLEUTH). Conversion to cropland or mining (FORE–SCE SRES B1).	Habitat removed from current habitat suitability index based on: Greater than or equal to 20 percent probability of urbanization (SLEUTH). Conversion to cropland or mining (FORE–SCE SRES A2).
Habitat Quality (1)	Percent of high or moderate quality habitat in the analysis unit.	Percent of high or moderate quality habitat in the analysis unit.	Percent of high or moderate quality habitat in the analysis unit.

For these projections, high condition analysis units were defined as those with high resiliency at the end of the predicted time horizon (at years 2050 and 2070). Units in high resiliency are expected to persist into the future and sustain populations, beyond year 2050 or 2070, and can withstand demographic and environmental stochastic events. Units in moderate resiliency were defined as having lower resiliency than those in high condition but are still expected to persist beyond year 2050 or 2070 and sustain populations in the wild. Units in moderate condition typically have smaller habitat extents or have lower habitat conditions than those in high condition or both (table 5). Finally, those units in low to very low condition were defined as having low resiliency and are less likely to withstand stochastic events. As a result, low to very low condition units were characterized as less likely to be able to sustain populations in the wild beyond either 30 or 50 years.

TABLE 5—HABITAT CONDITIONS CHARACTERISTIC OF MODERATE AND HIGHLY RESILIENT ANALYSIS UNITS

Parameter	Habitat condition	
	Moderate	High
Connectivity (km of roads/1,960 ha of analysis unit suitable habitat).	0.3–0.11 km/1,960 ha	Less than or equal to 0.1 km/1,960 ha.
Habitat Extent (ha of suitable habitat in analysis unit)	50,001–100,000 ha	Greater than 100,000 ha.
Habitat Quality (Percent of analysis unit in moderate or highly suitable habitat in HSI).	70–89 percent	90 percent or greater.
Protected Lands (Percent of Analysis Unit Area)	25–50 percent	Greater than 50 percent.

Under all future scenarios and in both future time horizons, we expect the resiliency of analysis units and the representation and redundancy of the species to decline. The resiliency of short-tailed snake analysis units declines across all scenarios by year 2050, with habitat loss continuing at a slower rate through year 2070. However, in the three future scenarios and both timesteps, one analysis unit is projected to exhibit high resiliency (Unit 1, Mount Dora Ridge) and one is projected to exhibit moderate resiliency (Unit 3, Brooksville Ridge South) (see figures 2 and 3, below). The two units projected to remain in high and moderate resiliency encompass the majority of protected lands in the range of the species. Nine of the 11 analysis units are projected to exhibit low or very low resiliency in all future scenarios at both timesteps. However, 55 to 68 percent of current suitable habitat is projected to remain on the landscape in the species' range. The analysis unit projected to remain in high resiliency (Unit 1) composes 36–42 percent of this spatial habitat extent depending on the scenario and timestep. Similarly, the unit projected to remain in moderate resiliency (Unit 3) composes 17–18 percent of future suitable habitat. Our future condition analysis did not project additional analysis unit extirpation, although the eight extirpated units are expected to remain extirpated as no suitable habitat remains in these areas. The number of analysis units in low or very low resiliency is comparable across future scenarios and timesteps, with the expected impacts to the species (primarily urbanization) occurring under all three scenarios by the earlier timestep of 2050. Under scenarios A and B, in 2050 and 2070, our future condition analysis projects one unit will remain in high resiliency, one high resiliency unit will shift to moderate resiliency, four units will exhibit low resiliency, and five units will exhibit very low resiliency. Under Scenario C (higher impact scenario) in 2050 and 2070, our future condition analysis projects one unit will remain in high resiliency, one high resiliency unit will shift to moderate resiliency, three units will exhibit low resiliency, and six units will exhibit very low resiliency.

We expect declines in representation in the future due to fragmentation of suitable habitat and decreased connectivity within and among analysis units. Similarly, we expect declines in redundancy as resiliency decreases in the future. Although no analysis unit extirpations are projected, the contributions of analysis units in low and very low resiliency to species-level redundancy is limited in the future. Representation and redundancy are projected to be reduced compared to current levels.

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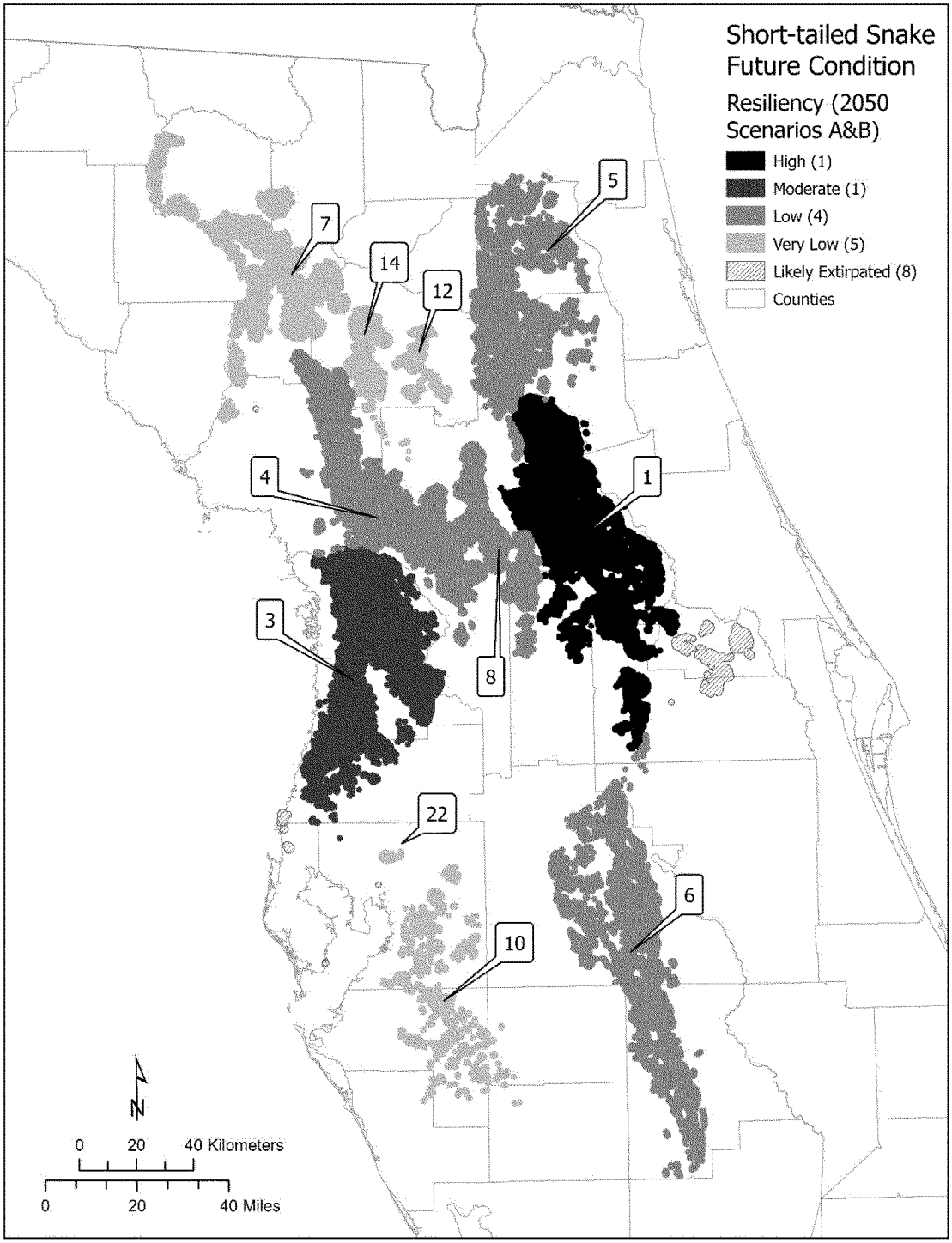

Figure 2. Short-tailed snake analysis unit resiliency at year 2050 under scenarios A (low development) and B (moderate development). Analysis unit resiliency classes are not projected to change in 2070, although the trend in habitat loss continues in all scenarios.

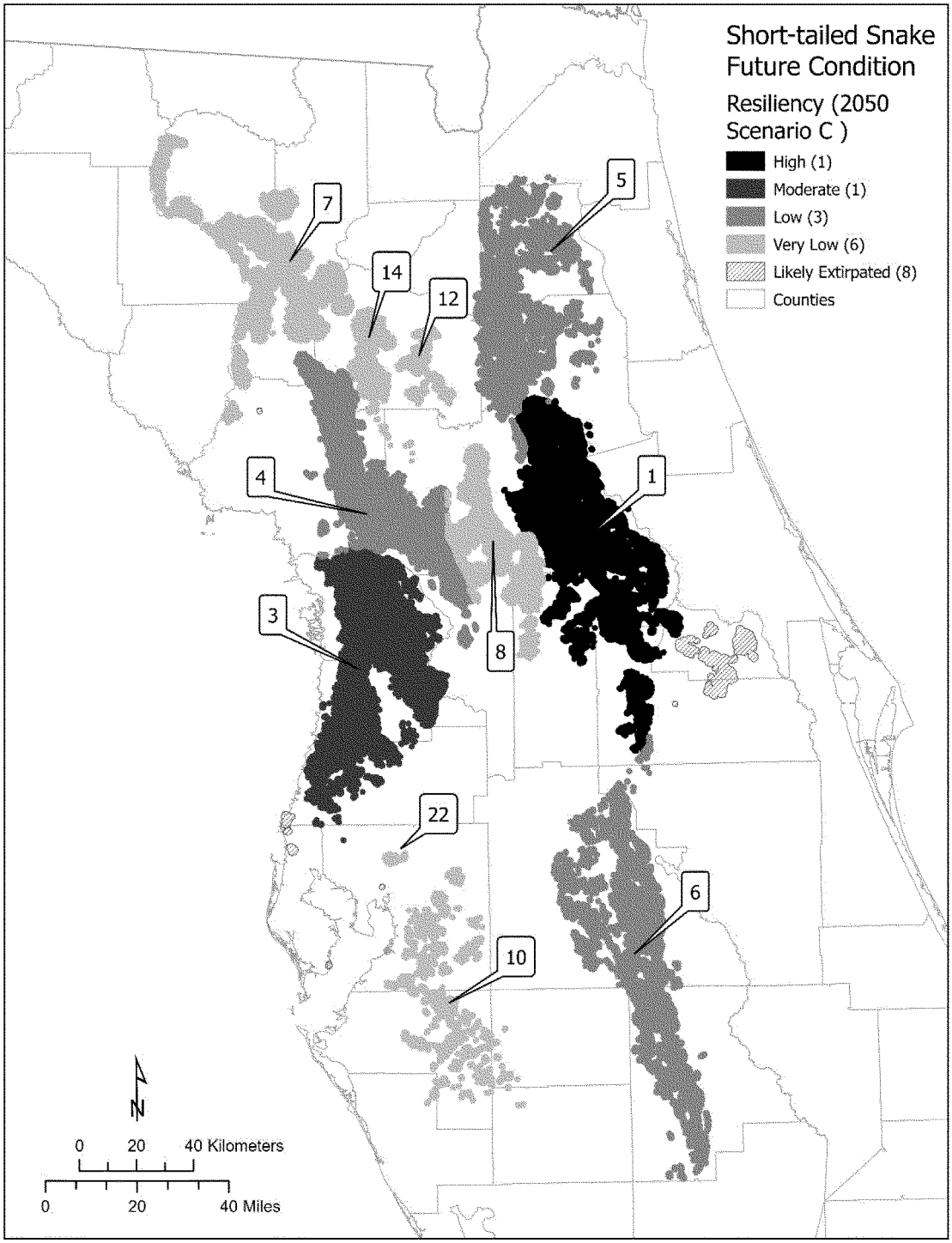

Figure 3. Short-tailed snake analysis unit resiliency at year 2050 under Scenario C (high development). Analysis unit resiliency classes are not projected to change in 2070, although the trend in habitat loss continues.

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Determination of Short-Tailed Snake's 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 the short-tailed snake does not meet the definition of an endangered or threatened species throughout all of its range. In our assessment of viability for the short-tailed snake, we considered the impacts of habitat loss and degradation (Factor A); habitat management (Factor A); nonnative, invasive species (Factors A and C); climate change (Factor E); disease (Factor C); collection (Factor B); intentional killing (Factor E); and small, isolated populations (Factor E). Furthermore, we considered the existing regulatory mechanisms (Factor D) and conservation measures and their effect on the identified threats and the status of the species. Of the threats considered, habitat loss and degradation were identified as the primary threats impacting populations and the species now and into the future. Urbanization and associated development, including roads, is the key driver of habitat loss and degradation and landcover change within the species' range. Urbanization and development are expected to increase within the range of the species in Florida as the human population increases there in the future. Sandhill and scrub habitats that do not experience habitat management (or natural fire) experience succession and become less suitable for short-tailed snake. Invasive species encroachment on suitable habitat where the short-tailed snake occurs negatively impacts the species as well. The effects of climate change act to exacerbate the effect of other threats. The individual and synergistic negative impacts to the short-tailed snake are expected to increase in the future, including fragmentation of suitable habitat, increased road density, reduced habitat management actions (prescribed fire), and increased nonnative and invasive species. The effects of climate change on short-tailed snake are unclear, but include effects to vegetation, natural and prescribed fire, prey species, and perhaps reproduction through skewed sex ratios. The effects of climate change are expected to increase in the future.

The species' current representation has likely decreased from its historical representation as evidenced by the loss of eight analysis units across the range of the species. However, the species occurs in a variety of habitats (including sand and scrub) and exhibits morphologically distinct groupings across its range. We expect that these ecological and morphological variations indicate sufficient adaptive capacity in the species. Due to the species' behavioral characteristics (fossorial and limited dispersal and its need for loose sandy soils), the short-tailed snake may be limited in its capacity to shift in space in a changing environment. The species is currently represented by six analysis units that exhibit moderate or high resiliency, and these six units are distributed across the range of the species. Despite the reductions from historical condition with extirpations of very small units, we have determined that the species' current representation and redundancy are moderate, and the species has sufficient ability to adapt to changing environmental conditions (representation) and withstand catastrophic events (redundancy).

As discussed above, the primary threat to the species is the loss and degradation of habitat (*e.g.,* urbanization and other land use changes, such as agriculture and mining), and this impacts the current resiliency of the species across its range. Although the species is negatively impacted by the loss and degradation of habitat within our assessment of current resiliency, 2 of 11 analysis units exhibit high resiliency, 4 analysis units exhibit moderate resiliency, 4 analysis units exhibit low resiliency, and 1 analysis unit exhibits very low resiliency. The two high resiliency analysis units encompass a large area (224,563 ha (554,907 ac)) in the center of the known range of the short-tailed snake, and these two units encompass 70 percent of the protected lands in the species' range. Further, the areal extent of moderate and high resilience analysis units encompasses approximately 32 percent and 46 percent, respectively, of the total identified current habitat. The analysis units exhibiting low (4 analysis units) or very low (1 analysis unit) resiliency occur at the periphery of the species' range, are generally smaller in size, and encompass less suitable habitat than the remaining analysis units.

Although the species is impacted by threats rangewide, the short-tailed snake exhibits sufficient resiliency, redundancy, and representation to support species' viability. Overall, no current threat is acting at an extent or severity such that the short-tailed snake is at risk of extinction throughout all of its range. Thus, after assessing the best available information, we conclude that the short-tailed snake is not in danger of extinction throughout all of its range.

Therefore, we proceed with determining whether the short-tailed snake is likely to become endangered within the foreseeable future throughout all of its range. Under three analyzed plausible future scenarios and in both future time horizons of 2050 and 2070, we expect habitat quantity and quality to decline. We rely on established models of projected landcover change, urbanization, and climate change to inform our future condition analysis. Declining habitat conditions are expected to negatively affect the short-tailed snake, although we do not have information available to accurately project the demographic condition of the species in the future. As described above, resiliency of 9 of 11 analysis units is projected to decline, and the species-level representation and redundancy are expected to decline as a result. The impacts of urbanization and development and other threats are projected to occur across the range by year 2050, with habitat loss continuing at a slower rate through year 2070. However, in all future scenarios and both timesteps, one analysis unit is projected to remain in high resiliency (Unit 1, Mount Dora Ridge), and another is projected to exhibit moderate resiliency (Unit 3, Brooksville Ridge South). The two analysis units projected in high and moderate resiliency encompass 45 percent of current identified suitable habitat and 53 to 60 percent of projected suitable habitat in the foreseeable future (depending on scenario and timestep). The two very large, high and moderately resilient analysis units also encompass 70 percent of the protected lands in the species' range, where the threat of urbanization and development is somewhat reduced. Our future condition analysis did not project analysis unit extirpation.

Although the resiliency of short-tailed snake analysis units is expected to be negatively affected by the threat of

habitat loss, degradation, and fragmentation in the foreseeable future, the species will maintain high and moderate resiliency in an area that encompasses almost half of the current suitable habitat now and in the future. Representation and redundancy are projected to be reduced compared to current levels but sufficient to support species' viability in the future. After assessing the best available information, we conclude that the short-tailed snake is not likely to become endangered 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 within the foreseeable future throughout all or a significant portion of its range. Therefore, we proceed to evaluating whether the species is an endangered or threatened species 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.

In undertaking this analysis for short-tailed snake, 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 short-tailed snake to determine if the species is in danger of extinction now in any portion of its range (*i.e.,* if it meets the Act's definition of an endangered species) or is likely to become an endangered species within the foreseeable future in any portion of its range (*i.e.,* if it meets the Act's definition of a threatened species). 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 Act's definition of an endangered or threatened species.

As discussed above and in our SSA report, we have information on eight analysis units with short-tailed snake occurrences before 1972 with little or no associated suitable habitat that we have determined are likely extirpated. For the purposes of considering portions of the short-tailed snake's range, we reviewed the analysis units we identified in the SSA report. We did not consider the eight likely extirpated analysis units in our future scenario modeling, as we do not anticipate that these units will contribute to the future viability of the species. Accordingly, when conducting our analysis to determine whether the species may be in danger of extinction in a significant portion of its range, we consider these very small (121 ha) likely extirpated units to be lost historical range and do not consider areas of lost historical range to be a significant portion of the range. We already take into account the effects that the loss of these units have on the current and future viability of short-tailed snake in our rangewide determination. This is consistent with our Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37577).

For the short-tailed snake, we first considered whether there are any portions of the species' current range that may have a different status. We first considered whether the species may be in danger of extinction in a significant portion of its range. As discussed under *Status Throughout all of Its Range,* above, the primary current threats to the short-tailed snake are habitat destruction or modification from urbanization and other incompatible land uses, such as cropland and mining. We examined those threats along with the effects from climate change, disease, and cumulative effects, and we considered whether conservation efforts and regulatory mechanisms ameliorated any of the effects. These factors and threats influence the short-tailed snake rangewide; however, we identified five analysis units as a portion where the species is currently in low or very low resiliency condition (*e.g.,* analysis units 5, 6, 10, 14, and 22) and that may have a different status than the remainder of the range. These units comprise 11.9, 9.4, 2.2, 1.1, and 0.03 percent of the geographic area of the short-tailed snake's range respectively, and 25 percent of the range collectively. These analysis units are currently in lower resiliency conditions than other units throughout the species' range due to impacts from increased habitat loss (*e.g.,* urbanization and incompatible land use) and habitat fragmentation (*e.g.,* increased road density). The impacts to the short-tailed snake and the species' response to the threats described have led to low or very low resiliency in these analysis units. The best scientific and commercial information indicates that these analysis units may have a different status than those in the remainder of the species' range.

We then proceeded to the significance question, asking whether this portion of the range (*i.e.,* ''5 analysis units portion''; analysis units 5, 6, 10, 14, and 22) is significant. The Service's most recent definition of ''significant'' within agency policy guidance has been invalidated by court order (see *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018)). In undertaking this analysis for the short-tailed snake, we considered whether the 5 analysis units portion of the species' range may be significant based on its biological importance to the overall viability of the short-tailed snake. Therefore, for the purposes of this analysis, when considering whether this portion is significant, we considered whether the portion may (1) occur in a unique habitat or ecoregion for the species; (2) contain high-quality or high-value habitat relative to the remaining portions of the range, for the species' continued viability in light of the existing threats; (3) contain habitat that is essential to a specific life-history function for the species and that is not found in the other portions (for example, the principal breeding ground for the species); or (4) contain a large geographic portion of the suitable habitat relative to the remaining portions of the range for the species.

Individually, the five units that make up the identified portion are generally small and occur on the periphery of the range where the habitat conditions are less suitable. Collectively, the portion of the range containing the 5 analysis units portion does not make up a large geographic portion of the suitable habitat (25 percent) relative to the remaining portions of the range. In addition, this portion does not have any areas of habitat that are unique or contain high-quality or high-value habitat relative to the remaining portions of the range. The 5 analysis units portion does not contain habitat that is essential to a specific life-history function. Overall, we found no substantial information that would indicate that the 5 analysis units portion constitutes a portion of the range that may be significant in terms of its overall contribution to the species' resiliency, redundancy, and representation, or that it is significant in terms of high-quality habitat or otherwise important for the

species' life history. As a result, we determined that the 5 analysis units portion does not constitute a significant portion of the range where the species is endangered. Accordingly, the short-tailed snake is not in danger of extinction within a significant portion of its range and does not meet the definition of an endangered species.

We next considered whether the short-tailed snake is likely to become an endangered species within the foreseeable future in a significant portion of its range (*i.e.,* if it meets the Act's definition of a threatened species). As described under *Status Throughout All of Its Range,* above, urbanization and development have impacted the short-tailed snake's viability through habitat loss and degradation and the associated reduced ability to effectively manage or maintain suitable habitat. The risks to the species associated with the negative effects of land use change on its habitat are likely to continue into the foreseeable future. These factors and threats influence the short-tailed snake rangewide; however, the threats are projected to have a more pronounced effect in 9 of the 11 non-extirpated analysis units such that they may have a different status than the remainder of the range within the foreseeable future. This geographic area (north/south portion) includes the nine areas delineated in the SSA report as Units 4 through 8, 10, 12, 14, and 22 (all non-extirpated units except Units 1 and 3) (Service 2021, entire). Although threats are similar throughout the species' range, the species' future response appears more pronounced in the nine analysis units in the northwest portion. For example, future resiliency for all nine analysis units is projected to be low or very low in all scenarios at both timesteps in the future. These units exhibit a greater decline of resiliency than the remaining portions of the range. The nine analysis units in the north/south portion generally have a lower proportion of moderate or highly suitable habitat in the future, as well as a lower proportion of protected areas within the analysis unit. The nine units in the north/south portion of the range are projected to have a higher degree of habitat degradation and habitat loss due to urbanization. Given the projected decline in resiliency in predicted future conditions within these nine analysis units, the best available scientific and commercial information indicates that the north/south portion, including analysis units 4 through 8, 10, 12, 14, and 22, is a portion that is likely to be in danger of extinction within the foreseeable future. The reductions in resiliency across these units will also affect the species' ability to recover from future catastrophic events (redundancy) and the species' capacity to adapt to future expected environmental changes (representation).

We then proceeded to the significance question, asking whether this portion of the range (*i.e.,* north/south portion including analysis units 4 through 8, 10, 12, 14, and 22) is significant. As discussed above, the Service's most recent definition of ''significant'' within agency policy guidance has been invalidated by court order (see *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018)). In undertaking this analysis for the short-tailed snake, we considered whether the north/south portion of the species' range may be significant based on its biological importance to the overall viability of the short-tailed snake. Therefore, for the purposes of this analysis, when considering whether this portion is significant, we considered whether the portion may (1) occur in a unique habitat or ecoregion for the species; (2) contain high-quality or high-value habitat relative to the remaining portions of the range, for the species' continued viability in light of the existing threats; (3) contain habitat that is essential to a specific life-history function for the species and that is not found in the other portions (for example, the principal breeding ground for the species); or (4) contain a large geographic portion of the suitable habitat relative to the remaining portions of the range for the species.

The north/south portion, consisting of nine analysis units, constitutes approximately 55 percent of the identified current suitable habitat across the short-tailed snake's range (278,599 of 503,161 hectares); and therefore is a large geographic area relative to the remaining portions of the range. Therefore, having assessed the north/south portion's biological significance in terms of the habitat considerations described above, we find the best available information indicates this portion is significant to the short-tailed snake.

Accordingly, having determined that the north/south portion of the species' range is (1) significant, and (2) likely to become in danger of extinction within the foreseeable future, we find that the short-tailed snake is likely to become an endangered species within the foreseeable future in a significant portion of its range. Accordingly, it meets the Act's definition of a threatened species. This is consistent with the courts' holding in *Desert Survivors* v. *Department of the Interior,* 321 F. Supp. 3d 1011 (N.D. Cal. 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that the short-tailed snake meets the Act's definition of a threatened species. Therefore, we propose to list the short-tailed snake 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://www.fws.gov/program/endangered-species*), 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 short-tailed snake. 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 short-tailed snake 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 (see 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 that 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) of the Act.

Examples of discretionary actions for the short-tailed snake that may be subject to conference and consultation procedures under section 7 of the Act are land management or other landscape-altering activities on Federal lands administered by the Department of Defense, U.S. Forest Service, and U.S. Fish and Wildlife Service, 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 Service, 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 issued under section 4(d) of the Act 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, for the short-tailed snake, 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 the proposed prohibitions and exceptions that would be established by protective regulation under section 4(d) of the Act (see II. Proposed Rule Issued Under Section 4(d) of the Act, below).

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 short-tailed snake by encouraging management of the habitat for the species in ways that facilitate conservation for the species. The provisions of this proposed rule are one of many tools that we would use to promote the conservation of the short-tailed snake. This proposed 4(d) rule would apply only if and when we make final the listing of the short-tailed snake 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).

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 short-tailed snake's conservation needs. As discussed previously in Summary of Biological Status and Threats, we have concluded that the short-tailed snake is likely to become in danger of extinction within the foreseeable future primarily due to habitat loss and degradation as a result of urbanization, development, and other land use changes (*e.g.,* agriculture and mining) and a lack of habitat management (*e.g.,* lack of prescribed fire in an ecosystem-appropriate fire interval and encroachment of invasive species). 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 short-tailed snake.

The protective regulations we are proposing for the short-tailed snake 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 protective regulation would provide for the conservation of the short-tailed snake by including all of these prohibitions because the short-tailed snake is at risk of extinction within the foreseeable future and putting these prohibitions in place would help to prevent further declines and preserve the species' remaining populations.

In particular, this proposed 4(d) rule would provide for the conservation of the short-tailed snake by prohibiting the following activities, unless they fall within specific exceptions or are otherwise authorized or permitted: 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.

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' remaining populations, slow their rate of decline, and decrease cumulative effects from other ongoing or future threats. Therefore, we propose to prohibit take of the short-tailed snake, except for take resulting from those actions and activities specifically excepted by the 4(d) rule.

The exceptions to the prohibition on take for the short-tailed snake would include all of the general exceptions to the prohibition on take of endangered wildlife, as set forth at 50 CFR 17.21(c)(2) through (4), along with other standard exceptions to the prohibitions (see Proposed Regulation Promulgation, below). The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

We are also considering additional exceptions to prohibitions including incidental take resulting from habitat management activities that maintain or restore short-tailed snake habitat including implementation of prescribed fire, actions to reduce the threat of invasive species such as feral hogs, or other activities that result in more suitable habitat conditions for the species. We are also considering a provision excepting incidental take from silviculture practices and forestry activities that follow best management practices. As described in Information Requested, we are soliciting comments from the public regarding specific prohibitions and exceptions to prohibitions of take of the short-tailed snake that we may consider in developing the final 4(d) rule for the species.

Despite the 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 (see 50 CFR 17.32).

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 short-tailed snake 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 short-tailed snake. 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.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that each Federal action agency ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the Federal agency would have already been required to consult with the Service even absent the designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to result in destruction or adverse modification of the critical habitat, the Federal action agency and

the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in 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.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in the 4(d) rule. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Critical Habitat Determinability

We determine that critical habitat is prudent. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. For the short-tailed snake, the species' needs can be inferred from habitat where it occurs but are not well known. In addition, a careful assessment of the economic impacts that may occur due to a critical habitat designation is ongoing. Until these efforts are complete, information sufficient to perform a required analysis of the impacts of the designation is lacking. Therefore, we conclude that the designation of critical habitat for the short-tailed snake is prudent, but not determinable at this time. The Act allows the Service an additional year to publish a critical habitat designation that is not determinable at the time of listing (16 U.S.C. 1533(b)(6)(C)(ii)).

Required Determinations

Clarity of the Rule

We are required by Executive Orders (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 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 coordinated with Tribes in the SSA development process and prior to the publication of this proposed rule. We will continue to work with Tribal entities during the development of a proposed rule for the designation of critical habitat for the short-tailed snake.

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, in paragraph (h), amend the List of Endangered and Threatened Wildlife by adding an entry for ''Snake, short-tailed'' in alphabetical order under REPTILES to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
REPTILES				
*	*	*	*	*
Snake, short-tailed	*Lampropeltis extenuata*	Wherever found	T	[**Federal Register** citation when published as a final rule]; 50 CFR 17.42(r).[4d]
*	*	*	*	*

■ 3. As proposed to be amended at 85 FR 61700 (September 30, 2020), 86 FR 18014 (April 7, 2021), 86 FR 62434 (November 9, 2021), 86 FR 66624 (November 23, 2021), and 87 FR 58648 (September 27, 2022), § 17.42 is further amended by adding paragraph (r) to read as follows:

§ 17.42 Special rules—reptiles.

* * * * *

(r) Short-tailed snake (*Lampropeltis extenuata*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to short-tailed snake. Except as provided under paragraph (r)(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 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 (c)(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.

Janine Velasco,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–21667 Filed 10–2–23; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register
Vol. 88, No. 190
Tuesday, October 3, 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 and other forms of information technology.

Comments regarding this information collection received by November 2, 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.

Forest Service

Title: Disposal of Mineral Materials.

OMB Control Number: 0596–0081.

Summary of Collection: The Forest Service (FS) is responsible for overseeing the management of National Forest System land. The Multiple-Use Mining Act of 1955 (30 U.S.C. 601, 603, 611–615) gives the FS specific authority to manage the disposal of mineral materials mined from National Forest land. FS uses form FS–2800–9, ''Contract for the Sale of Mineral Materials'' to collect detailed information on the planned mining and disposal operations as well as a contract for the sale of mineral materials.

Need and Use of the Information: The collected information enables the Forest Service to document planned operations, to prescribe the terms and conditions the agency deems necessary to protect surface resources, and to affect a binding contract agreement. Forest Service employees will evaluate the collected information to ensure that entities applying to mine mineral materials are financially accountable and will conduct their activities in accordance with the mineral regulations of title 36, Code of Federal Regulations, part 228, subpart C (36 CFR part 228).

If this information is not collected, the Forest Service would be unable to comply with Federal regulations to mine mineral materials, and operations could cause undue damage to surface resources.

Description of Respondents: Business or other for-profit.

Number of Respondents: 2,722.

Frequency of Responses: Reporting: on occasion.

Total Burden Hours: 7,040.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–21833 Filed 10–2–23; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology Comments regarding these information collections are best assured of having their full effect if received by November 2, 2023. 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.

Agricultural Marketing Service

Title: Origin of Livestock—Variance Request.

OMB Control Number: 0581–NEW.

Summary of Collection: The Organic Foods Production Act of 1990 (OFPA), as amended (7 U.S.C. 6501—6524), authorizes the Secretary of Agriculture to establish the National Organic Program (NOP) and accredit certifying agents to certify that farms and businesses meet national organic standards. The purpose of OFPA is to: (1) establish national standards governing the marketing of certain agricultural products as organically produced products; (2) assure

consumers that organically produced products meet a consistent standard; and (3) facilitate interstate commerce in fresh and processed food that is organically produced (7 U.S.C. 6501).

On April 5, 2022, the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) published the ''Origin of Livestock'' (OOL) final rule (87 FR 19740) related to livestock production practices under the USDA organic regulations (7 CFR part 205). AMS took this action to increase uniformity in organic dairy production practices and reduce organic certification discrepancies between certifying agents. The final rule clarified that certified organic dairy operations may transition nonorganic animals to organic production only once. After that, any animals added to a certified organic dairy operation must have been organically managed from the last third of gestation. To provide flexibility, the final rule allows [in 7 CFR 205.236(d)] small certified organic dairy operations to request a variance under limited conditions. A variance is a process by which an entity requests permission to not follow a particular regulatory requirement without repercussion of regulatory noncompliance. If the variance is approved by AMS, the small certified organic dairy operation may source, sell, liquidate, or transfer, as one event, organic dairy livestock that were transitioned to organic production (livestock that were not organically managed from no later than the last third of gestation).

Need and Use of the Information: AMS will be able to use other information submitted as part of the currently approved information collection package for the NOP (OMB #0581–0191) to determine if the applicants qualify as a small business [the first variance eligibility criterion at 7 CFR 205.236(d)(1)].

However, this new variance request specifies new information not currently collected by AMS. This new information is described in the USDA organic regulations in 7 CFR 205.236(d)(1)(i)-(iii) (see above). To apply for a variance, respondents (small certified organic dairy operations) will need to submit to AMS, through their certifying agent, records that demonstrate that they qualify for a variance due to bankruptcy proceedings, forced sales, insolvency, or an intergenerational transfer.

The new information collected will be used by AMS to grant (or deny) individual, small certified organic dairy operations a variance from the USDA organic regulations in regard to the origin of livestock.

Description of Respondents: Business or other for-profit; Farms.

Number of Respondents: 56.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 98.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–21832 Filed 10–2–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

[Docket No.: RHS–23–MFH–0021]

60-Day Notice of Proposed Information Collection: Section 515 Multi-Family Housing Preservation and Revitalization Restructuring (MPR) Demonstration Program; OMB Control No.: 0575–0190

AGENCY: Rural Housing Service (RHS), USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the United States Department of Agriculture (USDA) Rural Housing Service (RHS) announces its' intention to request a revision of a currently approved information collection and invites comments on this information collection.

DATES: Comments on this notice must be received by December 4, 2023, to be assured of consideration.

ADDRESSES: Comments may be submitted by the Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the ''Search Field'' box, labeled ''Search for dockets and documents on agency actions,'' enter the following docket number: (RHS–23–MFH–0021), and click ''Search.'' To submit public comments, select the ''Comment'' button. Before inputting your comments, you may also review the ''Commenter's Checklist'' (optional). Insert your comments under the ''Comment'' title, click ''Browse'' to attach files (if applicable). Input your email address and select an identity category then click ''Submit Comment.'' Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''FAQ'' link.

FOR FURTHER INFORMATION CONTACT: MaryPat Daskal, Chief, Branch 1, Rural Development Innovation Center—Regulations Management Division, USDA, 1400 Independence Avenue SW, STOP 1522, South Building, Washington, DC 20250–1522. Telephone: (202) 720–7853. Email *MaryPat.Daskal@usda.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RHS is submitting to OMB for revision.

Title: Section 515 Multifamily Preservation and Revitalization (MPR) Demonstration Program.

OMB Control Number: 0575–0190.

Expiration Date of Approval: August 31, 2024.

Type of Request: Revision of a currently approved information collection.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.57 hour per response.

Respondents: Individuals, partnerships, public and private non-profit corporations, agencies, institutions, organizations, and Indian tribes.

Estimated Number of Respondents: 150.

Estimated Number of Responses: 10,031

Estimated Number of Responses per Respondent: 66.87.

Estimated Annual Reporting Burden on Respondents: 15,447 hours.

Estimated Annual Recordkeeping Burden on Respondents: 350 hours.

Estimated Total Annual Burden on Respondents: 15,797 hours.

Abstract: The United State Department of Agriculture (USDA), Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 2006 (Pub. L. 109–97) provides funding for, and authorizes Rural Development (RD) to conduct a demonstration program for the preservation and revitalization of the Section 515 Multi-Family Housing portfolio. Section 515 of the Housing Act of 1949 (42 U.S.C. 1485) provides Rural Development the authority to make loans for low-income Multi-Family Housing and related facilities.

The information contained in this collection will be used to determine applicant eligibility for this demonstration program. If an applicant proposal is selected, that applicant will be notified of the selection and will be

provided conditions in which the agency will provide funding.

This MPR demonstration program continues to adjust the various opportunities available to demonstrate effective methods of providing the needed financial resources not otherwise available to current owners and transferees. Using alternative forms of financing, these owners will preserve existing Agency-financed Rural Rental Housing and Farm Labor Housing and extend the property's useful life for tenants meeting RD eligibility requirements. Since the inception of the MPR demonstration program in 2006, revisions and adjustments in the nature of the program have necessitated certain revisions in the context, formatting, and use of the original forms in this package to permit RD's ability to provide these needed financial opportunities.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent by the Federal eRulemaking Portal: Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.

Copies of this information collection can be obtained from Kimble Brown, Rural Development Innovation Center, USDA, 1400 Independence Avenue SW, STOP 1522, South Building, Washington, DC 20250–1522. Telephone: (202) 720–6780. Email *kimble.brown@usda.gov.*

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Joaquin Altoro,

Administrator, Rural Housing Service.

[FR Doc. 2023–21764 Filed 10–2–23; 8:45 am]

BILLING CODE 3410–XV–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Arkansas Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of 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 Arkansas Advisory Committee (Committee) will hold a virtual (online) meeting Monday, October 23, 2023 at 12:30 p.m. Central Time. The purpose of the meeting is to discuss public distribution of the recently published IDEA Compliance and Implementatioin in AR Schools report and to begin discussion of other civil rights topics in the state.

DATES: The meeting will be held on Monday October 23, 2023 at 12:30 p.m. central time.

ADDRESSES:

Web Access (audio/visual): Register at: *https://www.zoomgov.com/j/1609293461?pwd=RlN3TUZDNS93dlBnUXBjcWFxRzdFdz09.*

Phone Access (audio only): 833–435–1820, Meetin ID: 160 929 3461.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, Designated Federal Officer, at *mwojnaroski@usccr.gov* or (202) 618–4158.

SUPPLEMENTARY INFORMATION: Members of the public may join online or listen to this discussion through the above registration link or call-in number. An open comment period will be provided to allow members of the public to make a statement as time allows. 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. Closed captions will be provided. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Melissa Wojnaroski at *mwojnaroski@usccr.gov.*

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Arkansas 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 Unit at the above email or street address.

Agenda

I. Welcome & Roll Call
II. Report publication and distribution: IDEA Compliance and Implementation in AR Schools
III. Discussion of other civil rights topics in the state
IV. Next Steps
V. Public Comment
VI. Adjournment

Dated: September 28, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–21869 Filed 10–2–23; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meetings.

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 Pennsylvania Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a business meeting on Wednesday October 11, 2023 from 12 p.m.-1 p.m. eastern time. The purpose of the meeting is for the Committee to select the next topic of study.

DATES: Wednesday October 11, 2023 from 12 p.m.–1 p.m. eastern time.

ADDRESSES: *Registration (Audio/Visual): https://www.zoomgov.com/j/1614255857?pwd=WUN2Q3VwdDRJZVA5K0RxcUhlMjN3UT09 Telephone (Audio Only):* (833) 435–1820 Toll Free; Meeting ID: 161 425 5857.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or (202) 618–4158.

SUPPLEMENTARY INFORMATION: Members of the public may listen to these discussions. Committee meetings are available to the public through the

above listed online registration link (audio/visual) or teleconference phone line (audio only). An open comment period will be provided to allow members of the public to make a statement as time allows. 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. Closed captions will be provided. Indivudals with disabilities requiring other accommodations may contact Corrine Sanders at *csanders@usccr.gov* 10 days prior to the meeting to make their request.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to *csanders@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (202) 618–4158.

Records generated from this meeting may be inspected and reproduced as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Pennsylvania 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 Unit at the above email address.

Agenda

Welcome and Roll Call

Discussion: To discuss and select next topic of study

Public Comment

Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given fewer than 15 calendar days prior to the meeting because of the exceptional circumstances of report completion timeline.

Dated: September 28, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–21879 Filed 10–2–23; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2152]

Designation of New Grantee; Foreign-Trade Zone 47; Boone County, Kentucky

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

The Foreign-Trade Zones (FTZ) Board (the Board) has considered the application (docketed June 20, 2023) submitted by the Greater Cincinnati Foreign Trade Zone, Inc., grantee of FTZ 47, requesting reissuance of the grant of authority for said zone to the Northern Kentucky Foreign Trade Zone, Inc., which has accepted such reissuance subject to approval by the FTZ Board. Upon review, the Board finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest.

Therefore, the Board approves the application and recognizes the Northern Kentucky Foreign Trade Zone, Inc. as the new grantee for Foreign-Trade Zone 47, subject to the FTZ Act and the Board's regulations, including section 400.13.

Dated: September 27, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2023–21826 Filed 10–2–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–555–002, A–570–152, A–301–805, A–533–917, A–557–825, A–471–808, A–583–872, A–489–849, A–552–836]

Certain Paper Shopping Bags From Cambodia, the People's Republic of China, Colombia, India, Malaysia, Portugal, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable October 3, 2023.

FOR FURTHER INFORMATION CONTACT: Charles Doss (Cambodia) at (202) 482–4474; Yang Jin Chun (the People's Republic of China (China)) at (202) 482–5760; Laurel LaCivita (Colombia) at (202) 482–4243; David Crespo (India) at (202) 482–3693; Dan Alexander (Malaysia) at (202) 482–4313; Colin Thrasher (Portugal) at (202) 482–3004; Brittany Bauer (Taiwan) at (202) 482–3860; Howard Smith (the Republic of Turkey (Turkey)) at (202) 482–5193; and Myrna Lobo (the Socialist Republic of Vietnam (Vietnam)) at (202) 482–2371, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On June 20, 2023, the U.S. Department of Commerce (Commerce) initiated the less-than-fair-value (LTFV) investigations of imports of certain paper shopping bags (paper bags) from Cambodia, China, Colombia, India, Malaysia, Portugal, Taiwan, Turkey, and Vietnam.[1] Currently, the preliminary determinations are due no later than November 7, 2023.

Postponement of Preliminary Determinations

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in an LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) the petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On September 19, 2023, the Coalition For Fair Trade in Shopping Bags (the petitioner) submitted a timely request that Commerce postpone the

[1] *See Certain Paper Shopping Bags from Cambodia, the People's Republic of China, Colombia, India, Malaysia, Portugal, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 41589 (June 27, 2023).

preliminary determinations in the LTFV investigations for Cambodia, China, Colombia, India, Malaysia, Portugal, Taiwan, Turkey, and Vietnam.[2] The petitioner stated that it requests postponement due to concerns that Commerce will need more time to issue supplemental questionnaires to address deficiencies in the respondents' initial questionnaire responses.[3]

For the reasons stated above, and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act and 19 CFR 351.205(e), is postponing the deadline for the preliminary determinations by 50 days (*i.e.,* 190 days after the date on which these investigations were initiated). As a result, Commerce will issue its preliminary determinations no later than December 27, 2023. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations in these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed at a later date.

Notification to Interested Parties

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: September 27, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–21824 Filed 10–2–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with 19 CFR 351.213, that the U.S. Department of Commerce (Commerce) conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting date.

Respondent Selection

In the event Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 35 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. Commerce invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the review.

In the event Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, Commerce finds that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of a review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to a review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection. Parties are requested to: (a) identify which companies subject to review previously were collapsed; and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete a Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of a proceeding where Commerce considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that requests a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.[1] Section 773(e) of the Act states that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation

[2] *See* Petitioner's Letter, ''Petitioner's Request for Postponement of the Preliminary Determinations,'' dated September 19, 2023.

[3] *Id.* at 1.

[1] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial Section D responses.

Opportunity to Request a Review: Not later than the last day of October 2023,[2] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in October for the following periods:

	Period
Antidumping Duty Proceedings	
AUSTRALIA: Hot-Rolled Steel Flat Products, A–602–809	10/1/22—9/30/23
BRAZIL: Carbon and Certain Alloy Steel Wire Rod A–351–832	10/1/22—9/30/23
INDIA: Stainless Steel Flanges, A–533–877	10/1/22—9/30/23
INDONESIA: Carbon and Certain Alloy Steel Wire Rod, A–560–815	10/1/22—9/30/23
JAPAN: Hot-Rolled Steel Flat Products, A–588–874	10/1/22—9/30/23
MEXICO: Carbon and Certain Alloy Steel Wire Rod, A–201–830	10/1/22—9/30/23
MEXICO: Refillable Stainless Steel Kegs, A–201–849	10/1/22—9/30/23
MOLDOVA: Carbon and Certain Alloy Steel Wire Rod, A–841–805	10/1/22—9/30/23
REPUBLIC OF KOREA: Hot-Rolled Steel Flat Products, A–580–883	10/1/22—9/30/23
TAIWAN: Steel Concrete Reinforcing Bar, A–583–859	10/1/22—9/30/23
THAILAND: Glycine, A–549–837	10/1/22—9/30/23
THE NETHERLANDS: Hot-Rolled Steel Flat Products, A–421–813	10/1/22—9/30/23
THE PEOPLE'S REPUBLIC OF CHINA: Barium Carbonate, A–570–880	10/1/22—9/30/23
THE PEOPLE'S REPUBLIC OF CHINA: Barium Chloride, A–570–007	10/1/22—9/30/23
THE PEOPLE'S REPUBLIC OF CHINA: Boltless Steel Shelving Units Prepackaged For Sale, A–570–018	10/1/22—9/30/23
THE PEOPLE'S REPUBLIC OF CHINA: Electrolytic Manganese Dioxide, A–570–919	10/1/22—9/30/23
THE PEOPLE'S REPUBLIC OF CHINA: Polyvinyl Alcohol, A–570–879	10/1/22—9/30/23
THE PEOPLE'S REPUBLIC OF CHINA: Steel Wire Garment Hangers, A–570–918	10/1/22—9/30/23
TRINIDAD AND TOBAGO: Carbon and Certain Alloy Steel Wire Rod, A–274–804	10/1/22—9/30/23
TURKEY: Hot-Rolled Steel Flat Products, A–489–826	10/1/22—9/30/23
UNITED KINGDOM: Hot-Rolled Steel Flat Products, A–412–825	10/1/22—9/30/23
Countervailing Duty Proceedings	
BRAZIL: Carbon and Certain Alloy Steel Wire Rod, C–351–833	1/1/22—12/31/22
INDIA: Stainless Steel Flanges, C–533–878	1/1/22 –12/31/22
IRAN: Roasted In-Shell Pistachios, C–507–601,	1/1/22—12/31/22
REPUBLIC OF KOREA: Certain Hot-Rolled Steel Flat Products, C–580–884	1/1/22—12/31/22
THE PEOPLE'S REPUBLIC OF CHINA: Boltless Steel Shelving Units Prepackaged For Sale, C–570–019	1/1/22—12/31/22
Suspension Agreements	
ARGENTINA: Lemon Juice, A–357–818	10/1/22—9/30/23
MEXICO: Fresh Tomatoes,[3] A–201–820	9/1/22—8/31/23
RUSSIA: Uranium, A–821–802	10/1/22—9/30/23

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which was produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Note that, for any party Commerce was unable to locate in prior segments, Commerce will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested

[2] Or the next business day, if the deadline falls on a weekend, Federal holiday or any other day when Commerce is closed.

[3] In the notice of opportunity to request administrative review for September anniversary orders, published in the **Federal Register** on September 6, 2023 (88 FR 60923), Commerce inadvertently listed an incorrect period of review for this case. The correct period of review is listed above.

party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), and *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), Commerce clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders.[4]

Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative reviews.[5] Accordingly, the NME entity will not be under review unless Commerce specifically receives a request for, or self-initiates, a review of the NME entity.[6] In administrative reviews of antidumping duty orders on merchandise from NME countries where a review of the NME entity has not been initiated, but where an individual exporter for which a review was initiated does not qualify for a separate rate, Commerce will issue a final decision indicating that the company in question is part of the NME entity. However, in that situation, because no review of the NME entity was conducted, the NME entity's entries were not subject to the review and the rate for the NME entity is not subject to change as a result of that review (although the rate for the individual exporter may change as a function of the finding that the exporter is part of the NME entity). Following initiation of an antidumping administrative review when there is no review requested of the NME entity, Commerce will instruct CBP to liquidate entries for all exporters not named in the initiation notice, including those that were suspended at the NME entity rate.

All requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) on Enforcement and Compliance's ACCESS website at *https://access.trade.gov.*[7] Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[8]

Commerce will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of October 2023. If Commerce does not receive, by the last day of October 2023, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, Commerce will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period of the order, if such a gap period is applicable to the period of review.

Establishment of and Updates to the Annual Inquiry Service List

On September 20, 2021, Commerce published the final rule titled ''*Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*'' in the **Federal Register**.[9] On September 27, 2021, Commerce also published the notice entitled ''*Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions*'' in the **Federal Register**.[10] The *Final Rule* and *Procedural Guidance* provide that Commerce will maintain an annual inquiry service list for each order or suspended investigation, and any interested party submitting a scope ruling application or request for circumvention inquiry shall serve a copy of the application or request on the persons on the annual inquiry service list for that order, as well as any companion order covering the same merchandise from the same country of origin.[11]

In accordance with the *Procedural Guidance,* for orders published in the **Federal Register** before November 4, 2021, Commerce created an annual inquiry service list segment for each order and suspended investigation. Interested parties who wished to be added to the annual inquiry service list for an order submitted an entry of appearance to the annual inquiry service list segment for the order in ACCESS, and on November 4, 2021, Commerce finalized the initial annual inquiry service lists for each order and suspended investigation. Each annual inquiry service list has been saved as a public service list in ACCESS, under each case number, and under a specific segment type called ''AISL-Annual Inquiry Service List.'' [12]

As mentioned in the *Procedural Guidance,* beginning in January 2022, Commerce will update these annual inquiry service lists on an annual basis when the *Opportunity Notice* for the anniversary month of the order or suspended investigation is published in the **Federal Register**.[13] Accordingly, Commerce will update the annual inquiry service lists for the above-listed antidumping and countervailing duty proceedings. All interested parties wishing to appear on the updated annual inquiry service list must take one of the two following actions: (1) new interested parties who did not previously submit an entry of appearance must submit a new entry of appearance at this time; (2) interested

[4] *See* the Enforcement and Compliance website at *https://www.trade.gov/us-antidumping-and-countervailing-duties.*

[5] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[6] In accordance with 19 CFR 351.213(b)(1), parties should specify that they are requesting a review of entries from exporters comprising the entity, and to the extent possible, include the names of such exporters in their request.

[7] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[8] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[9] *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws,* 86 FR 52300 (September 20, 2021) (*Final Rule*).

[10] *See Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions,* 86 FR 53205 (September 27, 2021) (*Procedural Guidance*).

[11] *Id.*

[12] This segment has been combined with the ACCESS Segment Specific Information (SSI) field which will display the month in which the notice of the order or suspended investigation was published in the **Federal Register**, also known as the anniversary month. For example, for an order under case number A–000–000 that was published in the **Federal Register** in January, the relevant segment and SSI combination will appear in ACCESS as ''AISL-January Anniversary.'' Note that there will be only one annual inquiry service list segment per case number, and the anniversary month will be pre-populated in ACCESS.

[13] *See Procedural Guidance,* 86 FR at 53206.

parties who were included in the preceding annual inquiry service list must submit an amended entry of appearance to be included in the next year's annual inquiry service list. For these interested parties, Commerce will change the entry of appearance status from ''Active'' to ''Needs Amendment'' for the annual inquiry service lists corresponding to the above-listed proceedings. This will allow those interested parties to make any necessary amendments and resubmit their entries of appearance. If no amendments need to be made, the interested party should indicate in the area on the ACCESS form requesting an explanation for the amendment that it is resubmitting its entry of appearance for inclusion in the annual inquiry service list for the following year. As mentioned in the *Final Rule*,[14] once the petitioners and foreign governments have submitted an entry of appearance for the first time, they will automatically be added to the updated annual inquiry service list each year.

Interested parties have 30 days after the date of this notice to submit new or amended entries of appearance. Commerce will then finalize the annual inquiry service lists five business days thereafter. For ease of administration, please note that Commerce requests that law firms with more than one attorney representing interested parties in a proceeding designate a lead attorney to be included on the annual inquiry service list.

Commerce may update an annual inquiry service list at any time as needed based on interested parties' amendments to their entries of appearance to remove or otherwise modify their list of members and representatives, or to update contact information. Any changes or announcements pertaining to these procedures will be posted to the ACCESS website at *https://access.trade.gov.*

Special Instructions for Petitioners and Foreign Governments

In the *Final Rule,* Commerce stated that, ''after an initial request and placement on the annual inquiry service list, both petitioners and foreign governments will automatically be placed on the annual inquiry service list in the years that follow.'' [15] Accordingly, as stated above and pursuant to 19 CFR 351.225(n)(3), the petitioners and foreign governments will not need to resubmit their entries of appearance each year to continue to be included on the annual inquiry service list. However, the petitioners and foreign governments are responsible for making amendments to their entries of appearance during the annual update to the annual inquiry service list in accordance with the procedures described above.

This notice is not required by statute but is published as a service to the international trading community.

Dated: September 25, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2023–21799 Filed 10–2–23; 8:45 am]

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[14] *See Final Rule,* 86 FR at 52335.

[15] *Id.*

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–870]

Certain New Pneumatic Off-the-Road Tires From India: Final Results of Countervailing Duty Administrative Review; 2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of certain new pneumatic off-the-road tires (OTR Tires) from India. The period of review (POR) January 1, 2021, through December 31, 2021.

DATES: Applicable October 3, 2023.

FOR FURTHER INFORMATION CONTACT: Mark Hoadley, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3148.

SUPPLEMENTARY INFORMATION:

Background

On April 5, 2023, Commerce published the *Preliminary Results* and invited interested parties to comment.[1] These final results cover 23 companies for which an administrative review was initiated.[2] We selected two companies for individual examination: ATC Tires Private Limited (ATC) and Balkrishna Industries Ltd. (BKT). For a description of the events that followed the *Preliminary Results, see* the Issues and Decision Memorandum.[3] Commerce conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The products covered by the *Order* are OTR Tires from India. For a complete description of the scope, *see* the Issues and Decision Memorandum.[4]

Analysis of Comments Received

We addressed all issues raised in the case and rebuttal briefs in the Issues and Decision Memorandum. A list of these issues is attached in Appendix I to this notice. The Issues and Decision Memorandum is a public document and is available electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Services System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our analysis of the comments received from interested parties, a review of the record, and for the reasons explained in the Issues and Decision Memorandum, we made certain revisions to the subsidy calculations for ATC and BKT, as detailed in the Issues and Decision Memorandum.[5] As a result of the changes to ATC's and BKT's rates, the final rate for the 21 non-selected companies under review also changed.

Methodology

Commerce is conducting this administrative review in accordance with section 751(a)(1)(A) of the Act. For each of the subsidy programs found countervailable, we find that there is a subsidy, *i.e.,* a financial contribution from an authority that gives rise to a benefit to the recipient and that the subsidy is specific.[6] The Issues and

[1] *See Certain New Pneumatic Off-the-Road Tires from India: Preliminary Results of Countervailing Duty Administrative Review;* 2021, 88 FR 20125 (April 5, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 50034 (September 7, 2021).

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Certain New Pneumatic Off-the-Road Tires from India; 2021,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See* Issues and Decision Memorandum.

[5] *Id.* at 4.

[6] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E)

Continued

Decision Memorandum contains a full description of the methodology underlying Commerce's conclusions.

Companies Not Selected for Individual Review

Generally, Commerce looks to section 705(c)(5) of the Act for guidance for calculating the rate for companies that were not selected for individual examination in an administrative review. Under section 705(c)(5)(A) of the Act, the all-others rate is normally determined by weight averaging the countervailable subsidy rates established for each of the companies individually investigated, excluding zero and *de minimis* rates or any rates based solely on the facts available.

In this review, in accordance with 19 CFR 351.221(b)(5), we calculated a subsidy rate of 2.20 percent for ATC and a subsidy rate of 0.33 percent for BKT. Therefore, we preliminarily determine to apply the weighted average of the net subsidy rates calculated for ATC and BKT using publicly ranged sales data submitted by those respondents to the non-selected companies.[7] The companies for which a review was requested, and which were not selected as mandatory respondents or found to be cross-owned with a mandatory respondent, are listed in Appendix 2.

Final Results of Review

We determine that the following total net countervailable subsidy rates exist for the period January 1, 2021, through December 31, 2021:

Company	Subsidy rate (percent ad valorem)
ATC Tires Private Limited[8] ..	2.20
Balkrishna Industries Ltd	0.33
Companies Not Selected for Individual Examination	1.58

Disclosure

Commerce intends to disclose the calculations performed in connection with these final results of review to parties in this review within five days after public announcement of the final results or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(2), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, countervailing duties on all appropriate entries of subject merchandise in accordance with the final results of this review, for the above-listed companies at the applicable *ad valorem* assessment rates listed. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, Commerce intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies listed above on shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposits, effective upon the publication of the final results of this review, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction or return of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the destruction or return of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: September 27, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

Appendix II

List of Companies Not Selected for Individual Examination

Apollo Tyres Ltd.
Asian Tire Factory Ltd.
Cavendish Industries Ltd.
CEAT Ltd.
Celite Tyre Corporation
Emerald Resilient Tyre Manufacturer
HRI Tires India
Innovative Tyres & Tubes Limited
JK Tyres and Industries Ltd.
K.R.M. Tyres
M/S. Caroline Furnishers Pvt Ltd.
MRF Limited
MRL Tyres Limited (Malhotra Rubbers Ltd.)
OTR Laminated Tyres (I) Pvt. Ltd.
Rubberman Enterprises Pvt. Ltd.
Sheetla Polymers
Speedways Rubber Company
Sun Tyres & Wheel Systems
Sundaram Industries Private Limited
Superking Manufacturers (Tyre) Pvt., Ltd.
TVS Srichakra Limited

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of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[7] *See* Memorandum, ''Calculation of Subsidy Rate for Non-Selected Companies Under Review,'' dated concurrently with this memorandum.

[8] This rate applies to ATC, ATC Tires AP Private Ltd., and Yokohama India Private Limited.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–863]

Honey From the People's Republic of China: Continuation of Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on honey from the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD order.

DATES: Applicable September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Emily Halle, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0176.

SUPPLEMENTARY INFORMATION:

Background

On December 10, 2001, Commerce published in the **Federal Register** the AD order on honey from China.[1] On March 1, 2023, the ITC instituted,[2] and Commerce initiated,[3] the fourth sunset review of the *Order,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). As a result of its review, Commerce determined that revocation of the *Order* would likely lead to continuation or recurrence of dumping, and, therefore, notified the ITC of the magnitude of the margins of dumping likely to prevail should the *Order* be revoked.[4]

On September 27, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Order* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

Scope of the Order

The products covered by this *Order* are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight and flavored honey.

The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

The merchandise subject to the *Order* is currently classifiable under subheadings 0409.00.00, 1702.90.90, 2106.90.99, 0409.00.0010, 0409.00.0035, 0409.00.0005, 0409.00.0045, 0409.00.0056, and 0409.00.0065 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, Commerce's written description of the merchandise under the *Order* is dispositive.

Also, included in the scope are blends of honey and rice syrup, regardless of the percentage of honey contained in the blend.

Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to a continuation or a recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), Commerce hereby orders the continuation of the *Order.* U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Order* will be September 27, 2023.[6] Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year review of the *Order* not later than 30 days prior to the fifth anniversary of the date of the last determination by the ITC.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return, destruction, or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply is a violation of the APO which may be subject to sanctions.

Notification to Interested Parties

This five-year sunset review and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: September 27, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–21823 Filed 10–2–23; 8:45 am]

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[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Honey from the People's Republic of China,* 66 FR 63670 (December 10, 2001) (*Order*).

[2] *See Honey from China; Institution of a Five-Year Review,* 88 FR 12992 (March 1, 2023).

[3] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 12915 (March 1, 2023).

[4] *See Honey from the People's Republic of China: Final Results of the Expedited Fourth Sunset Review of the Antidumping Duty Order,* 88 FR 37206 (June 7, 2023).

[5] *See Honey from China; Determination,* 88 FR 66507 (September 27, 2023).

[6] *Id.*

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Artificial Intelligence Advisory Committee

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Institute of Standards and Technology (NIST) announces that the National Artificial Intelligence Advisory Committee (NAIAC or Committee) will hold an open meeting in-person and virtually via web conference on October 19, 2023, from 10:00 a.m.–1:30 p.m. Eastern time. The primary purpose of this meeting is for the Committee to report working group findings, identify actionable recommendations, and receive an update from the NAIAC Law Enforcement Subcommittee. The final agenda will be posted to the NAIAC website: *ai.gov/naiac/.*

DATES: The meeting will be held on Thursday, October 19, 2023 from 10:00 a.m.–1:30 p.m. Eastern time.

ADDRESSES: The meeting will be held in-person and virtually via web conference from the U.S. Department of Commerce, Herbert C. Hoover Federal Building, located at 1401 Constitution Ave. NW, Washington, DC 20230. For instructions on how to attend and/or participate in the meeting, please see the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Alicia Chambers, Committee Liaison Officer, National Institute of Standards

and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, *alicia.chambers@nist.gov* or 301–975–5333, or Melissa Banner, Designated Federal Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, *melissa.banner@nist.gov* or 301–975–5245. Please direct any inquiries to *naiac@nist.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. 1001 *et seq.,* notice is hereby given that the NAIAC will meet on Thursday, October 19, 2023, from 10:00 a.m.–1:30 p.m. Eastern time. The meeting will be open to the public and will be held in-person and virtually via web conference. The primary purpose of this meeting is for the Committee to report working group findings, identify actionable recommendations, and receive an update from the NAIAC Law Enforcement Subcommittee. The final agenda and meeting time will be posted to the NAIAC website: *ai.gov/naiac/.*

The NAIAC is authorized by section 5104 of the National Artificial Intelligence Initiative Act of 2020 (Pub. L. 116–283, in accordance with the provisions of the Federal Advisory Committee Act, as amended (FACA), 5 U.S.C. 1001 *et seq.* The Committee advises the President and the National Artificial Intelligence Initiative Office on matters related to the National Artificial Intelligence Initiative. Additional information on the NAIAC is available at *ai.gov/naiac/.*

Comments: Individuals and representatives of organizations who would like to offer comments and suggestions related to items on the Committee's agenda for this meeting are invited to submit comments in advance of the meeting. Approximately ten minutes will be reserved for public comments, which will be read on a first-come, first-served basis. Please note that all comments submitted via email will be treated as public documents and will be made available for public inspection. All comments must be submitted via email with the subject line ''October 19, 2023, NAIAC Meeting Comments'' to *naiac@nist.gov* by 5:00 p.m. Eastern Time, Wednesday, October 18, 2023. NIST will not accept comments accompanied by a request that part or all of the comment be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive, protected, or personal information, such as account numbers, Social Security numbers, or names of other individuals.

Virtual Admittance Instructions: The meeting will be broadcast virtually via web conference. Registration is required to view the web conference. Instructions to register will be made available on *ai.gov/naiac/#MEETINGS.* Registration will remain open until the conclusion of the meeting.

In-Person Admittance Instruction: Limited space is available on a first-come, first-served basis for anyone who wishes to attend in person. Registration is required for in-person attendance. Registration details will be posted at *ai.gov/naiac/#MEETINGS.* Registration will close at 5:00 p.m. Eastern time on Wednesday, October 18, 2023.

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–21808 Filed 10–2–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Science Advisory Board

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public meetings.

SUMMARY: This notice sets forth the schedule and proposed agenda for a meeting of the Science Advisory Board (SAB). The members will discuss issues outlined in the section on Matters to be considered.

DATES: The meeting is scheduled for November 15, 2023 from 8:30 a.m. to 5:00 p.m. Eastern Standard Time (EST) and November 16, 2023 from 8:30 a.m. to 5:00 p.m. EST. These times and the agenda topics described below are subject to change. For the latest agenda please refer to the SAB website: *http://sab.noaa.gov/SABMeetings/.*

ADDRESSES: The meeting location is to be determined. The exact meeting location and a link for the webinar registration will be posted, when available, on the SAB website: *https://sab.noaa.gov/current-meetings/.*

FOR FURTHER INFORMATION CONTACT: Casey Stewart, Executive Director, SSMC3, Room 11360, 1315 East-West Hwy., Silver Spring, MD 20910; Phone Number: 240–381–0833; Email: *noaa.scienceadvisoryboard@noaa.gov;* or visit the SAB website at *https://sab.noaa.gov/current-meetings/.*

SUPPLEMENTARY INFORMATION: The NOAA Science Advisory Board (SAB) was established by a Decision Memorandum dated September 25, 1997, and is the only Federal Advisory Committee with responsibility to advise the Under Secretary of Commerce for Oceans and Atmosphere on strategies for research, education, and application of science to operations and information services. SAB activities and advice provide necessary input to ensure that National Oceanic and Atmospheric Administration (NOAA) science programs are of the highest quality and provide optimal support to resource management.

Status: The November 15–16, 2023 meeting will be open to public participation with a 15-minute public comment period at 4:45 p.m. EST on November 15. The SAB expects that public statements presented at its meetings will not be repetitive of previously submitted verbal or written statements. In general, each individual or group making a verbal presentation will be limited to a total time of three minutes. Written comments for the November 16–26, 2023 meeting should be received by the SAB Executive Director's Office (*noaa.scienceadvisoryboard@noaa.gov*) by November 08, 2023 to provide sufficient time for SAB review. Written comments received by the SAB Executive Director after these dates will be distributed to the SAB, but may not be reviewed prior to the meeting date.

Special Accommodations: These meetings are physically accessible to people with disabilities. Requests for special accommodations may be directed to the Executive Director no later than 12 p.m. on November 08, 2023.

Matters to be Considered: The meeting on November 15–16, 2023 will include the following topics: (1) the NOAA Update, (2) NOAA Science Update, (3) Presentation on the NOAA Response to Open Data/Open Science Report, (4) Presentation on the NOAA Response to EISWG S2S Report, (5) Presentation on the NOAA Response to ESMWG Rapidly Changing Marine Environment Report, (6) Presentation on NOAA Response to DAARWG Report on the NESDIS Common Cloud Framework, and (7) Presentation on Revisions to the P3 Report, (8) Presentation on the CWG Report on Operational Oceanographic Forecasting for Climate, and (9) Presentation on the EISWG Report on Radar Gaps. Meeting materials, including work products, will also be available on the SAB website: *https://*

sab.noaa.gov/current-meetings/current-meeting-documents/.

David Holst,

Chief Financial Officer/Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2023–21884 Filed 10–2–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD442]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public hybrid meeting of its Risk Policy Working Group to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). This meeting will be held in-person with a webinar option. Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, November 7, 2023, at 8:30 a.m.

ADDRESSES:

Meeting address: This meeting will be held at the Beauport Hotel, 55 Commercial Street, Gloucester, MA 01930; telephone: (978) 282–0008.

Webinar registration URL information: https://attendee.gotowebinar.com/register/3817101285012180064.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Risk Policy Working Group (RPWG) will address the terms of reference (TORs) approved by the New England Fishery Management Council (Council), including progress made in reviewing the Council's current Risk Policy, and Risk Policy Road Map (TOR 1). The RPWG will continue to consider possible changes to the Risk Policy (TOR 2), focusing on goals and objectives, identifying and defining key terms, and outlining how an updated Risk Policy could interact with existing ABC control rules used in each of the Council's Fishery Management Plans. Other business will be discussed, if necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Ph.D., Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: September 28, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–21860 Filed 10–2–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD437]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council (Council) Charter Halibut Management Committee will meet via web conference.

DATES: The meeting will be held on Friday, October 20, 2023, from 12:30 p.m. to 4:30 p.m., Alaska time.

ADDRESSES: The meeting will be a web conference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/3009.*

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave, Suite 400, Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting via video conference are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Sarah Marrinan, Council staff; phone: (907) 271–2809; email: *sarah.marrinan@noaa.gov.* For technical support, please contact our admin Council staff, email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Friday, October 20, 2023

The Charter Halibut Management Committee will meet to make recommendations on management measures to analyze for the 2024 season. The Alaska Department of Fish and Game (ADF&G) will go over the final numbers for 2022 and preliminary harvest and effort numbers for 2023. Then the committee will discuss development of the 2024 management measures for analysis. Additional topics for consideration include: a draft terms of reference, a discussion of the December timeline, unguided rental boats and any other business. The agenda is subject to change, and the latest version will be posted *https://meetings.npfmc.org/Meeting/Details/3009* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/3009.*

Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/3009.*

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

Dated: September 28, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–21859 Filed 10–2–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD400]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice of issuance of letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, notification is hereby given that a Letter of Authorization (LOA) has been issued to TGS for the take of marine mammals incidental to geophysical survey activity in the Gulf of Mexico.

DATES: The LOA is effective from September 29, 2023 through September 28, 2024.

ADDRESSES: The LOA, LOA request, and supporting documentation are available online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-oil-and-gas-industry-geophysical-survey-activity-gulf-mexico.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Rachel Wachtendonk, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which: (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively ''industry operators''), in U.S. waters of the Gulf of Mexico (GOM) over the course of 5 years (86 FR 5322, January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

Summary of Request and Analysis

TGS plans to conduct a three-dimensional (3D) ocean bottom node (OBN) survey in the Green Canyon, Ewing Bank, and Atwater Valley protraction areas, including approximately 380 lease blocks. Approximate water depths of the survey area range from 150 to 2,000 meters (m). See section F of the LOA application for a map of the area.

TGS anticipates using two source vessels, each towing low-frequency airgun sources known as Gemini (also referred to as a dual barbell source). Please see TGS's application for additional detail. The Gemini source was not included in the acoustic exposure modeling developed in support of the rule. However, our rule anticipated the possibility of new and unusual technologies (NUT) and determined they would be evaluated on a case-by case basis (86 FR 5322, 5442, January 19, 2021). This source was previously evaluated as a NUT in 2020 (prior to issuance of the 2021 final rule) pursuant to the requirements of NMFS' 2020 Biological Opinion on BOEM's Gulf of Mexico oil and gas program as well as the issuance of the rule. An associated report produced by Jasco Applied Sciences (Grooms *et al.,* 2019) provides information related to the acoustic output of the Gemini source, which informs our evaluation here.

The Gemini source operates on the same basic principles as a traditional airgun source in that it uses compressed air to create a bubble in the water column which then goes through a series of collapses and expansions creating primarily low-frequency sounds. However, the Gemini source consists of one physical element with two large chambers of 4,000 cubic inches (in^3) each (total volume of 8,000 in^3). This creates a larger bubble resulting in more of the energy being concentrated in low frequencies, with a fundamental frequency of 3.7 Hertz. In addition to concentrating energy at lower frequencies, the Gemini source is expected to produce lower overall sound levels than the conventional airgun proxy source. The number of airguns in an array is highly influential on overall sound energy output, because the output increases approximately linearly with the number of airgun elements. In this case, because the same air volume is used to operate two very large guns, rather than tens of smaller guns, the array produces lower sound

levels than a conventional array of equivalent total volume.

The modeled distances described in the aforementioned Jasco report show expected per-pulse sound pressure level threshold distances to the 160-dB level of 4.29 kilometers (km). When frequency-weighted, *i.e.,* considering the low frequency output of the source relative to the hearing sensitivities of different marine mammal hearing groups, the estimated distance is decreased to approximately 1 km for the low-frequency cetacean hearing group and to de minimis levels for mid- and high-frequency cetacean hearing groups, significantly less than comparable modeled distances for the proxy 72-element, 8,000 in^3 array evaluated in the rule.

These factors lead to a conclusion that take by Level B harassment associated with use of the Gemini source would be less than would occur for a similar survey instead using the modeled airgun array as a sound source. Based on the foregoing, we have determined there will be no effects of a magnitude or intensity different from those evaluated in support of the rule. Moreover, use of modeling results relating to use of the 72 element, 8,000 in^3 airgun array are expected to be significantly conservative as a proxy for use in evaluating potential impacts of use of the Gemini source.

Consistent with the preamble to the final rule, the survey effort proposed by TGS in its LOA request was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5398, January 19, 2021). In order to generate the appropriate take numbers for authorization, the following information was considered: (1) survey type; (2) location (by modeling zone [1]); (3) number of days; and (4) season.[2] The acoustic exposure modeling performed in support of the rule provides 24-hour exposure estimates for each species, specific to each modeled survey type in each zone and season.

No 3D OBN surveys were included in the modeled survey types, and use of existing proxies (*i.e.,* two-dimensional (2D), 3D narrow-azimuth (NAZ), 3D wide-azimuth (WAZ), Coil) is generally conservative for use in evaluation of 3D OBN survey effort, largely due to the greater area covered by the modeled proxies. Summary descriptions of these modeled survey geometries are available in the preamble to the proposed rule (83 FR 29220, June 22, 2018). Coil was selected as the best available proxy survey type in this case because the spatial coverage of the planned survey is most similar to the coil survey pattern.

The planned 3D OBN survey will involve two source vessels sailing along survey lines approximately 56 km in length. The coil survey pattern was assumed to cover approximately 144 kilometers squared (km^2) per day (compared with approximately 795 km^2, 199 km^2, and 845 km^2 per day for the 2D, 3D NAZ, and 3D WAZ survey patterns, respectively). Among the different parameters of the modeled survey patterns (*e.g.,* area covered, line spacing, number of sources, shot interval, total simulated pulses), NMFS considers area covered per day to be most influential on daily modeled exposures exceeding Level B harassment criteria. Although TGS is not proposing to perform a survey using the coil geometry, its planned 3D OBN survey is expected to cover approximately 55 km^2 per day, meaning that the coil proxy is most representative of the effort planned by TGS in terms of predicted Level B harassment exposures. In addition, all available acoustic exposure modeling results assume use of a 72-element, 8,000 in^3 array. Thus, as discussed above, estimated take numbers for this LOA are considered conservative due to differences between the Gemini acoustic source planned for use and the proxy array modeled for the rule.

The survey will take place over approximately 114 days, including 65 days of sound source operation. The survey plan includes approximately 64 days within Zone 5 and approximately 1 day within Zone 2. The seasonal distribution of survey days is not known in advance. Therefore, the take estimates for each species are based on the season that produces the greater value.

For some species, take estimates based solely on the modeling yielded results that are not realistically likely to occur when considered in light of other relevant information available during the rulemaking process regarding marine mammal occurrence in the GOM. The approach used in the acoustic exposure modeling, in which seven modeling zones were defined over the U.S. GOM, necessarily averages fine-scale information about marine mammal distribution over the large area of each modeling zone. This can result in unrealistic projections regarding the likelihood of encountering particularly rare species and/or species not expected to occur outside particular habitats. Thus, although the modeling conducted for the rule is a natural starting point for estimating take, our rule acknowledged that other information could be considered (*e.g.,* 86 FR 5322, January 19, 2021), discussing the need to provide flexibility and make efficient use of previous public and agency review of other information and identifying that additional public review is not necessary unless the model or inputs used differ substantively from those that were previously reviewed by NMFS and the public). For this survey, NMFS has other relevant information reviewed during the rulemaking that indicates use of the acoustic exposure modeling to generate a take estimate for Rice's whales and killer whales produces results inconsistent with what is known regarding their occurrence in the GOM. Accordingly, we have adjusted the calculated take estimates for those species as described below.

NMFS' final rule described a ''core habitat area'' for Rice's whales (formerly known as GOM Bryde's whales) [3] located in the northeastern GOM in waters between 100 and 400 m depth along the continental shelf break (Rosel *et al.,* 2016). However, whaling records suggest that Rice's whales historically had a broader distribution within similar habitat parameters throughout the GOM (Reeves *et al.,* 2011; Rosel and Wilcox, 2014). In addition, habitat-based density modeling identified similar habitat (*i.e.,* approximately 100–400 m water depths along the continental shelf break) as being potential Rice's whale habitat (Roberts *et al.,* 2016), although the core habitat area contained approximately 92 percent of the predicted abundance of Rice's whales. See discussion provided at, *e.g.,* 83 FR 29228, June 22, 2018; 83 FR 29280, June 22, 2018; 86 FR 5418, January 19, 2021.

Although Rice's whales may occur outside of the core habitat area, we expect that any such occurrence would be limited to the narrow band of suitable habitat described above (*i.e.,* 100–400 m) and that, based on the few available records, these occurrences would be rare. TGS's planned activities will overlap this depth range, with approximately 18 percent of the area expected to be ensonified by the survey above root-mean-squared pressure received levels (RMS SPL) of 160 dB (referenced to 1 micropascal (re 1 μPa))

[1] For purposes of acoustic exposure modeling, the GOM was divided into seven zones. Zone 1 is not included in the geographic scope of the rule.

[2] For purposes of acoustic exposure modeling, seasons include winter (December–March) and summer (April–November).

[3] The final rule refers to the GOM Bryde's whale (*Balaenoptera edeni*). These whales were subsequently described as a new species, Rice's whale (*Balaenoptera ricei*) (Rosel *et al.,* 2021).

overlapping the 100–400 m isobaths. Therefore, while we expect take of Rice's whale to be unlikely, there is some reasonable potential for take of Rice's whale to occur in association with this survey. However, NMFS' determination in reflection of the data discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for Rice's whales would result in estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected Rice's whale take (86 FR 5322, January 19, 2021; 86 FR 5403, January 19, 2021).

Killer whales are the most rarely encountered species in the GOM, typically in deep waters of the central GOM (Roberts *et al.,* 2015; Maze-Foley and Mullin, 2006). As discussed in the final rule, the density models produced by Roberts *et al.* (2016) provide the best available scientific information regarding predicted density patterns of cetaceans in the U.S. GOM. The predictions represent the output of models derived from multi-year observations and associated environmental parameters that incorporate corrections for detection bias. However, in the case of killer whales, the model is informed by few data, as indicated by the coefficient of variation associated with the abundance predicted by the model (0.41, the second-highest of any GOM species model; Roberts *et al.,* 2016). The model's authors noted the expected non-uniform distribution of this rarely-encountered species (as discussed above) and expressed that, due to the limited data available to inform the model, it ''should be viewed cautiously'' (Roberts *et al.,* 2015). NOAA surveys in the GOM from 1992 to 2009 reported only 16 sightings of killer whales, with an additional 3 encounters during more recent survey effort from 2017 to 2018 (Waring *et al.,* 2013; *https://www.boem.gov/gommapps*). Two other species were also observed on fewer than 20 occasions during the 1992–2009 NOAA surveys (Fraser's dolphin and false killer whale [4]). However, observational data collected by protected species observers (PSOs) on industry geophysical survey vessels from 2002 to 2015 distinguish the killer whale in terms of rarity. During this period, killer whales were encountered on only 10 occasions, whereas the next most rarely encountered species.[4] However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales. (Fraser's dolphin) was recorded on 69 occasions (Barkaszi and Kelly, 2019). The false killer whale and pygmy killer whale were the next most rarely encountered species, with 110 records each. The killer whale was the species with the lowest detection frequency during each period over which PSO data were synthesized (2002–2008 and 2009–2015). This information qualitatively informed our rulemaking process, as discussed at 86 FR 5322 and 86 FR 5334 (January 19, 2021), and similarly informs our analysis here.

The rarity of encounter during seismic surveys is not likely to be the product of high bias on the probability of detection. Unlike certain cryptic species with high detection bias, such as *Kogia spp.* or beaked whales, or deep-diving species with high availability bias, such as beaked whales or sperm whales, killer whales are typically available for detection when present and are easily observed. Roberts *et al.* (2015) stated that availability is not a major factor affecting detectability of killer whales from shipboard surveys, as they are not a particularly long-diving species. Baird *et al.* (2005) reported that mean dive durations for 41 fish-eating killer whales for dives greater than or equal to 1 minute in duration was 2.3–2.4 minutes, and Hooker *et al.* (2012) reported that killer whales spent 78 percent of their time at depths between 0 and 10 m. Similarly, Kvadsheim *et al.* (2012) reported data from a study of 4 killer whales, noting that the whales performed 20 times as many dives 1–30 m in depth than to deeper waters, with an average depth during those most common dives of approximately 3 m.

In summary, killer whales are the most rarely encountered species in the GOM and typically occur only in particularly deep water. This survey would take place in deep waters that would overlap with depths in which killer whales typically occur. While this information is reflected through the density model informing the acoustic exposure modeling results, there is relatively high uncertainty associated with the model for this species, and the acoustic exposure modeling applies mean distribution data over areas where the species is in fact less likely to occur. In addition, as noted above in relation to the general take estimation methodology, the assumed proxy source (72-element, 8,000- in^3 array) results in a significant overestimate of the actual potential for take to occur. NMFS' determination in reflection of the information discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for killer whales will generally result in estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected killer whale take (86 FR 5322, January 19, 2021; 86 FR 5403, January 19, 2021).

In past authorizations, NMFS has often addressed situations involving the low likelihood of encountering a rare species such as Rice's or killer whales in the GOM through authorization of take of a single group of average size (*i.e.,* representing a single potential encounter). See 83 FR 63268, December 7, 2018; 86 FR 29090, May 28, 2021; 85 FR 55645, September 9, 2020. For the reasons expressed above, NMFS determined that a single encounter of Rice's whales or killer whales is more likely than the model-generated estimates and has authorized take associated with a single group encounter (*i.e.,* up to two animals for Rice's whale and up to seven animals for killer whales).

Based on the results of our analysis, NMFS has determined that the level of taking authorized through the LOA is consistent with the findings made for the total taking allowable under the regulations for the affected species or stocks of marine mammals. See Table 1 in this notice and Table 9 of the rule (86 FR 5322, January 19, 2021).

Small Numbers Determination

Under the GOM rule, NMFS may not authorize incidental take of marine mammals in an LOA if it will exceed ''small numbers.'' In short, when an acceptable estimate of the individual marine mammals taken is available, if the estimated number of individual animals taken is up to, but not greater than, one-third of the best available abundance estimate, NMFS will determine that the numbers of marine mammals taken of a species or stock are small. For more information please see NMFS' discussion of the MMPA's small numbers requirement provided in the final rule (86 FR 5438, January 19, 2021).

The take numbers for authorization, which are determined as described above, are used by NMFS in making the necessary small numbers determinations through comparison with the best available abundance estimates (see discussion at 86 FR 5322, January 19, 2021; 86 FR 5391, January 19, 2021). For this comparison, NMFS' approach is to use the maximum theoretical population, determined through review of current stock assessment reports (SAR; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-*

[4] However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales.

mammal-stock-assessment-reports-species-stock) and model-predicted abundance information (*https://seamap.env.duke.edu/models/Duke/GOM/*). For the latter, for taxa where a density surface model could be produced, we use the maximum mean seasonal (*i.e.,* 3-month) abundance prediction for purposes of comparison as a precautionary smoothing of month-to-month fluctuations and in consideration of a corresponding lack of data in the literature regarding seasonal distribution of marine mammals in the GOM. Information supporting the small numbers determinations is provided in Table 1.

TABLE 1—TAKE ANALYSIS

Species	Authorized take	Scaled take [1]	Abundance [2]	Percent abundance
Rice's whale	2	n/a	51	3.9
Sperm whale	1,683	705.6	2,207	32.0
Kogia spp	[3] 636	193.4	4,373	5.2
Beaked whales	7,430	750.4	3,768	19.9
Rough-toothed dolphin	1,293	2,197.3	4,853	1.2
Bottlenose dolphin	7,656	562.7	176,108	0.3
Clymene dolphin	3,595	1,031.7	11,895	8.7
Atlantic spotted dolphin	2,664	764.6	74,785	1.0
Pantropical spotted dolphin	16,313	4,681.8	102,361	4.6
Spinner dolphin	4,371	1,254.5	25,114	5.0
Striped dolphin	1,404	403.0	5,229	7.7
Fraser's dolphin	404	116.0	1,665	7.0
Risso's dolphin	1,056	311.6	3,764	8.3
Melon-headed whale	2,362	696.7	7,003	9.9
Pygmy killer whale	556	164.0	2,126	7.7
False killer whale	885	261.2	3,204	8.2
Killer whale	7	n/a	267	2.6
Short-finned pilot whale	683	201.5	1,981	10.2

[1] Scalar ratios were applied to ''Authorized Take'' values as described at 86 FR 5322 and 86 FR 5404 (January 19, 2021) to derive scaled take numbers shown here.

[2] Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.,* 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For Rice's whale and the killer whale, the larger estimated SAR abundance estimate is used.

[3] Includes 34 takes by Level A harassment and 602 takes by Level B harassment. Scalar ratio is applied to takes by Level B harassment only; small numbers determination made on basis of scaled Level B harassment take plus authorized Level A harassment take.

Based on the analysis contained herein of TGS's proposed survey activity described in its LOA application and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the affected species or stock sizes (*i.e.,* less than one-third of the best available abundance estimate) and therefore the taking is of no more than small numbers.

Authorization

NMFS has determined that the level of taking for this LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. Accordingly, we have issued an LOA to TGS authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: September 27, 2023.

Catherine Marzin,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–21760 Filed 10–2–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD433]

Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Groundfish Advisory Subpanel (GAP), Groundfish Management Team (GMT), Ecosystem Working Group (EWG), Salmon Technical Team (STT), Habitat Committee (HC), and Salmon Advisory Subpanel (SAS) will hold online meetings to discuss items on the Pacific Council's November Council meeting agenda as detailed in the **SUPPLEMENTARY INFORMATION** below. These meetings are open to the public.

DATES: The GAP meeting, including a joint session with the GMT and EWG, will be held Monday, October 23, 2023, from 12 p.m. to 4 p.m., Pacific daylight time (PDT), or until business is completed.

The STT meeting will be held Tuesday, October 24, from 9 a.m. to 3 p.m., PDT, or until business is completed.

The HC meeting will be held Tuesday, October 24, from 8:30 a.m. to 4:30 p.m., and Wednesday, October 25, from 1:30 p.m. to 4:30 p.m., until business is completed each day.

The SAS meeting will be held Tuesday, October 31, 2023, from 9 a.m. to 3 p.m., PDT, or until business is completed.

ADDRESSES: These meetings will be held online. Specific meeting information, including directions on how to join the meeting and system requirements, will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Jessi Doerpinghaus, Staff Officer, Pacific Council; telephone: (503) 820–2415.

SUPPLEMENTARY INFORMATION: The primary purpose of these meetings is for the GAP, STT, HC, and SAS to prepare for the November 2023 Pacific Council meeting. The GAP, STT, HC, and SAS will discuss items related to the advisory body's particular management items and other matters on the Pacific Council's November agenda. The GAP, GMT, and EWG will meet during the GAP webinar to discuss matters related to the Council's fishery ecosystem plan initiative. No management actions will be decided by the GAP, GMT, EWG, STT, HC, or SAS. The GAP, GMT, EWG, STT, HC, and SAS recommendations will be considered by the Council at their November or March Council (ecosystem matters) meetings. A detailed agenda for each of the GAP, STT, HC, and SAS webinars will be available on the Pacific Council's website prior to the meeting.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: September 28, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–21843 Filed 10–2–23; 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 Permit Family of Forms

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 December 4, 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 0648–0206 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Gabrielle Aberle, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK, 99802–1668. Telephone 907–586–7356.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Services (NMFS), Alaska Region, is requesting extension of a currently approved information collection for the applications for the Federal Fisheries Permit (FFP), the Federal Processor Permit (FPP), and the Exempted Fishing Permit (EFP).

NMFS requires an FFP for U.S. vessels that are used to fish for groundfish in the Gulf of Alaska or Bering Sea and Aleutian Islands. An FFP is also required for vessels used to fish for any non-groundfish species and that are required to retain any bycatch of groundfish under 50 CFR 679.4(b). An FPP is required for stationary floating processors (processing vessels that operate solely within Alaska State waters) and is required for shoreside processors that receive and/or process groundfish harvested from Federal waters or from any federally permitted vessels. NMFS issues an EFP to allow groundfish fishing activities that would otherwise be prohibited under regulations for groundfish fishing. EFPs are issued to support projects that could benefit the groundfish fisheries and the environment and result in gathering information not otherwise available through research or commercial fishing operations. Regulations governing these permits are at 50 CFR 600.745, 679.4, and 679.6.

Section 303(b)(1) of the Magnuson-Stevens Fishery Conservation and Management Act specifically recognizes the need for permit issuance. Requiring a permit for marine resource users—mandated by 50 CFR 679.4(b), 679.4(f); 679.6; and 600.745(b)—is one of the regulatory steps taken to carry out conservation and management objectives. Permit issuance is essential in fishery resources management for identification of the participants and expected activity levels and for regulatory compliance. The information requested on the FFP, FPP, and EFP applications is used for fisheries management and regulatory compliance by NMFS Sustainable Fisheries Division, NMFS Restricted Access Management Program, NMFS Observer Program, NOAA Office of Law Enforcement, the U.S. Coast Guard, and the North Pacific Fisheries Management Council.

The type of information collected on the FFP application includes permit holder identification information, vessel information, permit information, and species endorsements. Information collected on the FPP application includes processor identification information, stationary floating processor or community quota entity vessel information, and vessel ownership information. An EFP application includes information on the applicant and a description of the project design including how it will vary from current fishing regulations, the species affected and targeted, when and where the fishing will take place, the vessel that will be used, and a provision for public release of all obtained information.

II. Method of Collection

The FFP and FPP application forms are available as fillable pdfs on the NMFS Alaska Region website and are

submitted by mail, delivery, or fax. An FPP may be renewed online through eFISH on the NMFS Alaska Region website. There is no form to apply for an EFP. Applicants submit the required information by mail, delivery, email, or fax.

III. Data

OMB Control Number: 0648–0206.

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.

Estimated Number of Respondents: 484.

Estimated Time per Response: Application for Federal Fisheries Permit: 21 minutes; Application for Federal Processor Permit: 25 minutes; Exempted Fisheries Permit application: 100 hours.

Estimated Total Annual Burden Hours: 474 hours.

Estimated Total Annual Cost to Public: $2,420 in recordkeeping and reporting costs.

Respondent's Obligation: Required to obtain or retain benefits, mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act.

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. 2023–21845 Filed 10–2–23; 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 American Fisheries Act Reports

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 December 4, 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 0648–0401 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Gabrielle Aberle, National Marine Fisheries Service, Juneau, AK. Telephone (907) 586–7356.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Services (NMFS), Alaska Region, requests extension of a currently approved information collection for American Fisheries Act reporting requirements.

NMFS Alaska Region manages the groundfish fisheries of the Bering Sea and Aleutian Islands Management Area in the Exclusive Economic Zone off Alaska. The North Pacific Fishery Management Council (Council) prepared the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) under the authority of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.,* and other applicable laws. Regulations implementing the FMP are at 50 CFR part 679.

The Bering Sea pollock fishery is managed under the American Fisheries Act (AFA). The purpose of the AFA was to tighten U.S. ownership standards for U.S. fishing vessels under the Anti-reflagging Act and to provide the Bering Sea pollock fleet the opportunity to conduct its fishery in a more rational manner while protecting non-AFA participants in the other fisheries. The AFA established sector allocations in the Bering Sea pollock fishery, determined eligible vessels and processors, allowed the formation of cooperatives, set limits on the participation of AFA vessels in other fisheries, and imposed special catch weighing and monitoring requirements on AFA vessels.

This information collection contains the annual and periodic reporting requirements for AFA cooperatives. These requirements include reports about on-going fishing operations of the cooperatives and reports focused on efforts to minimize salmon bycatch in the Bering Sea pollock fishery. These reporting requirements are at 50 CFR 679.21 and 679.61.

This information is used to manage the Bering Sea pollock fishery, to evaluate the salmon bycatch management measures, and to provide the public with information about how the program operates and information about bycatch reduction under this program. This information collection provides the Council and NMFS with information about the organization and fishing operations of the AFA cooperatives, allocations to the AFA cooperatives, and the effectiveness of the Chinook salmon and chum salmon bycatch management measures. This information is necessary to ensure long-term conservation and abundance of salmon and pollock, maintain a healthy marine ecosystem, and provide maximum benefit to fishermen and communities that depend on salmon and pollock.

II. Method of Collection

There are no forms associated with this information collection. The information is usually submitted by mail or email, and in an oral presentation to the Council.

III. Data

OMB Control Number: 0648–0401.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 11.

Estimated Time per Response: AFA Cooperative Contract 8 hours; AFA Annual Cooperative Report 16 hours; Incentive Plan Agreement amendment 50 hours; IPA Annual Report 80 hours; IPA administrative appeals 4 hours.

Estimated Total Annual Burden Hours: 486 hours.

Estimated Total Annual Cost to the Public: $605 in recordkeeping and reporting.

Respondent's Obligation: Required to obtain or retain benefits; mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act; American Fisheries Act.

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. 2023–21847 Filed 10–2–23; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Public Availability of Fiscal Year 2021 Service Contract Inventory

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is publishing this notice to advise the public of the availability of CFTC's Fiscal Year 2021 Service Contract Inventory.

FOR FURTHER INFORMATION CONTACT: Questions regarding the service contract inventory should be directed to Livia Bykov, Procurement Analyst, at 202–418–5103 or *lbykov@cftc.gov.*

SUPPLEMENTARY INFORMATION: In accordance with section 743 of division C of the Consolidated Appropriations Act of 2010, Public Law 111–117, 123 Stat. 3034, CFTC is publishing this notice to advise the public of the availability of the Fiscal Year (FY) 2021 Service Contract Inventory. CFTC has posted its inventory documents on the agency website at the following link: *https://www.cftc.gov/About/CFTCReports/index.htm.*

This inventory provides information on service contracts above the Simplified Acquisition Threshold ($250,000), as determined by the base and all options value, that were awarded in FY 2021. CFTC's service contract inventory data is included in the government-wide inventory, which can be filtered to display the CFTC-specific data. A link to the government-wide inventory is included in the posting on the CFTC website, or it can be accessed directly at *https://www.acquisition.gov/service-contract-inventory.*

The inventory documents posted on the CFTC website also include the CFTC FY 2020 Service Contract Inventory Analysis (dated February 15, 2022). This report provides information about the Product Service Codes that the CFTC analyzed from the 2020 inventory.

Dated: September 28, 2023.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2023–21842 Filed 10–2–23; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent To Renew Collection 3038–0093, Part 40, Provisions Common to Registered Entities

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (''PRA''), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection, and to allow 60 days for public comment. This notice solicits comments on collections of information provided for by part 40 of the Commission's regulations, Provisions Common to Registered Entities.

DATES: Comments must be submitted on or before December 4, 2023.

ADDRESSES: You may submit comments, identified by OMB Control No. 3038–0093 by any of the following methods:

- The Agency's Website, at *https://comments.cftc.gov/.* Follow the instructions for submitting comments through the website.
- *Email:* Comments may also be sent by email to *secretary@cftc.gov.* Please make sure to put ''OMB Control No. 3038–0093'' in the email subject line.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one method and identify that it is for the renewal of Collection Number 3038–0093.

FOR FURTHER INFORMATION CONTACT: Maura Dundon, Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC

20581, (202)-418–5286, email: *mdundon@cftc.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501 *et seq.,* Federal agencies must obtain approval from the Office of Management and Budget (''OMB'') for each collection of information they conduct or sponsor. ''Collection of Information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Title: Part 40, Provisions Common to Registered Entities (OMB Control No. 3038–0093). This is a request for extension of a currently approved information collection.

Abstract: This collection of information involves the collection and submission to the Commission of information from registered entities concerning new products, rules, and rule amendments pursuant to the procedures outlined in §§ 40.2, 40.3, 40.5, 40.6, and 40.10 found in 17 CFR part 40. Part 40 of the Commission's regulations implements section 5c(c) of the CEA and sets forth provisions that are common to registered entities, including designated contract markets (''DCMs''), derivatives clearing organizations (''DCOs''), swap execution facilities (''SEFs'') and swap data repositories (''SDRs''). Part 40 establishes requirements and procedures for registered entities to submit information about their rules and products to the Commission prior to implementing rules, listing products for trading, or accepting products for clearing. Part 40 generally provides two means for registered entities to submit rules and products to the Commission. Typically, a registered entity elects to certify that their product (§ 40.2) or rule (§ 40.6) complies with the CEA and the Commission regulations. This process is known as self-certification. Alternatively, a registered entity may seek Commission approval of the product (§ 40.3) or rule (§ 40.5).[1] The regulations also include special certification provisions (§ 40.10) for certain rules submitted by systemically important DCOs (''SIDCOs'').

With respect to the collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of collection of information on those who use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[2]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the Information Collection Request will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement: OMB Control Number 3038–0093 reflects the information collection burden under Commission regulations associated with product filings (§§ 40.2 and 40.3); rule filings (§§ 40.5 and 40.6); and SIDCO filings (§ 40.10). As part of this renewal, the Commission has updated its burden estimates to reflect current filing volumes and burden hours.

Provisions Common to Regulated Entities IC

The Commission estimates the average burden of the Provisions Common to Regulated Entities IC as follows:

- *Product Submissions (§ 40.2 and 40.3)*

Estimated Number of Respondents: 70.[3]

Annual Responses by each Respondent: 12.[4]

Estimated Hours per Response: 21.[5]

Estimated Total Hours per Year: 17,640.

- *Rule Submissions (§§ 40.5 and 40.6)*

Estimated Number of Respondents: 70.[6]

Annual Responses by each Respondent: 20.[7]

Estimated Hours per Response: 2.

Estimated Total Hours per Year: 2,800.

- *SIDCO Submissions (§ 40.10)*

Estimated Number of Respondents: 2.

Annual Responses by each Respondent: 1.[8]

[1] Commission regulations may expressly or impliedly trigger the requirement for a registered entity to make a submission pursuant to part 40. For example, the Commission's part 150 regulation on position limits contains an express requirement to make a § 40.5 rule filing in certain circumstances. *See* 17 CFR 150.9(a).

[2] 17 CFR 145.9.

[3] The estimated number of 70 respondents includes 16 active DCMs, 23 registered SEFs, 15 registered DCOs, 5 provisionally registered SDRs, plus pending applications for those entities.

[4] The 3-year average of total responses for §§ 40.2 and 40.3 submissions combined was 848 responses, calculated by taking the annual total submissions received under §§ 40.2 and 40.3 combined from all entities and averaging them for the years of 2020, 2021 and 2022. The estimated number of reports per respondent is calculated as 848 responses divided by 70 respondents (848 responses/70 respondents = 12 responses per respondent).

[5] The 21-hour estimate for product submissions reflects industry comments received in 2018. *See* 83 FR 43855, 43856 (Aug. 28, 2018); Supporting Statement at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201808-3038-003.*

[6] *See supra* n.3.

[7] The 3-year average of total responses for §§ 40.5 and 40.6 submissions combined was 1,412 responses, calculated by taking the annual total submissions received under §§ 40.5 and 40.6 combined from all entities and averaging them for the years of 2020, 2021 and 2022. The estimated number of reports per respondent is calculated as 1,412 responses divided by 70 respondents (1,412 responses/70 respondents = 20 responses per respondent).

[8] The 3-year average of total responses for § 40.10 submissions was 2, calculated by taking the annual total submissions received under § 40.10 from all SIDCOs and averaging them for the years of 2020, 2021 and 2022. The average number of reports per respondent is 1, calculated as 2 responses divided by 2 respondents (2 responses/2 respondents = 1 response per respondent).

Estimated Hours per Response: 50.
Estimated Total Hours per Year: 100.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: September 28, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–21817 Filed 10–2–23; 8:45 am]

BILLING CODE 6351–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No: CFPB–2023–0049]

Privacy Act of 1974; System of Records

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Rescindment of a system of records notice.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, Consumer Financial Protection Bureau (CFPB) provides notice that it is rescinding CFPB.007 CFPB Directory Database from its inventory of record systems. The system of records provided the CFPB with a single, agency-wide repository of identifying and registration information concerning entities offering or providing, or materially assisting in the offering or provision of, consumer financial products or services. The CFPB is rescinding this system of records notice because this system is not currently maintained by CFPB, thereby making the system of records notice unnecessary.

DATES: Comments must be received no later than November 2, 2023. The modified system of records will be effective November 13, 2023 unless the comments received result in a contrary determination.

ADDRESSES: You may submit comments, identified by the title and docket number (see above Docket No. CFPB–2023–0049), by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: privacy@cfpb.gov.* Include Docket No. CFPB–2023–0049 in the subject line of the email.
- *Mail/Hand Delivery/Courier:* Kathryn Fong, Chief Privacy Officer, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at CFPB is subject to delay, commenters are encouraged to submit comments electronically.

All submissions must include the agency name and docket number for this notice. In general, all comments received will be posted without change to *https://www.regulations.gov.* All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Kathryn Fong, Chief Privacy Officer, (202) 435–7058. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION: The CFPB replaced the Directory Database with a central repository of entity business information that does not maintain individual-level information. Directory Database is therefore currently obsolete, no longer maintained by CFPB, and no longer meets the definition of a system of records under the Privacy Act. Accordingly, the CFPB reasonably believes that rescinding this System of Records Notice will have little effect on individuals' privacy. Rescindment of this System of Records Notice will also promote the overall streamlining and management of Privacy Act record systems for the CFPB.

SYSTEM NAME AND NUMBER:

CFPB.007 CFPB Directory Database.

HISTORY:

78 FR 54630; 83 FR 23435.

Kathryn Fong,

Senior Agency Official for Privacy, Consumer Financial Protection Bureau.

[FR Doc. 2023–21809 Filed 10–2–23; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0094]

Privacy Act of 1974; System of Records

AGENCY: Department of Defense (DoD).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the DoD is modifying and reissuing a current system of records re-titled, ''Privacy and Civil Liberties Complaints and General Correspondence Records,'' DoD–0017. This system of records covers DoD's maintenance of records about privacy or civil liberties-related complaints or correspondence submitted to DoD privacy and civil liberties offices and is being modified to expressly cover general correspondence and reporting from DoD- and U.S. Government-affiliated personnel and the public on a variety of matters. In addition, a routine use relating to national security, homeland security, counterintelligence, and scientific study is being added.

DATES: This system of records is effective upon publication; however, comments on the Routine Uses will be accepted on or before November 2, 2023. The Routine Uses are effective at the close of the comment period.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Rahwa Keleta, Defense Privacy and Civil Liberties Division, Directorate for Privacy, Civil Liberties, and Freedom of Information, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700; *OSD.DPCLTD@mail.mil;* (703) 571–0070.

SUPPLEMENTARY INFORMATION:

I. Background

The newly renamed DoD system of records Privacy and Civil Liberties Complaints and General Correspondence Records, DoD–0017, is being modified to expressly cover general correspondence from DoD- and

U.S. Government-affiliated personnel and the public.

This system of records supports the receipt, review, processing, tracking, and response to correspondence. The term ''correspondence'' includes records managed by a DoD Privacy and Civil Liberties Office that may include news, information, opinions, questions, concerns, issues, or general complaints, as well as any associated case files. As modified, this system will also expressly encompass general correspondence and reporting from DoD- and other U.S. Government-affiliated personnel and the public, including correspondence to DoD and its components expressing opinions or complaints, raising questions or concerns, or providing information or reporting on DoD programs and activities. The system consists of both electronic and paper records.

Subject to public comment, the DoD is also updating this SORN to add routine use L, which permits disclosures to appropriate Federal, State, local, territorial, tribal, foreign, and international agencies for purposes of scientific study or counterintelligence, and for executing and enforcing laws designed to protect the national security and homeland security of the United States and its Allies. Additionally, the following sections of this SORN are being modified as follows: (1) the System Manager(s), to add DoD Component Public Affairs Offices and DoD component offices responsible for maintaining general correspondence records as system managers; (2) the Authority for Maintenance of the System, to add an additional authority; (3) Purpose of the System, to add the management of general correspondence and reporting; (4) Categories of Individuals Covered by the System, to expand coverage to individuals who submit correspondence; (5) Categories of Records in the System, to include general correspondence and reports; (6) Record Source Categories, to add DoD- and U.S. Government-affiliated personnel and members of the public who provide correspondence and reporting to DoD; and (7) Policies and Practices for Retention and Disposal of Records to update the description of records retention and disposal schedules.

DoD SORNs have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties, and Transparency Division website at *https://dpcld.defense.gov.*

II. Privacy Act

Under the Privacy Act, a ''system of records'' is a group of records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined as a U.S. citizen or lawful permanent resident.

In accordance with 5 U.S.C. 552a(r) and Office of Management and Budget (OMB) Circular No. A–108, DoD has provided a report of this system of records to the OMB and to Congress.

Dated: September 28, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER:

Privacy and Civil Liberties Complaints and General Correspondence Records, DoD–0017

SECURITY CLASSIFICATION:

Unclassified; Classified.

SYSTEM LOCATION:

Department of Defense (Department or DoD), located at 1000 Defense Pentagon, Washington, DC 20301–1000, and other Department installations, offices, or mission locations. Information may also be stored within a government-certified cloud, implemented and overseen by the Department's Chief Information Officer (CIO), 6000 Defense Pentagon, Washington, DC 20301–6000.

SYSTEM MANAGER(S):

A. Director, Privacy and Civil Liberties Directorate, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700; *OSD.DPCLTD@mail.mil;* phone (703) 571–0070.

B. At DoD components, the system manager is the component privacy and civil liberties officer(s) responsible for maintaining privacy and civil liberties complaints and correspondence. The contact information for DoD component privacy and civil liberties offices is found at this website: *https://dpcld.defense.gov/Privacy/Privacy-Contacts/.*

C. Director, Community Engagement, Office of the Assistant to the Secretary of Defense for Public Affairs, 1400 Defense Pentagon, Washington, DC 20301–1400; *osd.pa.dutyofficer@mail.mil;* phone (703) 571–3343.

D. Public Affairs officers assigned to components throughout the Department and other DoD component offices responsible for maintaining general correspondence records. Their addresses will vary according to the location where the actions in this notice are conducted.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 113, Secretary of Defense; 42 U.S.C 2000ee–1, Privacy and Civil Liberties Officers; 32 CFR part 310, and Executive Order 9397 (SSN), as amended. See also: DoD Privacy Program; DoD Instruction 5400.11, DoD Privacy and Civil Liberties Programs; and DoD Directive 5122.05, Assistant to the Secretary of Defense for Public Affairs (ATSD(PA)).

PURPOSE(S) OF THE SYSTEM:

A. To manage privacy and civil liberties complaints and correspondence received by or referred to DoD privacy and civil liberties offices, including those within DoD and Office of the Secretary of Defense (OSD) components.

B. To manage general correspondence from DoD- and U.S. Government-affiliated personnel or members of the public to DoD and DoD components, including correspondence or reports expressing opinions or complaints, raising questions or concerns, or providing information or reporting on DoD programs and activities.

C. To track and report data, conduct research and statistical analysis, and evaluate program effectiveness.

D. To maintain records for oversight and auditing purposes and to ensure appropriate handling and management as required by law and policy.

Note 1: Complaints received through the process for which established formal procedural avenues exist, such as those resulting in non-judicial punishments, military courts-martial, administrative separations, and Equal Employment Opportunity actions, are outside the scope of this SORN.

Note 2: Civil Liberties complaints may be referred to the DoD Office of Inspector General (DoDIG) for handling under the Inspector General Act of 1978, as amended. The OIG decides whether it will pursue the case, or decline to investigate it and refer it back to the component privacy and civil liberties office, for appropriate action. Any resulting DoDIG complaint records are excluded from this system of records.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

A. Individuals who submit correspondence or complaints to DoD privacy and civil liberties offices, either directly or by authorized representatives, or whose

correspondence or complaints are referred to such offices.

B. Individuals, including members of the public and DoD- or U.S. Government-affiliated personnel, who submit general correspondence or report information to DoD or its components, including correspondence expressing opinions or complaints, raising questions or concerns, or providing information or reporting on DoD programs and activities.

CATEGORIES OF RECORDS IN THE SYSTEM:

A. Correspondence and reporting records, to include records managed by a privacy and civil liberties office that may include news, information, opinions, questions, concerns, issues, or complaints, as well as any associated records received from individuals, either directly or through authorized representatives.

B. Records of general correspondence, including correspondence or reports that express opinions or complaints, raise questions or concerns, or provide information or reporting on DoD programs and activities. Such records include general correspondence managed by public affairs or other offices that may include news, information, opinions, questions, concerns, issues, or complaints. Such records include associated records provided by individuals, either directly or through authorized representatives.

C. Records provided by individuals may include data such as the individual's name, unique identifying numbers (such as the individual's DoD ID Number or Social Security Number), contact information (address, phone, email), other identifying information, detailed description of the issue or concern and how it pertains to DoD, dates, component, command and/or office, supporting materials, and any case or complaint number assigned by DoD. The records may also include information concerning those who are alleged to have violated an individual's privacy or civil liberties.

D. Records or reports created or compiled in response to the correspondence, such as internal memorandums or email, internal records pertinent to the matter, witness statements, consultations with or referrals to other agencies within or external to DoD, and responses sent to the individual. The specific types of data in these records may vary widely depending on the nature of the individual's correspondence, report, or complaint.

RECORD SOURCE CATEGORIES:

Records and information maintained in this system of records are obtained from the individuals or their authorized representatives including:

A. DoD privacy and civil liberties personnel, DoD investigators.

B. DoD- and U.S. Government affiliated personnel and members of the public who provide correspondence or report information to DoD.

C. Any DoD personnel or recordkeeping system that may have information on the subject of the correspondence, report, or complaint, and other government sources.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, all or a portion of the records or information contained herein may specifically be disclosed outside the DoD as a Routine Use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal government when necessary to accomplish an agency function related to this system of records.

B. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

C. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the use of such record is deemed relevant and necessary.

D. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant and necessary to the proceeding.

E. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

F. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

G. To appropriate agencies, entities, and persons when (1) the DoD suspects or confirms a breach of the system of records; (2) the DoD determines as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

H. To another Federal agency or Federal entity, when the DoD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

I. To another Federal, State or local agency for the purpose of comparing to the agency's system of records or to non-Federal records, in coordination with an Office of Inspector General in conducting an audit, investigation, inspection, evaluation, or other review as authorized by the Inspector General Act of 1978, as amended.

J. To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

K. To an authorized appeal or grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator, or other duly authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee.

L. To appropriate Federal, State, local, territorial, tribal, foreign, or international agencies for the purpose of scientific study or counterintelligence activities authorized by U.S. law or Executive Order, or for the purpose of executing or enforcing laws designed to protect the national security or homeland security of the United States, including those relating to the sharing of records or information concerning

terrorism, homeland security, or law enforcement.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records may be stored electronically or on paper in secure facilities in a locked drawer behind a locked door. Electronic records may be stored locally on digital media; in agency-owned cloud environments; or in vendor Cloud Service Offerings certified under the Federal Risk and Authorization Management Program (FedRAMP).

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name and case number, or combination of both.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained and disposed of in accordance with National Archives and Records Administration General Records Schedules (GRS) or authorized DoD Component Records Disposition Schedules. The retention period for specific records may be obtained by contacting the system manager for the Component. Privacy complaint records are typically retained for three years after resolution or referral in accordance with National Archives and Records Administration General Records Schedule 4.2.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

DoD safeguards records in this system of records according to applicable rules, policies, and procedures, including all applicable DoD automated systems security and access policies. DoD policies require the use of controls to minimize the risk of compromise of personally identifiable information (PII) in paper and electronic form and to enforce access by those with a need to know and with appropriate clearances. Additionally, DoD has established security audit and accountability policies and procedures which support the safeguarding of PII and detection of potential PII incidents. DoD routinely employs safeguards such as the following to information systems and paper recordkeeping systems: Multifactor log-in authentication including Common Access Card (CAC) authentication and password; physical token as required; physical and technological access controls governing access to data; network encryption to protect data transmitted over the network; disk encryption securing disks storing data; key management services to safeguard encryption keys; masking of sensitive data as practicable; mandatory information assurance and privacy training for individuals who will have access; identification, marking, and safeguarding of PII; physical access safeguards including multifactor identification physical access controls, detection and electronic alert systems for access to servers and other network infrastructure; and electronic intrusion detection systems in DoD facilities.

RECORD ACCESS PROCEDURES:

Individuals seeking access to their records should follow the procedures in 32 CFR part 310. Individuals should address written inquiries to the DoD component or office with oversight of the records, as the component or office has Privacy Act responsibilities concerning access, amendment, and disclosure of the records within this system of records. DoD components include the Military Departments of the Army, Air Force (including the U.S. Space Force), and Navy (including the U.S. Marine Corps), field operating agencies, major commands, field commands, installations, and activities. The public may identify the contact information for the appropriate DoD office through the following website: *www.FOIA.gov.* Signed written requests should contain the name and number of this system of records notice along with the full name, current address, and email address of the individual. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the appropriate format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

Individuals seeking to amend or correct the content of records about them should follow the procedures in 32 CFR part 310.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system of records should follow the instructions for Records Access Procedures above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The DoD has exempted records maintained in this system from 5 U.S.C. 552a(c)(3); (d)(1), (2), (3), and (4); (e)(1); (e)(4)(G), (H), and (I); and (f) pursuant to 5 U.S.C. 552a(k)(1). In addition, when exempt records received from other systems of records become part of this system, the DoD also claims the same exemptions for those records that are claimed for the original primary system(s) of records of which they were a part, and claims any additional exemptions set forth here. An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c), and published in 32 CFR part 310.

HISTORY:

February 23, 2023, 88 FR 11412.

[FR Doc. 2023–21863 Filed 9–28–23; 4:15 pm]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Service Contract Inventory for Fiscal Year (FY) 2021

AGENCY: Office of Finance and Operations, Department of Education.

ACTION: Notice of availability—FY 2021 service contract inventory.

SUMMARY: Through this notice, the Secretary announces the availability of the Department of Education's service contract inventory for FY 2021 on its website at *www2.ed.gov/fund/data/report/contracts/servicecontractinventoryappendix/servicecontractinventory.html.* A service contract inventory is a tool for assisting the agency in better understanding how contracted services are being used to support mission and operations and whether contract labor is being utilized in an appropriate and effective manner.

FOR FURTHER INFORMATION CONTACT: Nathan Watters, U.S. Department of Education, Office of Finance and Operations, 400 Maryland Avenue SW, Washington, DC 20202. Telephone: (202) 245–6942. Email: *Nathan.Watters@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION: Section 743 of Division C of the Consolidated Appropriations Act of 2010, Public Law 111–117, requires civilian agencies other than the Department of Defense, that are required to submit an inventory

in accordance with the Federal Activities Inventory Reform Act of 1998 (Pub. L. 105–270, 31 U.S.C. 501 note) to submit their inventories to the Office of Federal Procurement Policy in the Office of Management and Budget. In addition, section 743 requires these agencies, which include the Department of Education, to (1) make the inventory available to the public, and (2) publish in the **Federal Register** a notice announcing that the inventory is available to the public along with the name, telephone number, and email address of the agency point of contact.

Through this notice, the Department announces the availability of its inventory for FY 2021 on the following website: *www2.ed.gov/fund/data/report/contracts/servicecontractinventoryappendix/servicecontractinventory.html.* The point of contact is provided under **FOR FURTHER INFORMATION CONTACT**.

Accessible Format: On request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site, you can view this document, as well as all other documents of this Department, published in the **Federal Register** in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Denise L. Carter,

Senior Advisor to the Assistant Secretary of the Office of Finance and Operations, Delegated the Authority to Perform the Duties and Functions of the Office of Finance and Operations Assistant Secretary.

[FR Doc. 2023–21892 Filed 10–2–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0143]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Veterans Upward Bound (VUB) Program Annual Performance Report

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 2, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Marie Julienne, 202–987–1054.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Veterans Upward Bound (VUB) Program Annual Performance Report.

OMB Control Number: 1840–0832.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments; private sector.

Total Estimated Number of Annual Responses: 62.

Total Estimated Number of Annual Burden Hours: 1,054.

Abstract: All Veterans Upward Bound projects must provide instruction in mathematics through pre-calculus, laboratory science, foreign language, composition, and literature. Projects may also provide short-term remedial or refresher courses for veterans who are high school graduates but have delayed pursuing postsecondary education. Projects are also expected to assist veterans in securing support services from other locally available resources such as the U.S. Department of Veterans Affairs, veterans' associations, and other state and local agencies that serve veterans.

The Department's annual performance report (APR) for VUB collects each current grantee's data at the participant level on services and performance over the course of a year. The Department uses the information conveyed in the performance report to assess a grantee's progress in meeting its approved goals and objectives and to evaluate a grantee's prior experience in accordance with the program regulations in 34 CFR 645.32. Grantees' annual performance reports also provide information on the outcomes of projects' work and of the VUB program as a whole. In addition, APR data allows the Department to respond to the reporting requirements of the Government Performance and Results Act.

The APR has been updated to include questions related to the Competitive Preference Priorities used in the most recent competition. These questions are not expected to affect the total burden hours per response.

Dated: September 27, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–21759 Filed 10–2–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0142]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Ronald E. McNair Postbaccalaureate Achievement Program Annual Performance Report

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 2, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Julie Laurel, 202–453–6733.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Ronald E. McNair Postbaccalaureate Achievement Program Annual Performance Report.

OMB Control Number: 1840–0640.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 206.

Total Estimated Number of Annual Burden Hours: 2,297.

Abstract: Ronald E. McNair Postbaccalaureate Achievement (McNair) Program grantees must submit the Annual Performance Report each year. The reports are used to evaluate grantees' performance for substantial progress, respond to the Government Performance and Results Act (GPRA), and award prior experience points at the end of each project (budget) period. The Department also aggregates the data to provide descriptive information on the projects and to analyze the impact of the McNair Program on the academic progress of participating students.

In this revision, the Department added two fields, at the project level, requesting information on the implementation of the Competitive Preference Priorities (CPPs) used in the most recent grant competition. The addition of the CPP questions coupled with an increase in the number of respondents resulted in a slight increase in total annual burden hours.

Dated: September 27, 2023

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–21763 Filed 10–2–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Secretary of Energy Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: The Department of Energy hereby publishes a notice of open meeting of the Secretary of Energy Advisory Board (SEAB). This meeting will be held virtually for members of the public, and in-person for SEAB members. The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, October 26, 2023; 12 p.m.–4:45 p.m. eastern time.

ADDRESSES: Virtual meeting for members of the public. SEAB members only will participate in-person at the SLAC National Accelerator Laboratory, 12575 Sand Hill Rd, Menlo Park, CA 94025. Registration is required by registering at the SEAB October 26 meeting page at: *www.energy.gov/seab/seab-meetings.*

FOR FURTHER INFORMATION CONTACT: David Borak, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; email: *seab@hq.doe.gov;* telephone: (202) 586–5216.

SUPPLEMENTARY INFORMATION:

Background: The Board was established to provide advice and recommendations to the Secretary on the Administration's energy policies; the Department's basic and applied research and development activities; economic and national security policy; and other activities as directed by the Secretary.

Purpose of the Meeting: This is the ninth meeting of Secretary Jennifer M. Granholm's SEAB.

Tentative Agenda: The meeting will start at 12:00 p.m. Eastern Time on October 26, 2023. The tentative meeting agenda includes: roll call, remarks from the Secretary, remarks from the SEAB chair, discussion of Artificial Intelligence, and public comments. The meeting will conclude at approximately 4:45 p.m. Meeting materials can be found here: *https://www.energy.gov/seab/seab-meetings.*

Public Participation: The meeting is open to the public via a virtual meeting option. Individuals who would like to attend must register for the meeting here: *https://www.energy.gov/seab/seab-meetings.*

Individuals and representatives of organizations who would like to offer comments and suggestions may do so during the meeting. Approximately 15 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but will not exceed three minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so via email, *seab@hq.doe.gov,* no later than 5 p.m. on Wednesday, October 25, 2023.

Those not able to attend the meeting or who have insufficient time to address the committee are invited to send a written statement to David Borak, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, or email to: *seab@hq.doe.gov.*

Minutes: The minutes of the meeting will be available on the SEAB website

or by contacting Mr. Borak. He may be reached at the above postal address or email address, or by visiting SEAB's website at *www.energy.gov/seab.*

Signed in Washington, DC, on September 27, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–21814 Filed 10–2–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Quantum Initiative Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open virtual meeting of the National Quantum Initiative Advisory Committee (NQIAC). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Friday, November 3, 2023; 1:00 p.m. to 3:00 p.m. EDT.

ADDRESSES: Virtual Meeting: Instructions to participate remotely will be posted on the National Quantum Initiative Advisory Committee website at: *https://www.quantum.gov/about/nqiac/* prior to the meeting and can also be obtained by contacting Thomas Wong, (240) 220–4668 or *NQIAC@quantum.gov.*

FOR FURTHER INFORMATION CONTACT: Thomas Wong, Designated Federal Officer, NQIAC, (240) 220–4668 or *NQIAC@quantum.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The NQIAC has been established to advise the President, the National Science and Technology Council (NSTC) Subcommittee on Quantum Information Science (SCQIS), and the NSTC Subcommittee on Economic and Security Implications of Quantum Science (ESIX) on the National Initiative Act (NQI) Program, and on trends and developments in quantum information science and technology, in accordance with the National Quantum Initiative Act (*Pub. L. 115–368*) and *Executive Order 14073.*

Tentative Agenda

- Quantum Networking Strategy and Activities

Public Participation: The meeting is open to the public. It is the policy of the NQIAC to accept written public comments no longer than 5 pages and to accommodate oral public comments, whenever possible. The NQIAC expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. The public comment period for this meeting will take place on November 3, 2023, at a time specified in the meeting agenda.

The public comment period is designed only for substantive commentary on NQIAC's work, not for business marketing purposes. The Chairperson(s) of the Committee will conduct the meeting to facilitate the orderly conduct of business.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at *NQIAC@quantum.gov,* no later than 12:00 p.m. Eastern Time on October 27, 2023. To accommodate as many speakers as possible, the time for public comments will be limited to three (3) minutes per person, with a total public comment period of up to 15 minutes. If more speakers register than there is space available on the agenda, NQIAC will select speakers on a first-come, first-served basis from those who applied. Those not able to present oral comments may always file written comments with the committee.

Written Comments: Although written comments are accepted continuously, written comments relevant to the subjects of the meeting should be submitted to *NQIAC@quantum.gov* no later than 12:00 p.m. Eastern Time on October 27, 2023, so that the comments may be made available to the NQIAC members prior to this meeting for their consideration. NQIAC operates under the provisions of FACA, all public comments and/or related materials will be treated as public documents and will be made available for public inspection, including being posted on the NQIAC website at: *https://www.quantum.gov/about/nqiac/.*

Minutes: Minutes of this meeting will be available at: *https://www.quantum.gov/about/nqiac/.*

Signed in Washington, DC, on September 27, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–21813 Filed 10–2–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, November 8, 2023; 4:00 p.m.–8:30 p.m. PST. The opportunity for public comment is at 4:10 p.m. PST.

This time is subject to change; please contact the Nevada Site Specific Advisory Board (NSSAB) Administrator (below) for confirmation of time prior to the meeting.

ADDRESSES: This meeting will be open to the public in-person at the Molasky Corporate Center (address below) or virtually via Microsoft Teams. To attend virtually, please contact Barbara Ulmer, NSSAB Administrator, by email *nssab@emcbc.doe.gov* or phone (702) 523–0894, no later than 4:00 p.m. PST on Monday, November 6, 2023.

Molasky Corporate Center, 15th Floor Conference Room, 100 North City Parkway, Las Vegas, NV 89106.

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, NSSAB Administrator, by phone: (702) 523–0894 or email: *nssab@emcbc.doe.gov* or visit the Board's internet homepage at *www.nnss.gov/NSSAB/.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda

1. Public Comment Period
2. Update from Deputy Designated Federal Officer
3. Update from National Nuclear Security Administration
4. Updates from NSSAB Liaisons
5. Presentations

Public Participation: The in-person/online virtual hybrid meeting is open to the public either in-person at the Molasky Corporate Center or via Microsoft Teams. To sign-up for public comment, please contact the NSSAB Administrator (above) no later than 4:00 p.m. PST on Monday, November 6, 2023. In addition to participation in the live public comment session identified above, written statements may be filed

with the Board either before or within seven days after the meeting by sending them to the NSSAB Administrator at the aforementioned email address. Written public comment received prior to the meeting will be read into the record. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so in 2-minute segments for the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing or calling Barbara Ulmer, NSSAB Administrator, U.S. Department of Energy, EM Nevada Program, 100 North City Parkway, Suite 1750, Las Vegas, NV 89106; Phone: (702) 523–0894. Minutes will also be available at the following website: *https://www.nnss.gov/nssab/nssab-meetings/.*

Signed in Washington, DC, on September 27, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–21812 Filed 10–2–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science (DOE)/Directorate for Mathematical and Physical Sciences (NSF) Nuclear Science Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of renewal.

SUMMARY: Pursuant the Federal Advisory Committee Act, and the Code of Federal Regulations, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the DOE/NSF Nuclear Science Advisory Committee (NSAC) has been renewed for a two-year period.

FOR FURTHER INFORMATION CONTACT: Dr. Timothy Hallman at (301) 903–3613, or *timothy.hallman@science.doe.gov.*

SUPPLEMENTARY INFORMATION: The Committee will provide advice and recommendations to the Director, Office of Science (DOE), and the Assistant Director, Directorate for Mathematical and Physical Sciences (NSF), on scientific priorities within the field of basic nuclear science research.

Additionally, the Secretary of Energy has determined that renewal of the NSAC is essential to conduct business of the Department of Energy and the National Science Foundation and is in the public interest in connection with the performance of duties imposed by law upon the Department of Energy. The Committee will continue to operate in accordance with the provisions of the Federal Advisory Committee Act, the Department of Energy Organization Act (Pub. L. 95–91), and the rules and regulations in implementation of these acts.

Signing Authority

This document of the Department of Energy was signed on September 27, 2023, by Sarah E. Buter, Committee Management Officer, 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 28, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–21820 Filed 10–2–23; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of an Open Meeting of the FDIC Advisory Committee of State Regulators

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of open meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, notice is hereby given of a meeting of the FDIC Advisory Committee of State Regulators. The Advisory Committee will provide advice and recommendations on a broad range of policy issues regarding the regulation of state-chartered financial institutions throughout the United States, including its territories. The meeting is open to the public. The public's means to observe this meeting of the Advisory Committee of State Regulators will be both in-person and via a Webcast live on the internet. In addition, the meeting will be recorded and subsequently made available on-demand approximately two weeks after the event. To view the live event, visit *http://fdic.windrosemedia.com.*

DATES: Wednesday, October 18, 2023, from 1 p.m. to 3 p.m.

ADDRESSES: The meeting will be held in the FDIC Board Room on the sixth floor of the FDIC building located at 550 17th Street NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Requests for further information concerning the meeting may be directed to Debra A. Decker, Committee Management Officer for the FDIC at (202) 898–8748.

SUPPLEMENTARY INFORMATION:

Agenda: The agenda will include a discussion of issues that have potential implications regarding the regulation and supervision of state-chartered financial institutions. The agenda is subject to change. Any changes to the agenda will be announced at the beginning of the meeting.

Type of Meeting: The meeting will be open to the public, limited only by the space available on a first-come, first-served basis. For security reasons, members of the public will be subject to security screening procedures and must present a valid photo identification to enter the building. Observers requiring auxiliary aids (*e.g.,* sign language interpretation) for this meeting should email *DisabilityProgram@fdic.gov* to make necessary arrangements. This meeting of the Advisory Committee of State Regulators will be Webcast live via the internet at *http://fdic.windrosemedia.com.* For optimal viewing, a high-speed internet connection is recommended. To view the recording, visit *http://fdic.windrosemedia.com/index.php.old?category=FDIC+Advisory+Committee+of+State+Regulators+(ACSR).* Written statements may be filed with the Advisory Committee before or after the meeting.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on September 27, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–21747 Filed 10–2–23; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and

all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association.

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 whether the proposed transaction complies with the standards enumerated in the HOLA (12 U.S.C. 1467a(e)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 10(c)(4)(B) of the HOLA (12 U.S.C. 1467a(c)(4)(B)). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

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 November 2, 2023.

A. Federal Reserve Bank of Richmond (Brent B. Hassell, Assistant Vice President) P.O. Box 27622, Richmond, Virginia 23261. Comments can also be sent electronically to *Comments.applications@rich.frb.org.*

1. *Oconee Federal, MHC, and Oconee Federal Financial Corp., both of Seneca, South Carolina;* to acquire control of Mutual Savings Bank, Hartsville, South Carolina.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–21857 Filed 10–2–23; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

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 question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the 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 18, 2023.

A. Federal Reserve Bank of Dallas (Karen Smith, Director, Mergers & Acquisitions) 2200 North Pearl Street, Dallas, Texas 75201–2272. Comments can also be sent electronically to *Comments.applications@dal.frb.org.*

1. *Plains Acquisition Corporation, Humble, Texas;* to retain Core + Tax Services, L.L.C., Houston, Texas, and thereby engage in financial and investment advisory activities and data processing activities, pursuant to sections 225.28(b)(6) and (b)(14) of Regulation Y.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–21856 Filed 10–2–23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice–C0A–2023–01; Docket No. 2023–0002; Sequence No. 35]

Office of Human Resources Management; SES Performance Review Board

AGENCY: Office of Human Resources Management (OHRM), General Services Administration (GSA).

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of new members to the GSA Senior Executive Service Performance Review Board. The Performance Review Board assures consistency, stability, and objectivity in the performance appraisal process.

DATES: *Applicable:* October 3, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Nathaniel Williams, Acting Director, Executive Resources Division, Office of Human Resources Management, GSA, 1800 F Street NW, Washington, DC 20405, or via telephone at (571) 513–9451.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of title 5 U.S.C requires each agency to establish, in accordance with regulation prescribed by the Office of Personnel Management, one or more SES performance review board(s). The board is responsible for making recommendations to the appointing and awarding authority on the performance appraisal ratings and performance awards for employees in the Senior Executive Service.

The following have been designated as members of the Performance Review Board of GSA:

- Katy Kale, Deputy Administrator—PRB Chair.
- Christopher Bennethum, Assistant Commissioner for Assisted Acquisition Services, Federal Acquisition Service.
- Lesley Briante, Associate Chief Information Officer for Enterprise Planning & Governance, Office of GSA IT.
- Krystal Brumfield, Associate Administrator for Government-wide Policy, Office of Government-wide Policy.
- Andrew Heller, Deputy Commissioner for Enterprise Strategy, Public Buildings Service.
- Jeffrey Lau, Regional Commissioner, Federal Acquisition Service, Northeast and Caribbean Region.
- Dena McLaughlin, Regional Commissioner, Federal Acquisition Service, Mid-Atlantic Region.

• Flavio Peres, Assistant Commissioner for Real Property Disposition, Public Buildings Service.
• Joanna Rosato, Regional Commissioner, Public Buildings Service, Mid-Atlantic Region.
• Camille Sabbakhan, Deputy General Counsel, Office of the General Counsel.

Robin Carnahan,

Administrator, General Services Administration.

[FR Doc. 2023–21818 Filed 10–2–23; 8:45 am]

BILLING CODE 6820–FM–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcing a Public Meeting of the President's Council on Sports, Fitness & Nutrition

AGENCY: Office of Disease Prevention and Health Promotion, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services (HHS) is hereby giving notice that the President's Council on Sports, Fitness & Nutrition (PCSFN) will hold a meeting for the subcommittees to share their plans and progress with the full Council. The meeting will be open to the public.

DATES: The meeting will be held on October 26, 2023, from 1:30 p.m. to 3 p.m. ET.

ADDRESSES: The meeting will be held virtually. The meeting will be accessible and recorded for later viewing. The public can obtain information on how to access the virtual meeting on *https://health.gov/our-work/nutrition-physical-activity/presidents-council* prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Designated Federal Officer for the PCSFN, Rachel Fisher, MS, MPH, RD; HHS/OASH/ODPHP, 1101 Wootton Parkway, Suite 420, Rockville, MD 20852, 240–453–8257; Email *fitness@hhs.gov*. Information about PCSFN, including details about the upcoming meeting, when they are available, can be obtained at *https://health.gov/our-work/nutrition-physical-activity/presidents-council.*

SUPPLEMENTARY INFORMATION:

Authority and Purpose: The primary functions of the PCSFN include advising the President, through the Secretary and functioning as liaisons and spokespersons on behalf of the PCSFN to relevant State, local, and private entities, and sharing information about the work of the PCSFN to advise the Secretary regarding opportunities to extend and improve physical activity, fitness, sports, and nutrition programs and services at the State, local, and national levels.

Purpose of the Meeting: At the meeting, the PCSFN subcommittees will provide updates on their plans and progress with the full Council. The Council will deliberate on the proposed plans for future activities. These activities include (but are not limited to) efforts to address the implementation of the National Strategy on Hunger, Nutrition, and Health; promotion of partnership opportunities and community engagement; and messaging around healthy eating and physical activity.

Meeting Agendas: The meeting agenda is in development and will be posted at *https://health.gov/our-work/nutrition-physical-activity/presidents-council/council-meetings* when it is finalized.

Meeting Information: The virtual meeting is open to the public and the media. The meeting will be accessible online and recorded for later viewing. The public can obtain information on how to access the virtual meeting on *https://health.gov/our-work/nutrition-physical-activity/presidents-council* prior to the meeting. The meeting will include an option to enable closed captioning. To request other special accommodations, please notify *fitness@hhs.gov* no later than 5 p.m. ET on Thursday, October 19, 2023.

Paul Reed,

Deputy Assistant Secretary for Health, Office of Disease Prevention and Health Promotion.

[FR Doc. 2023–21822 Filed 10–2–23; 8:45 am]

BILLING CODE 4150–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Request for Letters of Interest (LOI) for NCI-ComboMATCH Laboratories; Extension of Submission Period

AGENCY: National Institutes of Health, HHS.

ACTION: Notice; extension of submission period.

SUMMARY: The Department of Health and Human Services, National Institutes of Health (NIH) published a Notice in the **Federal Register** on August 14, 2023. This document extends the date to submit Letters of Interest (LOIs) to the National Cancer Institute (NCI), NIH.

DATES: The deadline to submit LOIs for NCI-ComboMATCH Laboratories, which published at 88 FR 55055 on August 14, 2023, is extended. LOIs should be submitted before 5 p.m. EST on October 31, 2023.

FOR FURTHER INFORMATION CONTACT: Questions about this request for LOIs should be directed to *NCICOMBOMATCHLabApps@nih.gov* or Benjamin Kim at *benjamin.kim@nih.gov* or by phone at (240) 276–5961.

SUPPLEMENTARY INFORMATION: On August 14, 2023, NIH published a notice in the **Federal Register**, FR Doc. 2023–17352, on pages 55055–55057. This notice extends the submission date for LOIs from September 30, 2023, to October 31, 2023.

Lyndsay N. Harris,

Associate Director, Cancer Diagnosis Program, Division of Cancer Treatment & Diagnosis, National Cancer Institute.

[FR Doc. 2023–21758 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Board on Medical Rehabilitation Research.

The meeting will be held as a hybrid (in person and virtual) meeting and is open to the public. Individuals who plan to attend as well as those who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed as below in advance of the meeting. The meeting will be videocast and can be accessed from the NIH Videocasting website (*http://videocast.nih.gov*).

Name of Committee: National Advisory Board on Medical Rehabilitation Research.

Date: December 4–5, 2023.

Time: December 4, 2023, 9:00 a.m. to 5:00 p.m.

Agenda: NICHD Director's Report, NCMRR Director's report; Report from the Training and Career Development Working Group; Plan for Updating the NIH Research Plan for Rehabilitation; Scientific Presentation on Incorporating Lived Experience; Report from the Veteran's Administration Rehabilitation Service; NIH response to the ACD Working Group on PWD.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, MPR, Bethesda, MD 20892–7510.

Time: December 5, 2023, 9:00 a.m. to 12:30 p.m.

Agenda: Science Talk: Insights from a Career Studying TBI, Anger, Relationships, and Outcome Path; Science Talks: Injury Rehabilitation; Planning for Next Board Meeting in May 2024.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, MPR, Bethesda, MD 20892–7510.

Contact Person: Ralph M. Nitkin, Ph.D., Deputy, National Center for Medical Rehabilitation Research and Director, Biological Sciences and Career Development Program, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Room 2116, Bethesda, MD 20892–7510, (301) 402–4206, *nitkinr@mail.nih.gov.*

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/advisory/nabmrr,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: September 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21777 Filed 10–2–23; 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 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 Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: November 2, 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 3G22, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Michael M. Opata, 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 3G22, Rockville, MD 20852, 240–627–3319, *michael.opata@nih.gov*.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Support for Research Excellence (SuRE) Award (R16—Clinical Trial Not Allowed).

Date: November 7, 2023.

Time: 10:00 a.m. to 6:00 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 3G22, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Michael M. Opata, 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 3G22, Rockville, MD 20852, 240–627–3319, *michael.opata@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 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21768 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Advisory Child Health and Human Development Council Task Force on Research Specific to Pregnant Women and Lactating Women (PRGLAC) Implementation Working Group Meeting

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD) PRGLAC Implementation Working Group of Council is charged with monitoring and reporting on implementation of the recommendations from the PRGLAC. This includes monitoring and reporting on implementation, updating regulations, and guidance, as applicable, regarding the inclusion of pregnant women and lactating women in clinical trials.

DATES: The virtual meeting will be held on November 17, 2023, from 12 p.m. to 4 p.m. EST.

ADDRESSES: The virtual meeting will be videocast and can be accessed from the NIH Videocasting website at *http://videocast.nih.gov/.*

FOR FURTHER INFORMATION CONTACT: For information concerning this meeting, Dr. Emma Carpenter, Health Science Policy Analyst Office of Legislation and Public Policy, NICHD, NIH, 6710B Rockledge Drive, Bethesda, MD 20892–7510, *emma.carpenter@nih.gov,* 303–981–0855.

SUPPLEMENTARY INFORMATION: This notice is pursuant to 42 U.S.C. 285g. The National Advisory Child Health and Human Development Council Task Force on Research Specific to Pregnant Women and Lactating Women (PRGLAC) Implementation Working Group meeting will be open to the public as a virtual meeting. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed in advance of the meeting.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person. Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/advisory,*

where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS).

Alison N. Cernich,

Deputy Director, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health.

[FR Doc. 2023–21858 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Advisory Child Health and Human Development Council Stillbirth Working Group Meeting

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD) Stillbirth Working Group of Council is charged with identifying current knowledge on stillbirth and prevention, areas of improvement for data collection, current resources for families impacted by stillbirth, and next steps to gather data and lower the rate of stillbirth in the United States.

DATES: The virtual meeting will be held on October 31, 2023, from 1 p.m. to 5 p.m. EST.

ADDRESSES: The virtual meeting will be videocast and can be accessed from the NIH Videocasting website at *http://videocast.nih.gov/.*

FOR FURTHER INFORMATION CONTACT: For information concerning this meeting, Dr. Natasha H. Williams, Branch Chief, Office of Legislation and Public Policy, NICHD, NIH, 6710B Rockledge Drive, Bethesda, MD 20892–7510, *natasha.williams2@nih.gov,* (240) 551–4985.

SUPPLEMENTARY INFORMATION: This notice is pursuant to 42 U.S.C. 285g. The National Advisory Child Health and Human Development Council Stillbirth Working Group meeting will be open to the public as a virtual meeting. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed in advance of the meeting.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person. Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/advisory,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS).

Alison N. Cernich,

Deputy Director, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health.

[FR Doc. 2023–21854 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; 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 General Medical Sciences Special Emphasis Panel R24 Review.

Date: November 27, 2023.

Time: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Greg Bissonette, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of General Medical Sciences, National Institute of Health, 45 Center Drive, Room Hoteling, Bethesda, Maryland 20892, 301–827–5118, *bissonettegb@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: September 27, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21769 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Child Health and Human Development Council.

The meeting will be held as a virtual meeting and is open to the public. Individuals who plan to view the virtual meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting will be videocast and can be accessed from the NIH Videocasting website (*https://videocast.nih.gov*).

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Child Health and Human Development Council.

Date: January 22–23, 2024.

Open Session: January 22, 2024, 12:00 p.m. to 5:00 p.m.

Agenda: Opening Remarks, Administrative Matters, NICHD Directors' Report, and other business of Council.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Closed Session: January 23, 2024, 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ms. Lisa Neal, Committee Management Officer, Committee Management Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6701B, Rockledge Drive, Room 2208, Bethesda, MD 20892, (301) 204–1830, *lisa.neal@nih.gov*.

Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/advisory/council,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: September 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21776 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; HIGH IMPACT NIDDK RC2 APPLICATIONS.

Date: November 3, 2023.

Time: 3:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ryan G. Morris, Ph.D., Scientific Review Officer, NIDDK/Scientific Review Branch, National Institutes of Health, 6707 Democracy Boulevard, Room 7015, Bethesda, MD 20892–2542, (301) 594–4721, *ryan.morris@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 27, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21771 Filed 10–2–23; 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 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 on Drug Abuse Special Emphasis Panel; Avenir Award Program for Chemistry and Pharmacology of Substance Use Disorders.

Date: January 10, 2024.

Time: 9:45 a.m. to 5:45 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: Marisa Srivareerat, Ph.D., Scientific Review Officer, Scientific Review Branch, Office of Extramural Policy, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 435–1258, *marisa.srivareerat@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 28, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21815 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary, Interagency Pain Research Coordinating Committee Call for Committee Membership Nominations

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) (Department) has created the Interagency Pain Research Coordinating Committee (IPRCC) and is seeking nominations for this committee.

DATES: Nominations are due by 5 p.m. ET on November 01, 2023.

ADDRESSES: Nominations must be submitted through the webform on the IPRCC website: *https://www.surveymonkey.com/r/IPRCC-nomination-form*.

FOR FURTHER INFORMATION CONTACT: Linda Porter, *porterl@ninds.nih.gov* or 301–451–4460.

SUPPLEMENTARY INFORMATION: As specified in Public Law 111–148 (''Patient Protection and Affordable Care Act'') the Committee will:

(A) develop a summary of advances in pain care research supported or conducted by the Federal agencies relevant to the diagnosis, prevention, and treatment of pain and diseases and disorders associated with pain;

(B) identify critical gaps in basic and clinical research on the symptoms and causes of pain;

(C) make recommendations to ensure that the activities of the National Institutes of Health and other Federal agencies are free of unnecessary duplication of effort;

(D) make recommendations on how best to disseminate information on pain care; and (e) make recommendations on how to expand partnerships between public entities and private entities to expand collaborative, cross-cutting research.

Membership on the committee will include six (6) non-Federal members from among scientists, physicians, and other health professionals and six (6)

non-Federal members of the general public who are representatives of leading research, advocacy, and service organizations for individuals with pain-related conditions. Members will serve overlapping three year terms. It is anticipated that the committee will meet at least once a year.

The Department strives to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that the views of diverse ethnic and racial groups and people with disabilities are represented on HHS Federal advisory committees, and the Department therefore, encourages nominations of qualified candidates from these groups. The Department also encourages geographic diversity in the composition of the Committee. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

The Department is soliciting nominations for two non-federal members from among scientists, physicians, and other health professionals and for two non-federal members of the general public who represent a leading research, advocacy, or service organization for people with pain-related conditions. These candidates will be considered to fill positions opened through completion of current member terms. Nominations are due by 5:00 p.m. ET on November 01, 2023, using the IPRCC nomination webform: *https://www.surveymonkey.com/r/IPRCC-nomination-form*.

More information about the IPRCC is available at *https://www.iprcc.nih.gov/*.

Dated: September 27, 2023.

Walter J. Koroshetz,

Director, National Institute of Neurological Disorders and Stroke, National Institutes of Health.

[FR Doc. 2023–21761 Filed 10–2–23; 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 30, 2023.

Time: 1:00 p.m. to 3:30 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 3E71, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Ann Marie M. Brighenti, 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 3E71, Rockville, MD 20852, 301–761–3100, *AnnMarie.Cruz@niaid.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 26, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21743 Filed 10–2–23; 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 Planning Grants (R34 Clinical Trial Not Allowed) and NIAID SBIR Phase II Clinical Trial Implementation Cooperative Agreement (U44 Clinical Trial Required).

Date: December 5, 2023.

Time: 11:00 a.m. to 3:00 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 3E71, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Samita Andreansky, 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 3E71, Rockville, MD 20852, 240–669–2915, *samita.andreansky@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 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21770 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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 Heart, Lung, and Blood Institute Special Emphasis Panel; Catalyze Enabling Technologies.

Date: December 4, 2023.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kristin Goltry, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 209–B, Bethesda, MD 20892, (301) 435–0297 *goltrykl@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Catalyze Product Definition.

Date: December 11, 2023.

Time: 9:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kristin Goltry, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 209–B, Bethesda, MD 20892, (301) 435–0297, *goltrykl@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 28, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21890 Filed 10–2–23; 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; Device-Based Treatments for SUD.

Date: November 8, 2023.

Time: 10:00 a.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: Preethy Nayar, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 443–4577, *nayarp2@csr.nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel Ex Vivo Models for Studies at the Intersection of HIV and Poly-Substance Use.

Date: November 17, 2023.

Time: 1:00 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: Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–5819, *gm145a@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Ending the HIV Epidemic: Justice-Involved Populations.

Date: November 29, 2023.

Time: 1:00 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: Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–5819, *gm145a@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 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21775 Filed 10–2–23; 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; Allergy, Immunology, and Transplantation Research Committee (AITC) Special Emphasis Panel.

Date: November 1, 2023.

Time: 10:30 a.m. to 12:00 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 3G45, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Vanitha S. Raman, 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 3G45, Rockville, MD 20852, 301–761–7949, *vanitha.raman@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 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21772 Filed 10–2–23; 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; Consortium for Food Allergy Research, Clinical Research Units (U01 Clinical Trial Required).

Date: November 2–3, 2023.

Time: 9:00 a.m. to 6:00 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 3G56, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Poonam Tewary, 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 3G56, Rockville, MD 20852, (301) 761–7219, *tewaryp@mail.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 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21773 Filed 10–2–23; 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; NIH Support for Conferences and Scientific Meetings.

Date: October 30, 2023.

Time: 2:00 p.m. to 3:00 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: Caitlin Moyer, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 443–4577, *caitlin.moyer@nih.gov*.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIDA L Conflict SEP.

Date: November 7, 2023.

Time: 2:00 p.m. to 3:30 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; Mechanism for Time-Sensitive Drug Abuse Research.

Date: November 7, 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: Sudhirkumar U. Yanpallewar, M.D., Scientific Review Officer, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 443–4577, *sudhirkumar.yanpallewar@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 27, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21774 Filed 10–2–23; 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: Microbiology, Infectious Diseases and AIDS Initial Review Group; Microbiology and Infectious Diseases B Research Study Section Microbiology and Infectious Diseases B Research Study Section.

Date: November 1–2, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Mario Cerritelli, 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, MSC 9834, Rockville, MD 20892, 240–669–5199, *cerritem@mail.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 28, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–21816 Filed 10–2–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2761–23; DHS Docket No. USCIS–2021–0003]

RIN 1615–ZB86

Extension and Redesignation of Venezuela for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Notice of Temporary Protected Status (TPS) extension and redesignation.

SUMMARY: Through this notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Venezuela for Temporary Protected Status (TPS) for 18 months, beginning on March 11, 2024 and ending on September 10, 2025. This extension allows existing TPS beneficiaries to retain TPS through September 10, 2025, if they otherwise continue to meet the eligibility requirements for TPS. Existing TPS beneficiaries who wish to extend their status through September 10, 2025, must re-register during the re-registration period described in this notice. Separately, the Secretary is also redesignating Venezuela for TPS. The redesignation of Venezuela allows additional Venezuelan nationals (and individuals having no nationality who last habitually resided in Venezuela) who have been continuously residing in the United States since July 31, 2023, to apply for TPS for the first time during the initial registration period described under the redesignation information in this notice. In addition to demonstrating continuous residence in the United States since July 31, 2023, and meeting other eligibility criteria, initial applicants for TPS under this designation must demonstrate that they have been continuously physically present in the United States since October 3, 2023, the effective date of this redesignation of Venezuela for TPS. The Secretary's actions represent two distinct TPS designations of Venezuela—the first designation of Venezuela that was announced on March 9, 2021 (Venezuela 2021) and is being extended in this FRN, and this second action, redesignating Venezuela on October 3, 2023 (Venezuela 2023).

DATES:

Extension of Designation of Venezuela for TPS: The 18-month extension of Venezuela 2021 begins on March 11, 2024 and will remain in effect for 18 months, ending on September 10, 2025. The extension affects existing beneficiaries of TPS and those who filed initial applications for TPS under Venezuela 2021 that were pending as of the date of this notice.

Re-registration: The 60-day re-registration period for existing beneficiaries under Venezuela 2021 runs from January 10, 2024, through March 10, 2024. (Note: It is important for re-registrants to timely re-register during the registration period and not to wait until their Employment Authorization Document (EAD) expires. Delaying re-registration could result in gaps in their employment authorization documentation.)

Redesignation of Venezuela for TPS (Venezuela 2023): The 18-month redesignation of Venezuela for TPS begins on October 3, 2023, and will remain in effect for 18 months, ending on April 2, 2025. The redesignation affects potential first-time applicants and others who do not currently have TPS.

First-time Registration: The initial registration period for new applicants under the Venezuela 2023 TPS redesignation begins on October 3, 2023, and will remain in effect through April 2, 2025.

FOR FURTHER INFORMATION CONTACT:

- You may contact Rená Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.
- For more information on TPS, including guidance on the registration process and additional information on eligibility, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* You can find specific information about Venezuela's TPS designation by selecting ''Venezuela'' from the menu on the left side of the TPS web page.
- If you have additional questions about TPS, please visit *uscis.gov/tools.* Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you cannot find your answers there, you may also call our USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).
- Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at *uscis.gov*, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.*
- You also can find more information at local USCIS offices after this notice is published.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

BIA—Board of Immigration Appeals
CFR—Code of Federal Regulations
DHS—U.S. Department of Homeland Security
DOS—U.S. Department of State
EAD—Employment Authorization Document
FNC—Final Nonconfirmation
Form I–131—Application for Travel Document
Form I–765—Application for Employment Authorization
Form I–797—Notice of Action
Form I–821—Application for Temporary Protected Status
Form I–9—Employment Eligibility Verification
Form I–912—Request for Fee Waiver
Form I–94—Arrival/Departure Record
FR—Federal Register
Government—U.S. Government
IER—U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section
IJ—Immigration Judge
INA—Immigration and Nationality Act
SAVE—USCIS Systematic Alien Verification for Entitlements Program
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status
TTY—Text Telephone
USCIS—U.S. Citizenship and Immigration Services
U.S.C.—United States Code

Purpose of This Action (TPS)

Through this notice, DHS sets forth procedures necessary for nationals of Venezuela (or individuals having no nationality who last habitually resided in Venezuela) to (1) re-register for TPS and apply to renew their EAD with USCIS or (2) submit an initial registration application under the redesignation and apply for an EAD.

Re-registration is limited to individuals who have previously registered for TPS under Venezuela 2021 [1] and whose applications have been granted. If you do not re-register properly within the re-registration period, USCIS may withdraw your TPS following appropriate procedures. *See* 8 CFR 244.14.

For individuals who have already been granted TPS under Venezuela 2021, the 60-day re-registration period for existing beneficiaries runs from January 10, 2024, through March 10, 2024. USCIS will issue new EADs with

[1] *See Designation of Venezuela for Temporary Protected Status and Implementation of Employment Authorization for Venezuelans Covered by Deferred Enforced Departure,* 86 FR 13574 (Mar. 9, 2021).

a September 10, 2025, expiration date to eligible Venezuelan TPS beneficiaries who timely re-register and apply for EADs. Given the time frames involved with processing TPS re-registration applications, DHS recognizes that not all re-registrants may receive a new EAD before their current EAD expires. Accordingly, through this **Federal Register** notice, DHS automatically extends through March 10, 2025, the validity of certain EADs previously issued under the TPS designation of Venezuela. As proof of continued employment authorization through March 10, 2025, TPS beneficiaries can show their EAD with the notation A–12 or C–19 under Category and a Card Expires date of March 10, 2024, or September 9, 2022. This notice explains how TPS beneficiaries and their employers may determine if an EAD is automatically extended and how this affects the Form I–9, Employment Eligibility Verification, E-Verify, and USCIS Systematic Alien Verification for Entitlements (SAVE) processes.

Individuals who have an initial Venezuela TPS application (Form I–821) or Application for Employment Authorization (Form I–765) pending as of October 3, 2023 under Venezuela 2021, do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through September 10, 2025. Similarly, if USCIS approves a pending TPS-related Form I–765, USCIS will issue the individual a new EAD that will be valid through the same date. Individuals who are current beneficiaries under the Venezuela 2021 designation and have a re-registration application (Form I–821) and/or Application for Employment Authorization (Form I–765) pending as of October 3, 2023, do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through September 10, 2025. Similarly, if USCIS approves a pending TPS-related Form I–765, USCIS will issue the individual a new EAD that will be valid through the same date.

Under the redesignation, Venezuela 2023, individuals who currently do not have TPS may submit an initial application during the initial registration period that runs from October 3, 2023, and runs through the full length of the redesignation period ending April 2, 2025. In addition to demonstrating continuous residence in the United States since July 31, 2023, and meeting other eligibility criteria, initial applicants for TPS under this redesignation (Venezuela 2023) must demonstrate that they have been continuously physically present in the United States since October 3, 2023,[2] the effective date of this redesignation of Venezuela, before USCIS may grant them TPS. DHS estimates that approximately 472,000 individuals may become newly eligible for TPS under the redesignation of Venezuela.

What is Temporary Protected Status (TPS)?

- TPS is a temporary immigration status granted to eligible nationals of a foreign state designated for TPS under the INA, or to eligible individuals without nationality who last habitually resided in the designated foreign state, regardless of their country of birth.
- During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain EADs if they continue to meet the requirements of TPS.
- TPS beneficiaries may also apply for and be granted travel authorization as a matter of DHS discretion.
- To qualify for TPS, beneficiaries must meet the eligibility standards at INA section 244(c)(1)–(2), 8 U.S.C. 1254a(c)(1)–(2).
- When the Secretary terminates a foreign state's TPS designation, beneficiaries return to one of the following:
  - The same immigration status or category that they maintained before TPS, if any (unless that status or category has since expired or terminated); or
  - Any other lawfully obtained immigration status or category they received while registered for TPS, if it is still valid beyond the date their TPS terminates.

When was Venezuela designated for TPS?

Venezuela was initially designated on the basis of extraordinary and temporary conditions that prevented nationals of Venezuela from returning in safety. *See Designation of Venezuela for Temporary Protected Status and Implementation of Employment Authorization for Venezuelans Covered by Deferred Enforced Departure,* 86 FR 13574 (Mar. 9, 2021). The TPS designation was extended for 18 months on September 8, 2022. *See Extension of the Designation of Venezuela for Temporary Protected Status,* 87 FR 55024 (Sept. 8, 2022).

What authority does the Secretary have to extend the designation of Venezuela for TPS?

Section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist.[3] The decision to designate any foreign state (or part thereof) is a discretionary decision, and there is no judicial review of any determination with respect to the designation, termination, or extension of a designation. *See* INA sec. 244(b)(5)(A), 8 U.S.C. 1254a(b)(5)(A). The Secretary, in their discretion, may then grant TPS to eligible nationals of that foreign state (or individuals having no nationality who last habitually resided in the designated foreign state). *See* INA sec. 244(a)(1)(A), 8 U.S.C. 1254a(a)(1)(A).

At least 60 days before the expiration of a foreign state's TPS designation or extension, the Secretary, after consultation with appropriate U.S. Government agencies, must review the conditions in the foreign state designated for TPS to determine whether they continue to meet the conditions for the TPS designation. *See* INA sec. 244(b)(3)(A), 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that the foreign state continues to meet the conditions for TPS designation, the designation will be extended for an additional period of 6 months or, in the Secretary's discretion, 12 or 18 months. *See* INA sec. 244(b)(3)(A), (C), 8 U.S.C. 1254a(b)(3)(A), (C). If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must

[2] The ''continuous physical presence'' date is the effective date of the most recent TPS designation of the country, which is either the publication date of the designation announcement in the **Federal Register** or a later date established by the Secretary. The ''continuous residence'' date is any date established by the Secretary when a country is designated (or sometimes redesignated) for TPS. *See* INA sec. 244(b)(2)(A) (effective date of designation); 244(c)(1)(A)(i–ii) (continuous residence and continuous physical presence date requirements); 8 U.S.C. 1254a(b)(2)(A); 1254a(c)(1)(A)(i–ii).

[3] INA section 244(b)(1) ascribes this power to the Attorney General. Congress transferred this authority from the Attorney General to the Secretary of Homeland Security. See Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (2002). The Secretary may designate a country (or part of a country) for TPS on the basis of ongoing armed conflict such that returning would pose a serious threat to the personal safety of the country's nationals and habitual residents, environmental disaster (including an epidemic), or extraordinary and temporary conditions in the country that prevent the safe return of the country's nationals. For environmental disaster-based designations, certain other statutory requirements must be met, including that the foreign government must request TPS. A designation based on extraordinary and temporary conditions cannot be made if the Secretary finds that allowing the country's nationals to remain temporarily in the United States is contrary to the U.S. national interest. INA sec. 244(b)(1); 8 U.S.C. 1254a(b)(1).

terminate the designation. *See* INA sec. 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B).

What is the Secretary's authority to redesignate Venezuela for TPS?

In addition to extending an existing TPS designation, the Secretary, after consultation with appropriate Government agencies, may redesignate a country (or part thereof) for TPS. *See* INA sec. 244(b)(1), 8 U.S.C. 1254a(b)(1); *see also* INA sec. 244(c)(1)(A)(i), 8 U.S.C. 1254a(c)(1)(A)(i) (requiring that ''the alien has been continuously physically present since the effective date of *the most recent designation of the state*'') (emphasis added).[4]

When the Secretary designates or redesignates a country for TPS, the Secretary also has the discretion to establish the date from which TPS applicants must demonstrate that they have been ''continuously resid[ing]'' in the United States. *See* INA sec. 244(c)(1)(A)(ii), 8 U.S.C. 1254a(c)(1)(A)(ii). The Secretary has determined that the ''continuous residence'' date for applicants for TPS under the redesignation of Venezuela will be July 31, 2023. Initial applicants for TPS under this redesignation must also show they have been ''continuously physically present'' in the United States since October 3, 2023, which is the effective date of the Secretary's redesignation of Venezuela. *See* INA sec. 244(c)(1)(A)(i), 8 U.S.C. 1254a(c)(1)(A)(i). For each initial TPS application filed under the redesignation, USCIS cannot make the final determination of whether the applicant has met the ''continuous physical presence'' requirement until October 3, 2023, the effective date of this redesignation for Venezuela. USCIS, however, will issue employment authorization documentation, as appropriate, during the registration period in accordance with 8 CFR 244.5(b).

Why is the Secretary extending the TPS designation for Venezuela 2021 and redesignating Venezuela for TPS?

DHS has reviewed country conditions in Venezuela. Based on the review, including input received from DOS and other U.S. Government agencies, the Secretary has determined that an 18-month TPS extension is warranted because extraordinary and temporary conditions continue to prevent Venezuelan nationals from returning in safety. The Secretary has further determined that redesignating Venezuela for TPS under INA section 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C) is warranted on the same statutory basis of extraordinary and temporary conditions.

Overview

Venezuela continues to face a severe humanitarian emergency due to a political and economic crisis, as well as human rights violations and abuses and high levels of crime and violence, that impacts access to food, medicine, healthcare, water, electricity, and fuel, and has led to high levels of poverty. Additionally, Venezuela has recently experienced heavy rainfall in the spring and summer of 2023 which triggered flooding and landslides. Given the current conditions in Venezuela, these issues contribute to the country's existing challenges.

Venezuela is experiencing ''an unprecedented political, economic, and humanitarian crisis.'' [5] ''Venezuela is suffering one of the worst humanitarian crises in the history of the Western Hemisphere,'' which has been characterized by ''[h]igh levels of poverty, food insecurity, malnutrition, and infant mortality, together with frequent electricity outages and the collapse of health infrastructure.'' [6] Though there were some positive developments in Venezuela in 2022 ''as the economy stabilized and showed signs of economic growth,'' the effects of these changes were not felt across the Venezuelan population and did not offset the impact of the large-scale economic contraction which resulted in significant humanitarian challenges that continue today and will take time to address.[7]

Political Repression and Human Rights

The Maduro regime has closed off channels for political dissent, restricting enjoyment of civil liberties and ''prosecuting perceived opponents without regard for due process.'' [8] The UN Human Rights Council's Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela (IIFFM) found in its September 2022 report, ''Venezuela's military and civilian intelligence agencies function as well-coordinated and effective structures in the implementation of a plan'' to ''repress dissent.'' [9]

Crime and Insecurity

Venezuela has one of the highest rates of violent deaths in the world.[10] Additionally, ''Venezuelans face physical insecurity and violence from several sources, including irregular armed groups, security forces, and organized gangs.'' [11] Corruption in Venezuela exacerbates insecurity. InSight Crime has reported that ''criminal groups and corrupt state actors together form a hybrid state that combines governance with criminality, and where illegal armed groups act at the service of the state, while criminal networks form within it.'' [12] Human trafficking remains a serious concern. Traffickers exploit and subject Venezuelans, including those fleeing the country, to egregious forms of exploitation, including sex trafficking and forced labor.[13] Members of non-state armed groups that operate in the

[4] The extension and redesignation of TPS for Venezuela is one of several instances in which the Secretary and, before the establishment of DHS, the Attorney General, have simultaneously extended a country's TPS designation and redesignated the country for TPS. *See, e.g.,* ''Extension and Redesignation of Haiti for Temporary Protected Status,'' 76 FR 29000 (May 19, 2011); ''Extension and Re-designation of Temporary Protected Status for Sudan,'' 69 FR 60168 (Oct. 7, 2004); ''Extension of Designation and Redesignation of Liberia Under Temporary Protected Status Program,'' 62 FR 16608 (Apr. 7, 1997).

[5] Clare Ribando Seelke, Rebecca M. Nelson, Rhoda Margesson, & Phillip Brown, Venezuela: Background and U.S. Relations, Congressional Research Service (CRS), p.1, Dec. 6, 2022, available at *https://crsreports.congress.gov/product/pdf/R/R44841* (last visited Jul. 7, 2023).

[6] Michael Penfold & Cynthia J. Arnson, Overcoming Barriers to Humanitarian Aid in Venezuela, Wilson Center, p.1, Mar. 2023, available at *https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/OVERCOMING%20BARRIERS%20TO%20HUMANITARIAN%20AID%20IN%20VENEZUELA_0.pdf* (last visited Aug. 10, 2023).

[7] United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Venezuela Humanitarian Fund Annual Report 2022, p.6, Jun. 14, 2023, available at *https://www.unocha.org/publications/report/venezuela-bolivarian-republic/venezuela-humanitarian-fund-annual-report-2022* (last visited Aug. 10, 2023).

[8] Freedom House, Freedom in the World 2023—Venezuela, Mar. 10, 2023, available at *https://freedomhouse.org/country/venezuela/freedom-world/2023* (last visited Jul. 18, 2023).

[9] United Nations Human Rights Council, Venezuela: new UN report details responsibilities for crimes against humanity to repress dissent and highlights situation in remotes mining areas, Sept. 20, 2022, available at *https://www.ohchr.org/en/press-releases/2022/09/venezuela-new-un-report-details-responsibilities-crimes-against-humanity* (last visited Sept. 27, 2023).

[10] Overseas Security Advisory Council (OSAC), Venezuela Country Security Report, U.S. Department of State, May 10, 2022, available at *https://www.osac.gov/Content/Report/34f99e62-2161-412d-bfeb-1e752539f6bf* (last visited Jul. 19, 2023).

[11] Freedom House, Freedom in the World 2023—Venezuela, Mar. 10, 2023, available at *https://freedomhouse.org/country/venezuela/freedom-world/2023* (last visited Jul. 18, 2023).

[12] Venezuela Investigative Unit, Rise of the Criminal Hybrid State in Venezuela, InSight Crime, p.5, Jul. 2023, available at *https://insightcrime.org/wp-content/uploads/2023/07/Rise-of-the-Criminal-Hybrid-State-in-Venezuela-InSight-Crime-1.pdf* (last visited Jul. 19, 2023).

[13] U.S. Dep't. of State, 2023 Trafficking in Persons Report: Venezuela, June 15, 2023, available at *https://www.state.gov/reports/2023-trafficking-in-persons-report/venezuela/* (last visited Sep. 25, 2023).

country with impunity, subject Venezuelans to forced labor and forced criminality, and recruit or use child soldiers.[14]

Economic Collapse

Since 2014, Venezuela has suffered from an ''economic recession marked by hyperinflation, shortages of basic goods and a collapse in public services such as electricity and water.'' [15] Recently, Venezuela's economy has shown some signs of recovery; however, it is still in a precarious condition.[16] In a report covering the period from May 2022 through April 2023, the Office of the High Commissioner for Human Rights (OHCHR) noted that while economic growth which occurred in 2022 ''would bring hope for improved economic prospects, persistent challenges and other factors continued to negatively affect essential public services, transport, education, and health.'' [17]

In its annual report covering 2022, the Inter-American Commission on Human Rights (IACHR) noted ''the high rates of poverty and inequality in the country, in which there are estimates that more than 90% of the population lives in poverty.'' [18] The same report stated that ''as of March 2022, HumVenezuela estimated that 94.5% of the population would not have sufficient income to cover items such as food, housing, health, education, transportation and clothing.'' [19]

Health Crisis

Various sources have referred to severe problems with health systems in Venezuela, including the IACHR, Human Rights Watch, and the Congressional Research Service (CRS).[20] Per *The Associated Press,* Venezuela's ''health care system crumbled long before'' the start of the COVID–19 pandemic.[21] Likewise, in its 2022 annual report, the IACHR acknowledged that while the COVID–19 pandemic ''has had significant impacts on the health sector and the population, the serious affectations of the system preceded the health emergency.'' [22] Elaborating on this topic, the IACHR identified ''shortages of medicines, supplies, materials and medical treatment'' as of 2018, and that the ''situation has been worsening since 2014, and it is important to highlight that the health system has reportedly collapsed due to its persistent precariousness, which would have been exacerbated by the pandemic.'' [23]

According to OHCHR, health centers in Venezuela ''report structural underfunding and understaffing resulting in for example, regular blackouts and water shortages.'' [24] In its report on the humanitarian situation in Venezuela in 2022, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) noted that ''[h]ealth services continue to be affected by insufficient water and sanitation conditions and the lack of electricity supply in facilities.'' [25] Similarly, Human Rights Watch stated in its annual report covering 2022 that ''[p]ower and water outages at healthcare centers—and emigration of healthcare workers—were further weakening operational capacity.'' [26] Furthermore, the IACHR has reported that ''98% of the hospitals in the country lack medicines, electrical plants and water, as well as failures in laboratories, reagents and wards. As a result, it is estimated that only between 3 and 10% of the hospitals have medical and surgical material to solve medical circumstances.'' [27]

Food Insecurity

In a humanitarian response plan published in 2023, the Food and Agriculture Organization of the United Nations (FAO) identified food insecurity as ''the most pressing challenge for the population.'' [28] Human Rights Watch stated in its annual report covering 2022 that HumVenezuela reported in March 2022 that ''most Venezuelans face difficulties in accessing food, with 10.9 million undernourished or chronically hungry. Some 4.3 million are deprived of food, sometimes going days without eating.'' [29] Moreover, the IACHR noted in its 2022 annual report that ''32% of children live in a situation of chronic malnutrition.'' [30]

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[14] *Id.*

[15] Andrew Cawthorne and Diego Ore, Venezuela confirms recession, highest inflation in Americas, Reuters, Dec. 30, 2014, available at *https://www.reuters.com/article/us-venezuela-economy/venezuela-confirms-recession-highest-inflation-in-americas-idUSKBN0K81KV20141230* (last visited Jul. 7, 2023); Reuters, Venezuela's largest private company calls government supervision 'arbitrary', Apr. 25, 2020, available at *https://www.reuters.com/article/us-venezuela-economy-polar/venezuelas-largest-private-company-calls-government-supervision-arbitrary-idUSKCN2270U8* (last visited Jul. 7, 2023).

[16] The Economist, Nicolás Maduro, Venezuela's autocrat, is winning, Apr. 25, 2023, available at *https://web.archive.org/web/20230531114303/https://www.economist.com/the-americas/2023/04/25/nicolas-maduro-venezuelas-autocrat-is-winning* (last visited Jul. 10, 2023).

[17] Office of the High Commissioner for Human Rights (OHCHR), Situation of human rights in the Bolivarian Republic of Venezuela—Report of the United Nations High Commissioner for Human Rights, p.2, Jul. 4, 2023, available at *https://reliefweb.int/report/venezuela-bolivarian-republic/situation-human-rights-bolivarian-republic-venezuela-report-united-nations-high-commissioner-human-rights-ahrc5354-advance-unedited-version* (last visited Jul. 12, 2023).

[18] Inter-American Commission on Human Rights (IACHR), Annual Report 2022—Chapter IV.B—Venezuela, p.705, Apr. 20, 2023, available at *https://www.oas.org/en/iachr/docs/annual/2022/Chapters/9-IA2022_Cap_4B_VE_EN.pdf* (last visited Jul. 10, 2023).

[19] Inter-American Commission on Human Rights (IACHR), Annual Report 2022—Chapter IV.B—Venezuela, p.705, Apr. 20, 2023, available at *https://www.oas.org/en/iachr/docs/annual/2022/Chapters/9-IA2022_Cap_4B_VE_EN.pdf* (last visited Jul. 10, 2023).

[20] Inter-American Commission on Human Rights (IACHR), Annual Report 2022—Chapter IV.B—Venezuela, p.674, 706, 708, 709, Apr. 20, 2023, available at *https://www.oas.org/en/iachr/docs/annual/2022/Chapters/9-IA2022_Cap_4B_VE_EN.pdf* (last visited Jul. 12, 2023); Human Rights Watch, World Report 2023: Venezuela, Jan. 13, 2023, available at *https://www.hrw.org/world-report/2023/country-chapters/venezuela* (last visited Jul. 12, 2023); Clare Ribando Seelke, Rebecca M. Nelson, Rhoda Margesson, & Phillip Brown, Venezuela: Background and U.S. Relations, Congressional Research Service (CRS), p.11, Dec. 6, 2022, available at *https://crsreports.congress.gov/product/pdf/R/R44841* (last visited Jul. 12, 2023).

[21] Regina Garcia Cano, Governments pledge money, attention to Venezuela's crisis, The Associated Press, Mar. 17, 2023, *https://apnews.com/article/venezuela-migration-crisis-us-united-nations-805873048d2b0532bfbe53428f4ed2aa* (last visited Jul. 12, 2023).

[22] Inter-American Commission on Human Rights (IACHR), Annual Report 2022—Chapter IV.B—Venezuela, p.705, Apr. 20, 2023, available at *https://www.oas.org/en/iachr/docs/annual/2022/Chapters/9-IA2022_Cap_4B_VE_EN.pdf* (last visited Jul. 12, 2023).

[23] Inter-American Commission on Human Rights (IACHR), Annual Report 2022—Chapter IV.B—Venezuela, p.705–706, Apr. 20, 2023, available at *https://www.oas.org/en/iachr/docs/annual/2022/Chapters/9-IA2022_Cap_4B_VE_EN.pdf* (last visited Jul. 12, 2023).

[24] Office of the High Commissioner for Human Rights (OHCHR), Situation of human rights in the Bolivarian Republic of Venezuela—Report of the United Nations High Commissioner for Human Rights, p.3, Jul. 4, 2023, available at *https://reliefweb.int/report/venezuela-bolivarian-republic/situation-human-rights-bolivarian-republic-venezuela-report-united-nations-high-commissioner-human-rights-ahrc5354-advance-unedited-version* (last visited Jul. 13, 2023).

[25] United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Venezuela Humanitarian Fund Annual Report 2022, p.6, Jun. 14, 2023, available at *https://www.unocha.org/publications/report/venezuela-bolivarian-republic/venezuela-humanitarian-fund-annual-report-2022* (last visited Aug. 10, 2023).

[26] Human Rights Watch, World Report 2023: Venezuela, Jan. 13, 2023, available at *https://www.hrw.org/world-report/2023/country-chapters/venezuela* (last visited Jul. 13, 2023).

[27] Inter-American Commission on Human Rights (IACHR), Annual Report 2022—Chapter IV.B—Venezuela, p.708, Apr. 20, 2023, available at *https://www.oas.org/en/iachr/docs/annual/2022/Chapters/9-IA2022_Cap_4B_VE_EN.pdf* (last visited Jul. 13, 2023).

[28] Food and Agriculture Organization of the United Nations (FAO), The Bolivarian Republic of Venezuela: Humanitarian Response Plan 2022–2023, p.1, 2023, available at *https://www.fao.org/3/cc6775en/cc6775en.pdf* (last visited Jul. 14, 2023).

[29] Human Rights Watch, World Report 2023: Venezuela, Jan. 13, 2023, available at *https://www.hrw.org/world-report/2023/country-chapters/venezuela* (last visited Jul. 14, 2023).

[30] Inter-American Commission on Human Rights (IACHR), Annual Report 2022—Chapter IV.B—

Continued

Heavy Rains and Flooding

Since May 26, 2023, as hurricane season began, Venezuela has experienced heavy rains which resulted in flooding that affected several areas of the country.[31] According to ACAPS, ''Between June and July there have been 19 tropical waves, that have brought heavy rains, floods and landslides across the country.'' [32] As of July 11, 2023, the meteorological situation in Venezuela indicated ''that rainfall and resulting damages are expected to be more severe than previous years.'' [33] Reports of the damage caused by the heavy rains include 5,100 people affected with damage to houses and blockages in the drainage system in the state of Portuguesa.[34] In another area—Delta Amacuro state—around 7,500 people are affected by the 2023 floods.[35]

In summary, extraordinary and temporary conditions continue to prevent Venezuelan nationals from returning in safety due to a severe humanitarian emergency which has resulted in food insecurity and the inability to access adequate medicine, healthcare, water, electricity, and fuel. Additionally, human rights violations and abuses, high levels of poverty, high levels of crime and violence, and heavy rains and flooding prevent Venezuelan nationals from returning in safety and permitting Venezuelan noncitizens to remain in the United States temporarily would not be contrary to the interests of the United States.

Based on this review and after consultation with appropriate U.S. Government agencies, the Secretary has determined that:

- The conditions supporting Venezuela's designation for TPS continue to be met. *See* INA sec. 244(b)(3)(A) and (C), 8 U.S.C. 1254a(b)(3)(A) and (C).
- There continues to be extraordinary and temporary conditions in Venezuela that prevent Venezuelan nationals (or individuals having no nationality who last habitually resided in Venezuela) from returning to Venezuela in safety, and it is not contrary to the national interest of the United States to permit Venezuelan TPS beneficiaries to remain in the United States temporarily. *See* INA sec. 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C).
- The existing designation of Venezuela for TPS (Venezuela 2021) should be extended for an 18-month period, beginning on March 11, 2024 and ending on September 10, 2025. *See* INA sec. 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C).
- Due to the conditions described above, Venezuela should be redesignated for TPS beginning on October 3, 2023, and ending on April 2, 2025. *See* INA sec. 244(b)(1)(C) and (b)(2), 8 U.S.C. 1254a(b)(1)(C) and (b)(2).
- For the redesignation, the Secretary has determined that TPS applicants must demonstrate that they have continuously resided in the United States since July 31, 2023.
- Initial TPS applicants under the redesignation must demonstrate that they have been continuously physically present in the United States since October 3, 2023, the effective date of the redesignation of Venezuela for TPS.
- There are approximately 243,000 current Venezuela TPS beneficiaries who are eligible to re-register for TPS under the extension.
- It is estimated that approximately 472,000 additional individuals may be eligible for TPS under the redesignation of Venezuela. This population includes Venezuelan nationals in the United States in nonimmigrant status or without immigration status.

Notice of the Designation of Venezuela for TPS

By the authority vested in me as Secretary under INA section 244, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate U.S. Government agencies, the statutory conditions supporting Venezuela's designation for TPS on the basis of extraordinary and temporary conditions are met and it is not contrary to the national interest of the United States to allow Venezuelan TPS beneficiaries to remain in the United States temporarily. *See* INA sec. 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C). On the basis of this determination, I am extending the existing designation of Venezuela for TPS for 18 months, beginning on March 11, 2024, and ending on September 10, 2025.

Additionally, and also on the basis of this determination, I am redesignating Venezuela for TPS for 18 months, beginning on October 3, 2023 and ending on April 2, 2025. See INA sec. 244(b)(1) and (b)(2); 8 U.S.C. 1254a(b)(1), and (b)(2). I estimate approximately 472,000 individuals may be newly eligible for TPS under the redesignation of Venezuela.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Eligibility and Employment Authorization for TPS

Required Application Forms and Application Fees To Register or Re-Register for TPS

To register or re-register for TPS based on the designation of Venezuela, you must submit a Form I–821, Application for Temporary Protected Status. Re-registration under this notice applies to TPS beneficiaries whose re-registration application was approved under the TPS extension announced on September 8, 2022, who have been issued Form I–797, Notice of Action, indicating approval of their TPS application and an EAD with a March 10, 2024, expiration date. Individuals with an EAD with a March 10, 2024, expiration date who want to receive an EAD with the September 10, 2025, expiration date must re-register pursuant to the instructions noted in this FRN. If you are submitting an initial TPS application, you must pay the filing fee for Form I–821 (or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver). If you are filing an application to re-register for TPS, you do not need to pay the fee. *See* 8 CFR 244.17. You may need to pay the biometric services fee. If you can demonstrate an inability to pay the biometric services fee, you may request to have the fee waived. Please see additional information under the ''Biometric Services Fee'' section of this notice.

TPS beneficiaries are eligible for an Employment Authorization Document (EAD), which proves their authorization to work in the United States. You are not required to submit Form I–765, Application for Employment Authorization, or have an EAD to be granted TPS, but see below for more information if you want an EAD to use as proof that you can work in the United States.

Individuals who have an initial Venezuela TPS application (Form I–821) that was still pending as of October 3, 2023, do not need to file the application again. If USCIS approves an individual's Form I–821, USCIS will grant the individual TPS through April 2, 2025. Individuals who are current beneficiaries under the Venezuela 2021

Venezuela, p.709, Apr. 20, 2023, available at *https://www.oas.org/en/iachr/docs/annual/2022/Chapters/9-IA2022_Cap_4B_VE_EN.pdf* (last visited Jul. 14, 2023).

[31] ACAPS, ACAPS Anticipatory Note: Venezuela—Anticipation of flooding, 20 July 2023, July 20, 2023, available at *https://reliefweb.int/report/venezuela-bolivarian-republic/acaps-anticipatory-note-venezuela-anticipation-flooding-20-july-2023* (last visited Sept. 19, 2023).

[32] *Id.*

[33] Reliefweb, *Venezuela: Anticipatory Action for Floods—DREF Operation MDRVE008,* July 11, 2023, available at *https://reliefweb.int/report/venezuela-bolivarian-republic/venezuela-anticipatory-actions-floods-dref-operation-mdrve008* (last visited Sep. 19, 2023).

[34] *Id.*

[35] *Id.*

designation and have a re-registration application (Form I–821) and/or Application for Employment Authorization (Form I–765) pending as of October 3, 2023, do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through September 10, 2025. Similarly, if USCIS approves a pending TPS-related Form I–765, USCIS will issue the individual a new EAD that will be valid through the same date.

For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* Fees for the Form I–821, the Form I–765, and biometric services are also described in 8 CFR 103.7(b)(1) (Oct. 1, 2020). The instructions for Form I–821 and Form I–765 also provide more information on requirements and fees for both initial TPS applicants and existing TPS beneficiaries who are re-registering.

How can TPS beneficiaries obtain an Employment Authorization Document (EAD)?

Everyone must provide their employer with documentation showing that they have the legal right to work in the United States. TPS beneficiaries are eligible to obtain an EAD, which proves their legal right to work. If you want to obtain an EAD, you must file Form I–765 and pay the Form I–765 fee (or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver). TPS applicants may file this form with their TPS application, or separately later, if their TPS application is still pending or has been approved. Beneficiaries with an initial Venezuela TPS-related Form I–765 that was still pending as of October 3, 2023, do not need to file the application again. If USCIS approves a pending TPS-related Form I–765, USCIS will issue the individual a new EAD that will be valid through April 2, 2025. Individuals who are current beneficiaries under the Venezuela 2021 designation and have a re-registration application (Form I–821) and/or Application for Employment Authorization (Form I–765) pending as of October 3, 2023, do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through September 10, 2025. Similarly, if USCIS approves a pending TPS-related Form I–765, USCIS will issue the individual a new EAD that will be valid through the same date.

Refiling an Initial TPS Registration Application After Receiving a Denial of a Fee Waiver Request

If USCIS denies your fee waiver request, you can resubmit your TPS application. The fee waiver denial notice will contain specific instructions about resubmitting your application.

Filing Information

You may file Form I–821 and related requests for EADs online or by mail. However, if you request a fee waiver, you must submit your application by mail. When filing a TPS application, applicants may request an EAD by submitting a completed Form I–765 with their Form I–821.

Online filing: Form I–821 and Form I–765 are available for concurrent filing online.[36] To file these forms online, you must first create a USCIS online account.[37]

Mail filing: Mail your application for TPS to the proper address in Table 1.

Table 1—Mailing Addresses

Mail your completed Form I–821, Application for Temporary Protected Status; Form I–765, Application for Employment Authorization, if applicable; Form I–912, Request for Fee Waiver (if applicable); and supporting documentation to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If you live in:	*Then, mail your application to:*
California, Texas	*U.S. Postal Service (USPS):* USCIS, Attn: TPS Venezuela, P.O. Box 20300, Phoenix, AZ 85036–0300. *FedEx, UPS, and DHL deliveries:* USCIS, Attn: TPS Venezuela (Box 20300), 2108 E Elliot Rd., Tempe, AZ 85284–1806.
Florida	*U.S. Postal Service (USPS):* USCIS, Attn: TPS Venezuela, P.O. Box 660864, Dallas, TX 75266–0864. *FedEx, UPS, and DHL deliveries:* USCIS, Attn: TPS Venezuela (Box 660864), 2501 S State Highway, 121 Business, Suite 400, Lewisville, TX 75067–8003.
Illinois, Indiana, Massachusetts, New Jersey, New York, North Carolina, Utah, Virginia.	*U.S. Postal Service (USPS):* USCIS, Attn: Venezuela, P.O. Box 4091, Carol Stream, IL 60197–4091. *FedEx, UPS, and DHL deliveries:* USCIS, Attn: TPS Venezuela (Box 4091), 2500 Westfield Drive, Elgin, IL 60124–7836.
All other states, District of Columbia, and U.S. Territories	*U.S. Postal Service (USPS):* USCIS, Attn: TPS Venezuela, P.O. Box 805282, Chicago, IL 60680–5285. *FedEx, UPS, and DHL deliveries:* USCIS, Attn: TPS Venezuela (Box 805282), 131 South Dearborn Street, 3rd Floor, Chicago, IL 60603–5517.

If you were granted TPS by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) and you wish to request an EAD, please file online or mail your Form I–765 application to the appropriate mailing address in Table 1. If you file online, please include the fee. If you file by mail, please include the fee or fee waiver request. When you request an EAD based on an IJ/BIA grant of TPS, please include a copy of the IJ or BIA order granting you TPS with your application. This will help us verify your grant of TPS and process your application.

[36] Find information about online filing at ''Forms Available to File Online,'' *https://www.uscis.gov/file-online/forms-available-to-file-online.*

[37] *https://myaccount.uscis.gov/users/sign_up.*

Supporting Documents

The filing instructions on Form I–821 list all the documents needed to establish eligibility for TPS. You may also find information on the acceptable documentation and other requirements for applying (that is, registering) for TPS on the USCIS website at *https://www.uscis.gov/tps* under ''Venezuela.''

Travel

TPS beneficiaries may also apply for and be granted travel authorization as a matter of discretion. You must file for travel authorization if you wish to travel outside of the United States. If granted, travel authorization gives you permission to leave the United States and return during a specific period. To request travel authorization, you must file Form I–131, Application for Travel Document, available at *https://www.uscis.gov/i-131.* You may file Form I–131 together with your Form I–821 or separately. When filing Form I–131, you must:

- Select Item Number 1.d. in Part 2 on the Form I–131; and
- Submit the fee for Form I–131, or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver.

If you are filing Form I–131 together with Form I–821, send your forms to the address listed in Table 1. If you are filing Form I–131 separately based on a pending or approved Form I–821, send your form to the address listed in Table 2 and include a copy of Form I–797 for the approved or pending Form I–821.

TABLE 2—MAILING ADDRESSES

If you are . . .	Mail to . . .
Filing Form I–131 together with a Form I–821, Application for Temporary Protected Status.	The address provided in Table 1.
Filing Form I–131 based on a pending or approved Form I–821, and you are using the U.S. Postal Service (USPS): You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, P.O. Box 660167, Dallas, TX 75266–0867.
Filing Form I–131 based on a pending or approved Form I–821, and you are using FedEx, UPS, or DHL: You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, 2501 S State Hwy. 121 Business, Ste. 400, Lewisville, TX 75067.

Biometric Services Fee for TPS

Biometrics (such as fingerprints) are required for all applicants 14 years of age and older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay the biometric services fee, you may request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver. For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* USCIS may require you to visit an Application Support Center to submit biometrics. For additional information on the USCIS biometric screening process, please see the USCIS Customer Profile Management Service Privacy Impact Assessment, available at *https://www.dhs.gov/publication/dhsuscispia-060-customer-profile-management-service-cpms.*

General Employment-Related Information for TPS Applicants and Their Employers

How can I obtain information on the status of my TPS application and EAD request?

To get case status information about your TPS application, as well as the status of your TPS-based EAD request, you can check Case Status Online at uscis.gov, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.* If your Form I–765 has been pending for more than 90 days, and you still need assistance, you may ask a question about your case online at *https://egov.uscis.gov/e-request/Intro.do* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

Am I eligible to receive an automatic extension of my current EAD through March 10, 2025, through this Federal Register notice?

Yes. Regardless of your country of birth, if you currently have a Venezuela TPS-based EAD with the notation A–12 or C–19 under Category and a Card Expires date of March 10, 2024, or September 9, 2022, this **Federal Register** notice automatically extends your EAD through March 10, 2025. Although this **Federal Register** notice automatically extends your EAD through March 10, 2025, you must re-register timely for TPS in accordance with the procedures described in this **Federal Register** notice to maintain your TPS and employment authorization.

When hired, what documentation may I show to my employer as evidence of identity and employment authorization when completing Form I–9?

You can find the Lists of Acceptable Documents on Form I–9, Employment Eligibility Verification, as well as the Acceptable Documents web page at *https://www.uscis.gov/i-9-central/acceptable-documents.* Employers must complete Form I–9 to verify the identity and employment authorization of all new employees. Within three days of hire, employees must present acceptable documents to their employers as evidence of identity and employment authorization to satisfy Form I–9 requirements.

You may present any document from List A (which provides evidence of both identity and employment authorization) or one document from List B (which provides evidence of your identity) together with one document from List C (which provides evidence of employment authorization), or you may present an acceptable receipt as described in the Form I–9 Instructions. Employers may not reject a document based on a future expiration date. You can find additional information about Form I–9 on the I–9 Central web page at *https://www.uscis.gov/I-9Central.* An EAD is an acceptable document under List A. See the section ''How do my employer and I complete Form I–9 using my automatically extended EAD for a new job?'' of this **Federal Register** notice for more information. If your EAD states A–12 or C–19 under Category and has a Card Expires date of March 10, 2024, or September 9, 2022, this **Federal Register** notice extends it automatically, and you may choose to present your EAD to your employer as proof of identity and employment eligibility for Form I–9 through March 10, 2025, unless your TPS has been withdrawn or your request for TPS has been denied. Your country of birth noted on the EAD does not have to

reflect the TPS-designated country of Venezuela for you to be eligible for this extension.

What documentation may I present to my employer for Form I–9 if I am already employed but my current TPS-related EAD is set to expire?

Even though we have automatically extended your EAD, your employer is required by law to ask you about your continued employment authorization. Your employer may need to re-examine your automatically extended EAD to check the Card Expires date and Category code if your employer did not keep a copy of your EAD when you initially presented it. Once your employer has reviewed the Card Expires date and Category code, they should update the EAD expiration date in Section 2 of Form I–9. See the section ''What updates should my current employer make to Form I–9 if my EAD has been automatically extended?'' of this **Federal Register** notice for more information. You may show this **Federal Register** notice to your employer to explain what to do for Form I–9 and to show that USCIS has automatically extended your EAD through March 10, 2025, but you are not required to do so. The last day of the automatic EAD extension is March 10, 2025. Before you start work on March 11, 2025, your employer is required by law to reverify your employment authorization on Form I–9. By that time, you must present any document from List A or any document from List C on Form I–9 Lists of Acceptable Documents, or an acceptable List A or List C receipt described in the Form I–9 instructions to reverify employment authorization.

Your employer may not specify which List A or List C document you must present and cannot reject an acceptable receipt.

If I have an EAD based on another immigration status/benefit, can I obtain a new TPS-based EAD?

Yes, if you are eligible for TPS, you can obtain a new TPS-based EAD, even if you have an EAD or work authorization based on another immigration status or benefit. If you are a current TPS beneficiary under Venezuela 2021 and want to obtain a new TPS-based EAD valid through September 10, 2025, or if you are applying for TPS for the first time under Venezuela 2023 and want to obtain a TPS-based EAD valid through April 2, 2025, then you must file Form I–765, Application for Employment Authorization, and pay the associated fee (unless USCIS grants your fee waiver request).

Can my employer require that I provide any other documentation such as evidence of my status, proof of my Venezuelan citizenship, or a Form I–797C showing that I registered for TPS for Form I–9 completion?

No. When completing Form I–9, employers must accept any documentation you choose to present from the Form I–9 Lists of Acceptable Documents that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers may not request other documentation, such as proof of Venezuelan citizenship or proof of registration for TPS when completing Form I–9 for new hires or reverifying the employment authorization of current employees. If you present an EAD that USCIS has automatically extended, employers should accept it as a valid List A document if the EAD reasonably appears to be genuine and to relate to you. Refer to the ''Note to Employees'' section of this **Federal Register** notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status or your national origin.

How do my employer and I complete Form I–9 using my automatically extended EAD for a new job?

When using an automatically extended EAD to complete Form I–9 for a new job before March 10, 2025:

1. For Section 1, you should:

a. Check ''A noncitizen authorized to work until'' and enter March 10, 2025, as the ''expiration date''; and

b. Enter your USCIS number or A-Number where indicated. (Your EAD or other document from DHS will have your USCIS number or A-Number printed on it; the USCIS number is the same as your A-Number without the A prefix.)

2. For Section 2, employers should:

a. Determine whether the EAD is auto-extended by ensuring it is in category A–12 or C–19 and has a Card Expires date of March 10, 2024 or September 9, 2022;

b. Write in the document title;

c. Enter the issuing authority;

d. Provide the document number; and

e. Write March 10, 2025, as the expiration date.

Before the start of work on March 11, 2025, employers must reverify the employee's employment authorization on Form I–9.

What updates should my current employer make to Form I–9 if my EAD has been automatically extended?

If you presented a TPS-related EAD that was valid when you first started your job and USCIS has now automatically extended your EAD, your employer may need to re-examine your current EAD if they do not have a copy of the EAD on file. Your employer should determine whether your EAD is automatically extended by ensuring that it contains Category A–12 or C–19 and has a Card Expires date of March 10, 2024 or September 9, 2022. Your employer may not rely on the country of birth listed on the card to determine whether you are eligible for this extension.

If your employer determines that USCIS has automatically extended your EAD, your employer should update Section 2 of your previously completed Form I–9 as follows:

1. Write EAD EXT and March 10, 2025, as the last day of the automatic extension in the Additional Information field; and

2. Initial and date the correction.

Note: This is not considered a reverification. Employers do not reverify the employee until either the automatic extension has ended, or the employee presents a new document to show continued employment authorization, whichever is sooner. By March 11, 2025, when the employee's automatically extended EAD has expired, employers are required by law to reverify the employee's employment authorization on Form I–9.

If I am an employer enrolled in E-Verify, how do I verify a new employee whose EAD has been automatically extended?

Employers may create a case in E-Verify for a new employee by entering the number from the Document Number field on Form I–9 into the document number field in E-Verify. Employers should enter March 10, 2025, as the expiration date for an EAD that has been extended under this **Federal Register** notice.

If I am an employer enrolled in E-Verify, what do I do when I receive a ''Work Authorization Documents Expiring'' alert for an automatically extended EAD?

E-Verify automated the verification process for TPS-related EADs that are automatically extended. If you have employees who provided a TPS-related EAD when they first started working for you, you will receive a ''Work Authorization Documents Expiring'' case alert when the auto-extension period for this EAD is about to expire.

Before this employee starts work on March 11, 2025, you must reverify their employment authorization on Form I–9. Employers may not use E-Verify for reverification.

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This **Federal Register** notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888–464–4218 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls and emails in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (Form I–9 and E-Verify), employers may call the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) Employer Hotline at 800–255–8155 (TTY 800–237–2515). IER offers language interpretation in numerous languages. Employers may also email IER at *IER@usdoj.gov* or get more information online at *www.justice.gov/ier.*

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888–897–7781 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls in English, Spanish and many other languages. Employees or job applicants may also call the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) Worker Hotline at 800–255–7688 (TTY 800–237–2515) for information regarding employment discrimination based on citizenship, immigration status, or national origin, including discrimination related to Form I–9 and E-Verify. The IER Worker Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the Lists of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt as described in the Form I–9 Instructions. Employers may not require extra or additional documentation other than what is required to complete Form I–9. Further, employers participating in E-Verify who receive an E-Verify case result of ''Tentative Nonconfirmation'' (mismatch) must promptly inform employees of the mismatch and give these employees an opportunity to resolve the mismatch. A mismatch means that the information entered into E-Verify from Form I–9 differs from records available to DHS.

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any adverse action against an employee because of a mismatch while the case is still pending with E-Verify. A Final Nonconfirmation (FNC) case result is received when E-Verify cannot confirm an employee's employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call USCIS for assistance at 888–897–7781 (TTY 877–875–6028). For more information about E-Verify-related discrimination or to report an employer for discrimination in the E-Verify process based on citizenship, immigration status, or national origin, contact IER's Worker Hotline at 800–255–7688 (TTY 800–237–2515). Additional information about proper nondiscriminatory Form I–9 and E-Verify procedures is available on the IER website at *https://www.justice.gov/ier* and the USCIS and E-Verify websites at *https://www.uscis.gov/i-9-central* and *https://www.e-verify.gov.*

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

For Federal purposes, if you present an automatically extended EAD referenced in this **Federal Register** notice, you do not need to show any other document, such as a Form I–797C, Notice of Action, reflecting receipt of a Form I–765 EAD renewal application or this **Federal Register** notice, to prove that you qualify for this extension. While Federal Government agencies must follow the guidelines laid out by the Federal Government, State and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, State, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary, show you are authorized to work based on TPS or other status, or that may be used by DHS to determine if you have TPS or another immigration status. Examples of such documents are:

- Your current EAD with a TPS category code of A–12 or C–19, even if your country of birth noted on the EAD does not reflect the TPS-designated country of Venezuela;
- Your Form I–94, Arrival/Departure Record;
- Your Form I–797, Notice of Action, reflecting approval of your Form I–765; or
- Form I–797 or Form I–797C, Notice of Action, reflecting approval or receipt of a past or current Form I–821, if you received one from USCIS.

Check with the government agency requesting documentation about which document(s) the agency will accept. Some state and local government agencies use the SAVE program to confirm the current immigration status of applicants for public benefits.

While SAVE can verify that an individual has TPS, each agency's procedures govern whether they will accept an unexpired EAD, Form I–797, Form I–797C, or Form I–94, Arrival/Departure Record. If an agency accepts the type of TPS-related document you present, such as an EAD, the agency should accept your automatically extended EAD, regardless of the country of birth listed on the EAD. It may assist the agency if you:

a. Give the agency a copy of the relevant **Federal Register** notice showing the extension of TPS-related documentation in addition to your recent TPS-related document with your A-number, USCIS number, or Form I–94 number;

b. Explain that SAVE will be able to verify the continuation of your TPS using this information; and

c. Ask the agency to initiate a SAVE query with your information and follow through with additional verification steps, if necessary, to get a final SAVE response verifying your TPS.

You can also ask the agency to look for SAVE notices or contact SAVE if they have any questions about your immigration status or automatic extension of TPS-related documentation. In most cases, SAVE provides an automated electronic response to benefit-granting agencies within seconds, but occasionally verification can be delayed.

You can check the status of your SAVE verification by using CaseCheck at *https://save.uscis.gov/casecheck/.* CaseCheck is a free service that lets you follow the progress of your SAVE verification case using your date of birth and one immigration identifier number (such as A-number, USCIS number, or Form I–94 number) or Verification Case

Number. If an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted on or will act on a SAVE verification and you do not believe the SAVE response is correct, the SAVE website, *https://www.uscis.gov/save,* has detailed information on how to make corrections or update your immigration record, make an appointment, or submit a written request to correct records.

[FR Doc. 2023–21865 Filed 9–29–23; 4:15 pm]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–66]

30-Day Notice of Proposed Information Collection: Green and Resilient Retrofit Program (GRRP) Application Forms; OMB Control No.: 2502–0624

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* November 2, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email *PaperworkReductionActOffice@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 1, 2023 at 88 FR 50166.

A. Overview of Information Collection

Title of Information Collection: Green and Resilient Retrofit Program (GRRP) Application Forms.

OMB Approval Number: 2502–0624.

OMB Expiration Date: 8/31/2023.

Type of Request: Revision of a currently approved collection.

Form Numbers: HUD 5991, HUD 5992, and HUD 5993.

Description of the need for the information and proposed use: The Green and Resilient Retrofit Program (''GRRP'') is newly funding through Title III of the Inflation Reduction Act of 2022, H.R. 5376 (IRA), in section 30002 titled ''Improving Energy Efficiency or Water Efficiency or Climate Resilience of Affordable Housing'' (the ''IRA''), authorizing HUD to make loans, grants to improve energy or water efficiency; enhance indoor air quality or sustainability; implement the use of zero-emission electricity generation, low-emission building materials or processes, energy storage, or building electrification strategies; or address climate resilience of eligible HUD-assisted multifamily properties. The program leverages significant technological advancements in utility efficiency and adds a focus on preparing for climate hazards—both reducing residents' and properties' exposure to hazards and protecting life, livability, and property when disaster strikes. With its dual focus, GRRP is the first program to consider, at the national scale, how best to approach both green and energy efficiency upgrades simultaneously with investment in climate resilience strategies in multifamily housing. HUD is taking a multi-faceted approach to deploy these funds multiple funding rounds and for properties at different development stages.

Funding under this program will be made through multiple cohorts under one or multiple Notices of Funding Opportunity (NOFOs) that will detail the application process for eligible applicants. This collection is necessary in order to receive applications requesting funding under this program.

Respondents: HUD-assisted multifamily owners.

Estimated Number of Respondents: 680.

Estimated Number of Responses: 680.

Frequency of Response: Once per application.

Average Hours per Response: 15 hours.

Total Estimated Burden: 10,200.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–21849 Filed 10–2–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_CA_FRN_MO4500161911]

Notice of Public Meeting: Northern California District Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Northern California District Resource Advisory Council (RAC) will meet as follows.

DATES: The Northern California District RAC has rescheduled its August 23–24, 2023, meeting for October 25, 2023, from 10 a.m. to 4 p.m. Pacific Time (PT); and October 26, 2023, from 8 a.m. to 3 p.m. PT.

ADDRESSES: The RAC will participate in a field tour on October 25 to public lands managed by the BLM Eagle Lake Field Office and host a business meeting on October 26. The field tour will commence and conclude, and the meeting will be held at, the BLM Eagle Lake Field Office, 2550 Riverside Drive, Susanville, CA 96130. A virtual participation option will be available. Meeting links and participation instructions will be provided to the public via news media, social media, the BLM California RAC web page *blm.gov/get-involved/rac/California/northern-california-rac,* and through personal contact 2 weeks prior to the meeting. Written comments pertaining to the meeting can be sent to the BLM Northern California District Office, at the earlier address, marked Attention: RAC meeting comments.

FOR FURTHER INFORMATION CONTACT: Public Affairs Officer Joseph J. Fontana, telephone: (530) 260–0189, email: *jfontana@blm.gov.*

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the BLM, concerning the issues relating to land use planning or the management of the public land resources located in northern California and northwest Nevada. For the October 26 meeting, agenda topics include review and comment on the Northwest California Integrated Resource Management Plan, an update on the management plan revision for the Cascade Siskiyou National Monument, an update on wild horse and burro management, and review of and comment on business plans for recreational facilities managed by the Redding and Arcata Field Offices.

All meetings are open to the public. A 30-minute public comment period will be available on October 26 at 11 a.m. PT. Depending on the number of persons wishing to speak and the time available, the amount of time for oral comments may be limited. Written public comments may be sent to the BLM Northern California District Office at the address listed in the **ADDRESSES** section of this notice. All comments received will be provided to the RAC.

Public Disclosure 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.

Members of the public are welcome on field tours but must provide their own transportation and meals. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM (see **FOR FURTHER INFORMATION CONTACT**).

Detailed meeting minutes for the RAC meetings will be maintained in the Northern California District Office. Minutes will also be posted to the California RAC web page.

Authority: 43 CFR 1784.4–2

Erica St. Michel,

Deputy State Director, Communications.

[FR Doc. 2023–21880 Filed 10–2–23; 8:45 am]

BILLING CODE 4331–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_OR_FRN_MO4500171063]

Notice of Temporary Seasonal Wildlife Closures on Public Lands in Deschutes and Jefferson Counties, OR

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of temporary closure.

SUMMARY: Notice is hereby given that 3,479 acres of Bureau of Land Management (BLM) administered public lands described later in this notice in Deschutes and Jefferson Counties, Oregon, will be temporarily closed to all forms of entry seasonally for up to 2 years to protect the habitat of bald eagles, golden eagles, prairie falcons, and other nesting raptors during sensitive breeding and nesting time frames.

DATES: The temporary seasonal closures in the BLM Prineville District in central Oregon will take effect annually beginning on January 1 and running through August 31 for the Tumalo area, from January 15 through August 31 for the Trout Creek area, and from February 1 through August 31 for the Maston/Jaguar, Fryrear, Deep Canyon, and Horny Hollow areas. During these time frames, the Prineville District will monitor nest occupancy and determine whether any or all of these temporary closures can be lifted earlier due to nest failure and/or nest fledging; however, none of the temporary closures will be lifted earlier than May 15 of each year.

The temporary seasonal closures take effect on November 2, 2023 and will expire 30 days after the BLM publishes a final supplementary rule in the **Federal Register** implementing the 2005 Upper Deschutes Resource Management Plan (RMP), 1986 Two Rivers RMP, and other associated National Environmental Policy Act (NEPA) documents, or 2 years from the date of publication of this notice in the **Federal Register**, whichever occurs soonest.

ADDRESSES: Bureau of Land Management, Prineville District Office, 3050 NE Third Street, Prineville, Oregon 97754 or via email: *BLM_OR_PR_Mail@blm.gov.* Please reference ''wildlife closures'' on all correspondence.

Maps of these temporary seasonal closures will be posted at key locations that provide access to these areas and will be available at the Prineville District Office or by request via mail or email.

FOR FURTHER INFORMATION CONTACT: Larry Ashton, BLM Prineville District Office, at (541) 416–6700 or by email at *lashton@blm.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: Seasonal closure dates to protect nesting raptors vary based on migration and nesting seasons and the time needed to fledge young. Closures in these areas for bald eagle habitat will occur from January 1 up to August 31; seasonal closures to protect golden eagle habitat will occur no earlier than January 15 up to August 31; and seasonal closures to protect prairie falcon habitat will occur from March 15 up to August 15. If other raptors occupy these same nests, closures will begin March 1 and end August 31. These seasonal closures may be lifted earlier if monitoring determines that the birds have successfully fledged from their nests, have abandoned their nests, and/or no new nesting attempts are occurring in these areas; however, no closures will be lifted earlier than May 15 of each year. The start and end dates of these closures may be altered slightly if a new raptor moves in and occupies the same territory. The 3,479 acres of public land affected by these seasonal closures represent 0.21 percent of the 1.65 million acres of the public lands administered by the BLM Prineville District in central Oregon. Public access to multiple recreational trails in the immediate exterior vicinity of these closures will remain available.

Bald eagles, golden eagles, prairie falcons, and other raptors are federally protected under the Migratory Bird Treaty Act and the Lacey Act, and bald and golden eagles are also federally protected under the Bald and Golden Eagle Protection Act. Raptors are sensitive to human disturbances surrounding their nests during the breeding and nesting season, and human intrusions could jeopardize their nesting success in the public lands described later. Human-caused disturbances known to negatively impact nesting success during the closure periods include, but are not limited to, people walking, running, or riding a bike or horse; motorized vehicle use; and creating loud noises (*e.g.,* chain saw use, blasting, shooting). The following-described seasonal closures are based on scientific findings that limiting human activities within 0.5 miles from the line of sight of occupied nests, within 0.25 miles from the non-line of sight of occupied nests, and up to 1 mile away for blasting activities, can successfully mitigate such disturbances to raptor habitat.

The BLM's 2005 Upper Deschutes RMP and Record of Decision (ROD) directs the Prineville District to avoid or mitigate impacts from human disturbances occurring in or near the habitats of these three protected species as well as other raptors. The BLM's Two Rivers RMP and ROD (1986) directs the Prineville District to apply seasonal restrictions to mitigate impacts of human activities on important seasonal wildlife habitat, including raptor nesting habitat. The seasonal closures included in this notice were also previously analyzed and approved in the following publicly reviewed NEPA documents: the Cline Buttes Recreation Area Plan Environmental Assessment (EA) and Decision Record (DR) (2010), the Crooked River Ranch Trails Project EA and DR (2008), the Tumalo Vegetation and Trail Management Project EA and DR (2012), and the Trout Creek Rock Climbing Area Access and Trail Plan EA and DR (2012). The seasonal closures included in this notice will collectively protect bald eagles nesting in the Tumalo area; five pairs of golden eagles nesting in the Maston/Jaguar, Deep Canyon, Fryrear, Tumalo, and Horny Hollow areas; and two pairs of prairie falcons nesting in the Fryrear and Maston/Jaguar areas; and can apply if alternative raptors move in and occupy these same nests.

The authority to establish these closures is found at 43 CFR 8364.1, which allows the BLM to issue orders to close or restrict public lands to protect public lands and resources.

The following persons are exempt from these closures: any Federal, Tribal, State, or local government official acting within the scope of their duties; members of any organized rescue or firefighting forces acting within the scope of their duties; and any person authorized, in writing, by the authorized officer.

Any person who violates this closure may be tried before a United States Magistrate and fined in accordance with 18 U.S.C. 3571, imprisoned no more than 12 months under 43 U.S.C. 1733(a) and 43 CFR 8360.0–7, or both. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of Oregon law.

The legal descriptions of the affected public lands in the seasonal closure areas are:

Tumalo closure includes 80.49 acres of BLM-administered lands in the following area:

Willamette Meridian, Oregon

T. 17 S., R. 11 E.,
Sec. 3, those portions of the NE¼SE¼ and S½SE¼ lying easterly of a 50-foot perpendicular offset from the center line of the Tumalo Feed Canal and northerly of a 50-foot perpendicular offset from the center line of an unnamed dirt road more particularly described as follows:
Beginning at the road intersection with the East boundary of the section at approximate latitude: 44°07′25.9″ N., longitude: 121°23′01.0″ W., thence westerly to intersect the 50-foot perpendicular offset from the center line of the Tumalo Feed Canal at approximate latitude: 44°07′26.0″ N., longitude: 121°23′10.5″ W.

Trout Creek closure includes 406.08 acres of BLM-administered lands in the following area:

Willamette Meridian, Oregon

T. 9 S., R. 13 E.,
Sec. 12, those portions of lots 1 thru 3 and E½SE¼ lying southeasterly of a 30-foot perpendicular offset from the center line of Trout Creek Trail;
Sec. 13, NW¼NE¼.
T. 9 S., R. 14 E.,
Sec. 7, lots 4 and 5, SE¼NW¼ and NE¼SW¼, and those portions of lots 2 and 3 lying southerly of a 30-foot perpendicular offset from the center line of Trout Creek Trail.

The BLM will implement a partial opening of climbing routes in the Trout Creek area that are over 0.25 miles away from the active nest after May 15. This would allow climbing on identified ''walls'' with one hiking access path to the routes. Available routes and access will be posted in the Trout Creek area, at the Prineville District Office, and on all relevant BLM websites by May 15.

Deep Canyon closure includes 953.96 acres of BLM-administered lands in the following area:

Willamette Meridian, Oregon

T. 14 S., R. 11 E.,
Sec. 34, those portions of the E½NE¼, SE¼SW¼ and SE¼ lying southeasterly of a 100-foot perpendicular offset from the center line of an unnamed dirt trail more particularly described as follows:
Beginning at the trail intersection with the South boundary of the section at approximate latitude: 44°18′21.2″ N., longitude: 121°24′26.6″ W., thence northeasterly to a trail junction at approximate latitude: 44°18′24.7″ N., longitude: 121°24′24.8″ W., thence northeasterly to a trail junction at approximate latitude: 44°18′33.5″ N., longitude: 121°24′09.9″ W., thence

northeasterly to a trail junction at approximate latitude: 44°18′36.6″ N., longitude: 121°24′08.8″ W., thence northeasterly to a trail junction at approximate latitude: 44°18′39.9″ N., longitude: 121°24′02.4″ W., thence easterly and northeasterly to intersect the North boundary of the section at approximate latitude: 44°19′13.7″ N., longitude: 121°23′36.0″ W.;

Sec. 35, those portions of NW¼ and S½ lying westerly of a 100-foot perpendicular offset from the center line of an unnamed dirt road more particularly described as follows:

Beginning at the road intersection with the North-South center line of the section at approximate latitude: 44°19′13.0″ N., longitude: 121°22′56.2″ W., thence southwesterly to a road junction at approximate latitude: 44°19′01.4″ N., longitude: 121°23′00.1″ W., thence southeasterly to intersect the North-South center line of the section at approximate latitude: 44°18′54.3″ N., longitude: 121°22′56.4″ W.;

Continuing on the center line of an unnamed road, beginning at the road intersection with the East-West center line at approximate latitude: 44°18′47.1″ N., longitude: 121°22′41.5″ W., thence southwesterly to intersect the South boundary of the section at approximate latitude: 44°18′21.0″ N., longitude: 121°23′00.5″ W.

T. 15 S., R. 11 E.,

Sec. 2, lot 4 and those portions of S½NW¼ and S½ lying northerly of a 100-foot perpendicular offset from the center line of State Highway No. 126 and westerly of a 100-foot perpendicular offset from the center line of an unnamed dirt road more particularly described as follows:

Beginning at the road intersection with the East-West center line of the NW¼ at approximate latitude: 44°18′07.8″ N., longitude: 121°23′02.0″ W., thence southwesterly to a road junction at approximate latitude: 44°18′04.5″ N., longitude: 121°23′06.5″ W., thence southeasterly to intersect the 100-foot perpendicular offset from the center line of State Highway No. 126 at approximate latitude: 44°17′42.5″ N., longitude: 121°22′50.1″ W.;

Sec. 3, lots 1 and 2 and those portions of lot 3, SW¼NE¼, SE¼NW¼, NE¼SW¼ and NW¼SE¼ lying northerly of a 100-foot perpendicular offset from the center line of State Highway No. 126 and easterly of a 100-foot perpendicular offset from the center line of an unnamed dirt trail more particularly described as follows:

Beginning at the intersection of the dirt trail with the North boundary of the section at approximate latitude: 44°18′21.2″ N., longitude: 121°24′26.6″ W., thence southwesterly to a trail junction at approximate latitude: 44°18′20.9″ N., longitude: 121°24′27.2″ W., thence southeasterly to a trail junction at approximate latitude: 44°18′07.6″ N., longitude: 121°24′13.0″ W., thence southwesterly to intersect the North-South center line of the NW¼ at approximate latitude: 44°18′03.4″ N., longitude: 121°24′27.8″ W.

Fryrear Canyon closure includes 1,284.90 acres of BLM-administered lands in the following area:

Willamette Meridian, Oregon

T. 15 S., R. 11 E.,

Sec. 15, those portions of W½SW1/4 lying westerly of a 100-foot perpendicular offset from the center line of OHV Trail No. 15 and OHV Trail No. 21, excepting Jordan Road also known as A.J. Warrin Road and OHV Trail No. 24, an unmaintained County dirt road, 60 feet wide;

Sec. 16, those portions of E½, NE¼NW¼ and E½SW¼ lying westerly of a 100-foot perpendicular offset from the center line of OHV Trail No. 21 and southerly of a 100-foot perpendicular offset from the center line of OHV Trail No. 23 and OHV Trail No. 20, excepting Jordan Road also known as A.J. Warrin Road and OHV Trail No. 24, an unmaintained County dirt road, 60 feet wide;

Sec. 21, those portions of N½ lying easterly of a 100-foot perpendicular offset from the center line of Fryrear Road and northerly of a 100-foot perpendicular offset from the center line of an unnamed dirt road more particularly described as follows:

Beginning at approximate latitude: 44°15′17.7″ N., longitude: 121°25′49.6″ W., thence easterly to a road junction at approximate latitude: 44°15′18.5″ N., longitude: 121°25′09.9″ W.; and northerly of a 15-foot perpendicular offset from the center line of an unnamed user defined trail, 10 feet wide, located in the S½NE¼ more particularly described as follows:

Beginning at a road junction with approximate latitude: 44°15′18.5″ N., longitude: 121°25′09.9″ W., thence northeasterly to a trail junction with approximate latitude: 44°15′20.8″ N., longitude: 121°24′56.5″ W., thence southeasterly to intersect the East-West center line of the section at approximate latitude: 44°15′18.3″ N., longitude: 121°24′55.3″ W.;

Sec. 22, those portions of W½NW¼ lying westerly of a 100-foot perpendicular offset from the center line of OHV Trail No. 15.

Maston Area closure and Deschutes River North and Deschutes River South closure includes 551.70 acres of BLM-administered lands in the following area:

Willamette Meridian, Oregon

T. 15 S., R. 12 E.,

Sec. 25, that portion of SW¼SW¼ lying southerly of a 100-foot perpendicular offset from the center line of Fat Rabbit Loop Trail and River Access Trail;

Sec. 26, that portion of SE¼SE¼ lying southeasterly of a 100-foot perpendicular offset from the center line of Fat Rabbit Loop Trail;

Sec. 35, those portions of N½, SW¼ and N½SE¼ lying southerly of a 100-foot perpendicular offset from the center line of Fat Rabbit Loop Trail, easterly of a 100-foot perpendicular offset from the center line of Wagon Train Trail, and easterly of a 100-foot perpendicular offset from the center line of Talon Trail.

T. 16 S., R. 12 E.,

Sec. 3, lot 1 and those portions of lot 2 and SE¼ lying easterly of a 100-foot perpendicular offset from the center line of Talon Trail, easterly of a 100-foot perpendicular offset from the center line of à la Rockbar Trail, northeasterly of a 100-foot perpendicular offset from the center line of River Access Trail, and northwesterly of the Deschutes River.

The prairie falcon territory and dates for the prairie falcon closure fall completely within the territory and dates for the Maston golden eagle. If the golden eagle closure is no longer needed, the closure will still apply to the prairie falcon with closure dates of March 15–August 31.

Horny Hollow closure includes 202.1 acres of BLM-administered land in the following area:

Willamette Meridian, Oregon

T. 13 S., R. 12 E.,

Sec. 3, that portion of lot 7 lying southwesterly of the Crooked River;

Sec. 4, those portions of lot 7, SW¼NE¼, SE¼NW¼, E½SW¼ and W½SE¼ lying southwesterly of the Crooked River, southerly of a line due east from the intersection of Horny Hollow Trail and Otter Bench Trail, and easterly of a 30-foot perpendicular offset from the center line of Otter Bench Trail;

Sec. 9, that portion of NE¼NE¼ lying northeasterly of a 30-foot perpendicular offset from the center line of Otter Bench Trail;

Sec. 10, that portion of NW¼NW¼ lying northerly of a 30-foot perpendicular offset from the center line of Otter Bench Trail and southerly of the Crooked River.

(Authority: 43 CFR 8364.1)

Amanda Roberts,

District Manager, Prineville.

[FR Doc. 2023–21762 Filed 10–2–23; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM930000.L14400000.BJ0000.BX0000]

Notice of Filing of Plats of Survey; New Mexico; Texas

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed 30 days after the date of this publication in the Bureau of Land Management (BLM), New Mexico State Office, Santa Fe, New Mexico. The surveys announced in this notice are

necessary for the management of lands administered by the agency indicated.

ADDRESSES: This plat will be available for inspection in the New Mexico State Office, Bureau of Land Management, 301 Dinosaur Trail, Santa Fe, New Mexico, 85004–4427. Protests of a survey should be sent to the New Mexico State Director at the above address.

FOR FURTHER INFORMATION CONTACT: Michael J. Purtee, Chief Cadastral Surveyor; (505) 761–8903; *mpurtee@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico

The plat representing the dependent resurvey and subdivision of a tract of land in Township 10 South, Range 26 East, accepted August 25, 2023, for Group No. 1216, New Mexico.

This plat was prepared at the request of the Bureau of Land Management, Roswell Field Office, New Mexico.

The plat representing the dependent resurvey of a tract of land in Township 13 North, Range 3 East, accepted September 27, 2023, for Group No. 1217, New Mexico.

This plat was prepared at the request of the Bureau of Indian Affairs, Southern Pueblos Agency.

Val Verde County, Texas

The plat representing the survey of a tract of land in Block A, Sections 17 and 18, of the International and Great Northern Railroad Company Survey, accepted September 21, 2023, for Group No. 15, Texas.

This plat was prepared at the request of the National Park Service.

A person or party who wishes to protest against this survey must file a written notice of protest within 30 calendar days from the date of this publication with the New Mexico State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within 30 days after the protest is filed. Before including your address, or other personal information in your protest, please be aware that your entire protest, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 U.S.C. chapter 3)

Michael J. Purtee,

Chief Cadastral Surveyor of New Mexico and Texas.

[FR Doc. 2023–21781 Filed 10–2–23; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NV_FRN_MO45001720402]

Notice of Segregation of Public Land for the Stagecoach Wind Project, White Pine County, Nevada

AGENCY: Bureau of Land Management, Department of Interior.

ACTION: Notice of segregation.

SUMMARY: Through this notice the BLM is segregating public lands included in the right-of-way application for the Stagecoach Wind Project from appropriation under the public land laws, including the Mining Law but not the Mineral Leasing or Material Sales Acts, for a period of two years from the date of publication of this notice, subject to valid existing rights. This segregation is to allow for the orderly administration of the public lands to facilitate consideration of development of renewable energy resources. The public lands segregated by this notice totals 69,431.23 acres.

DATES: This segregation for the lands identified in this notice is effective on October 3, 2023.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to the mailing list, send requests to: Brian Buttazoni, Planning & Environmental Specialist, at: telephone, 775–861–6491; address, 1340 Financial Boulevard, Reno, NV 89502; or by email: *StagecoachWind@blm.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: Regulations found at 43 CFR 2091.3–1(e) and 2804.25(f) allow the BLM to temporarily segregate public lands within a right-of-way application area for wind energy development from the operation of the public land laws, including the Mining Law, by publication of a **Federal Register** notice. The BLM uses this temporary segregation authority to preserve its ability to approve, approve with modifications, or deny proposed rights-of-way, and to facilitate the orderly administration of the public lands. This temporary segregation is subject to valid existing rights, including existing mining claims located before this segregation notice. Licenses, permits, cooperative agreements, or discretionary land use authorizations of a temporary nature which would not impact lands identified in this notice may be allowed with the approval of an authorized officer of the BLM during the segregation period. The lands segregated under this notice are legally described as follows: Mount Diablo Meridian,

Nevada

Mount Diablo Meridian, Nevada

T. 16 N., R. 56 E.,
Secs. 1 thru 5, secs. 8 thru 16, and secs. 21 thru 24;
Secs. 25, N1/2 and SW1/4;
sec. 26;
Secs. 27, NE1/4, E1/2NW1/4, and SE1/4;
Secs. 34, NE1/4NE1/4;
Secs. 35, N1/2NE1/4 and N1/2NW1/4;
Secs. 36, N1/2NW1/4.
T. 17 N., R. 56 E.,
Secs. 1 thru 4;
Secs. 5, lots 1 thru 4, S1/2NE1/4, S1/2NW1/4, SW1/4, N1/2SE1/4, and SE1/4SE1/4;
Secs. 7 thru 13;
Secs. 14, NE1/4NE1/4, S1/2NE1/4, W1/2, and SE1/4;
Secs. 15 thru 36.
T. 18 N., R. 56 E.,
Secs. 1 and 2;
Secs. 10 thru 15;
Secs. 21, NE1/4, NE1/4NW1/4, S1/2NW1/4, and S1/2;
Secs. 22 thru 27;
Secs. 28, NE1/4, W1/2NW1/4, SE1/4NW1/4, N1/2SW1/4, SE1/4SW1/4, and SE1/4;
Secs. 32;
Secs. 33, NE1/4, NE1/4NW1/4, S1/2NW1/4, and S1/2;
Secs. 34 thru 36.
T. 19 N., R. 56 E.,
Secs. 35 and 36.
T. 16 N., R. 57 E.,
Secs. 6, 7, and 18;
Secs. 19, lots 1 thru 4, N1/2NE1/4, SW1/4NE1/4, E1/2NW1/4, E1/2SW1/4, W1/2SE1/4, and SE1/4SE1/4;
Secs. 30, lots 1 and 2, NE1/4, and E1/2NW1/4.
T. 17 N., R. 57 E.,
Secs. 5 thru 8, secs. 17 thru 20, and secs. 29 thru 32.
T. 18 N., R. 57 E.,

Secs. 5 thru 8, secs. 17 thru 20, and secs. 29 thru 32.
T. 19 N., R. 57 E.,
Secs. 31 and 32.

The area described contains 69,431.23 acres, according to the official plats of the surveys of the said lands on file with the BLM. As provided in the regulations, the segregation of lands in this notice will not exceed two years from the date of publication unless extended for an additional two years through publication of a new notice in the **Federal Register**. The segregation period will terminate and the land will automatically reopen to appropriation under the public land laws, including the mining laws, at the earliest of the following dates: upon issuance of a decision by the authorized officer granting, granting with modifications, or denying the application for a right-of-way; without further administrative action at the end of the segregation provided for in the **Federal Register** notice initiating the segregation; or upon publication of *a* **Federal Register** notice terminating the segregation.

Upon termination of the segregation of these lands, all lands subject to this segregation would automatically reopen to appropriation under the public land laws, including the mining laws.

Authority: 43 CFR 2091.3–1(e) and 43 CFR 2804.25(f).

Robbie J. McAboy,

District Manager Ely.

[FR Doc. 2023–21741 Filed 10–2–23; 8:45 am]

BILLING CODE 4331–21–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–36612; PPWOCRADP2, PCU00RP14.R50000]

National Historic Landmarks Committee of the National Park System Advisory Board Meeting

AGENCY: National Park Service.

ACTION: Meeting notice.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the National Historic Landmarks Committee (Committee) of the National Park System Advisory Board (Board) will meet as indicated below.

DATES: The meeting will be held on Wednesday, November 15 and Thursday, November 16, 2023, from 10 a.m. to 4 p.m. (EST).

ADDRESSES: The meeting will be held virtually at the date and time noted above and instructions and access information will be provided online at *https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-committee-meetings.htm*. Please check the program website at *https://www.nps.gov/subjects/nationalhistoriclandmarks/index.htm* for the most current meeting information.

FOR FURTHER INFORMATION CONTACT: Dr. Lisa Davidson, Program Manager, National Historic Landmarks Program, National Park Service, 202–354–2179, 1849 C Street NW, Mail Stop 7228, Washington, DC 20240, or email *Lisa_Davidson@nps.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: The purpose of the meeting of the Committee is to evaluate nominations of historic properties in order to advise the Board of the qualifications of each property being proposed for National Historic Landmark designation, and to make recommendations regarding the possible designation of those properties as National Historic Landmarks to the Board at a future meeting. The Committee also makes recommendations to the Board regarding amendments to existing designations and proposals for withdrawal of designation. The members of the Committee are:

Dr. Lindsay Robertson, Chair
Dr. David G. Anderson
Dr. Ethan Carr
Dr. Julio Cesar Capó
Dr. Cynthia G. Falk
Dr. Victor Galan
Dr. Richard Longstreth
Dr. Alexandra M. Lord
Dr. Vergil E. Noble
Dr. Toni M. Prawl
Mr. Adam Smith
Dr. Sharita Jacobs Thompson
Dr. Carroll Van West
Dr. Richard Guy Wilson

Meeting Accessibility/Special Accommodations: The meeting will be open to the public. Pursuant to 36 CFR part 65, any member of the public may file, for consideration by the Committee, written comments concerning the National Historic Landmark nominations, amendments to existing designations, or proposals for withdrawal of designation.

Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Comments should be submitted to Sherry A. Frear, Chief, National Register of Historic Places and National Historic Landmarks Program, National Park Service, 1849 C Street NW, Mail Stop 7228, Washington, DC 20240, or email *nhl_info@nps.gov*. All comments received will be provided to the Committee and the Board.

Purpose of the Meeting: The Board and its Committee may consider the following nominations:

Commonwealth of the Northern Mariana Islands

LATTE QUARRY AT AS NIEVES, Rota, CNMI

District of Columbia

THE FURIES COLLECTIVE, Washington

Kentucky

BIG BONE LICK SITE, Union, KY

Nebraska

KREGEL WINDMILL COMPANY FACTORY, Nebraska City, NE

South Carolina

CHARLESTON CIGAR FACTORY, Charleston, SC

Proposed Amendments to Existing Designations:

Alaska

SITKA NAVAL OPERATING BASE AND U.S. ARMY COASTAL DEFENSES (Updated Documentation), Sitka, AK

LADD FIELD (Updated Documentation), Fairbanks, AK

Hawai'i

PU'UKOHOLĀ HEIAU (Updated Documentation), Kawaihae, HI

Michigan

QUINCY MINING COMPANY HISTORIC DISTRICT (Updated Documentation), Houghton County, MI

CALUMET HISTORIC DISTRICT (Updated Documentation), Calumet, MI

Missouri

WATKINS MILL (Updated Documentation), Lawson, MO

Texas

FORT BROWN (Updated Documentation), Brownsville, TX

Virginia

CEDAR CREEK BATTLEFIELD AND BELLE GROVE (Updated Documentation), Middletown, VA

Wyoming

WYOMING STATE CAPITOL BUILDING AND GROUNDS (Updated Documentation), Cheyenne, WY

Proposed Withdrawal of Existing Designations:

North Carolina

JOSEPHUS DANIELS HOUSE (WAKESTONE), Raleigh, NC

South Carolina

USS CLAMAGORE, Mount Pleasant, SC

Public Disclosure 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.

Authority: 36 CFR 65.5.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2023–21578 Filed 10–2–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–36642; PPWOCRADN0–PCU00RP16.R50000]

Native American Graves Protection and Repatriation Review Committee; Notice of Public Meetings

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: The National Park Service is hereby giving notice that the Native American Graves Protection and Repatriation Review Committee (Committee) will hold two virtual meetings as indicated below.

DATES: The Committee will meet via teleconference on Wednesday, November 1, 2023, and Thursday, November 30, 2023, from 2 p.m. until approximately 6 p.m. (eastern). All meetings are open to the public.

FOR FURTHER INFORMATION CONTACT: Melanie O'Brien, Designated Federal Officer, National Native American Graves Protection and Repatriation Act Program (2253), National Park Service, telephone (202) 354–2201, or email *nagpra_info@nps.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: The Committee was established in section 8 of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). Information about NAGPRA, the Committee, and Committee meetings is available on the National NAGPRA Program website at *https://www.nps.gov/subjects/nagpra/review-committee.htm.*

The Committee is responsible for monitoring the NAGPRA inventory and identification process; reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items; facilitating the resolution of disputes; compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum, and recommending specific actions for developing a process for disposition of such human remains; consulting with Indian Tribes and Native Hawaiian organizations and museums on matters affecting such Tribes or organizations lying within the scope of work of the Committee; consulting with the Secretary of the Interior on the development of regulations to carry out NAGPRA; and making recommendations regarding future care of repatriated cultural items. The Committee's work is carried out during the course of meetings that are open to the public.

The agenda for the meeting may include a report from the National NAGPRA Program; the discussion of the Review Committee Report to Congress; subcommittee reports and discussion; and other topics related to the Committee's responsibilities under section 8 of NAGPRA. In addition, the agenda may include requests to the Committee for a recommendation to the Secretary of the Interior that an agreed-upon disposition of Native American human remains proceed; presentations by Indian tribes, Native Hawaiian organizations, museums, Federal agencies, associations, and individuals; and public comment. The agenda and materials for this meeting will be posted on or before October 16, 2023, at *https://www.nps.gov/orgs/1335/events.htm.*

To submit a request or comment, see **FOR FURTHER INFORMATION CONTACT.** Information on joining the meeting by internet or telephone will be available on the National NAGPRA Program website at *https://www.nps.gov/orgs/1335/events.htm.*

Meeting Accessibility: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Public Disclosure of Comments: Before including your address, telephone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. ch. 10; 25 U.S.C. 3006.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2023–21839 Filed 10–2–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–WMRI–NPS0036614; PPWOWMADH2 199 PPMPSAS1Y.YH0000 (222); OMB Control Number 1024–0282]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; National Park Service Background Investigation/Clearance Initiation Request

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 we, the National Park Service (NPS) are proposing to renew an existing information collection with revisions.

DATES: Interested persons are invited to submit comments on or before November 2, 2023.

ADDRESSES: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *http://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 13461 Sunrise Valley Drive, Mail Stop 244, Reston, VA 20192, VA 20191 (mail); or *phadrea_ponds@nps.gov* (email). Please reference OMB Control Number 1024–0282 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Byron Hill, Security Officer, National Park Service, Snellville, GA 30078 (mail) or *byron_hill@nps.gov* (email) or 404–406–0527 (telephone). Please reference OMB Control Number 1024–0282 in the subject line of your comments. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point of contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on September 12, 2022 (87 FR 55848). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility.

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected.

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Authorized by Executive Order 10450, the Homeland Security Presidential Directive (HSPD–12), regulations mandated by the U.S. Office of Personnel Management OPM, and the Department of the Interior (DOI), the National Park Service (NPS) collects information from all applicants for Federal employment and non-Federal personnel requiring access to NPS property.

The NPS uses Form 10–152, ''Background Clearance Initiation Request'' to collect information from all applicants to determine their suitability to receive DOI credentials. The National Background Investigation Services (NBIS) Electronic Application (eApp) System, is used to create accounts necessary to initiate background investigations for all individuals requiring access to NPS property and/or to receive a DOIAccess Personal Identification Verification (PIV) badge. The information collected is protected by the Privacy Act and maintained in a secure system of records Interior/DOI–45, ''HSPD–12: Identity Management System and Personnel Security Files,'' 86 FR 50156; September 7, 2021).

With this renewal, we're proposing to update the name of the form from *National Park Service Background Clearance Initiation Request* to *National Park Service Investigation/Background Clearance Initiation Request.* Adding ''Investigation'' to the form clarifies the purpose and intent of the form. We've made modifications to two of the fields, expanding on the response options to clarify the different non-federal affiliations for fields in DOI Access and also based on the changes in the vetting model. We've added four new fields based on the new administrative requirements and due to the feedback received during the voluntary outreach exercise.

Title of Collection: National Park Service Background Investigation/Clearance Initiation Request.

OMB Control Number: 1024–0282.

Form Number: NPS Form 10–152.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Candidates for Federal employment, as well as contractors, partners, and other non-Federal candidates proposed to work for the NPS under a Federal contract or agreement who require access to NPS property and/or a DOI Access PIV badge.

Total Estimated Number of Annual Respondents: 6,500.

Total Estimated Number of Annual Responses: 6,500.

Estimated Completion Time per Response: 7 minutes.

Total Estimated Number of Annual Burden Hours: 758.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–21778 Filed 10–2–23; 8:45 am]

BILLING CODE 4312–52–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Appellate Rules; Hearing of the Judicial Conference

AGENCY: Judicial Conference of the United States.

ACTION: Advisory Committee on Appellate Rules; notice of cancellation of open hearing.

SUMMARY: The following public hearing on proposed amendments to the Federal Rules of Appellate Procedure has been canceled: Appellate Rules Hearing on October 18, 2023. The announcement for this hearing was previously published in the **Federal Register** on August 9, 2023.

DATES: October 18, 2023.

FOR FURTHER INFORMATION CONTACT: H. Thomas Byron III, Esq., Chief Counsel, Rules Committee Staff, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Phone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

(Authority: 28 U.S.C. 2073.)

Dated: September 26, 2023.

Shelly L. Cox,

Management Analyst, Rules Committee Staff.

[FR Doc. 2023–21829 Filed 10–2–23; 8:45 am]

BILLING CODE 2210–55–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Committee on Rules of Practice and Procedure; Meeting of the Judicial Conference

AGENCY: Judicial Conference of the United States.

ACTION: Committee on Rules of Practice and Procedure; notice of open meeting.

SUMMARY: The Committee on Rules of Practice and Procedure will hold a meeting in a hybrid format with remote attendance options on January 4, 2024 in Austin, TX. The meeting is open to the public for observation but not participation. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.*

DATES: January 4, 2024.

FOR FURTHER INFORMATION CONTACT: H. Thomas Byron III, Esq., Chief Counsel, Rules Committee Staff, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Phone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

(Authority: 28 U.S.C. 2073.)

Dated: September 26, 2023.

Shelly L. Cox,

Management Analyst, Rules Committee Staff.

[FR Doc. 2023–21830 Filed 10–2–23; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1051M]

Adjustment to the Aggregate Production Quota for Methylphenidate (for Sale) for 2023

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final order.

SUMMARY: The Drug Enforcement Administration is adjusting the 2023 aggregate production quota for the schedule II controlled substance methylphenidate (for sale).

DATES: This final order is effective October 3, 2023.

FOR FURTHER INFORMATION CONTACT: Scott A. Brinks, Regulatory Drafting and Policy Support Section, Diversion Control Division, Drug Enforcement Administration, Telephone: (571) 776–3882.

SUPPLEMENTARY INFORMATION:

Legal Authority

Section 306 of the Controlled Substances Act (CSA) (21 U.S.C. 826) requires the Attorney General to establish aggregate production quotas (APQ) for each basic class of controlled substance listed in schedule I and II. The Attorney General has delegated this function to the Administrator of the Drug Enforcement Administration (DEA) pursuant to 28 CFR 0.100.

Under 21 U.S.C. 826(h), when a request for individual manufacturing quota is submitted by a DEA-registered manufacturer pertaining to a schedule II controlled substance that is contained in a drug on FDA's list of drugs in shortage, DEA must complete review of such request not later than 30 days after receipt of the request. If, after the review is completed, DEA finds it necessary to address a shortage of that controlled substance, DEA is to increase the aggregate and individual production quotas of that controlled substance and any ingredient therein to the level requested. 21 U.S.C. 826(h)(1)(B)(i). However, if it is determined that the level requested is not necessary to address the shortage, DEA is to provide a written response detailing the basis for the determination. 21 U.S.C. 826(h)(1)(B)(ii).

Background

DEA published the 2023 established APQ for controlled substances in schedules I and II in the **Federal Register** on December 2, 2022. 87 FR 74168. The 2023 established APQ represents those quantities of schedule I and II controlled substances that may be manufactured in the United States to provide for the estimated medical, scientific, research, and industrial needs of the United States, for lawful export requirements, and for the establishment and maintenance of reserve stocks. These quotas do not include imports of controlled substances for use in industrial processes. The final order stipulated that all APQ are subject to an adjustment, in accordance with 21 CFR 1303.15.[1]

Quotas Applicable to Drugs in Shortage Pursuant to 21 U.S.C. 826(h)

DEA received written correspondence from FDA on August 10, 2023, in accordance with 21 U.S.C. 356c, addressing the domestic drug shortage

[1] Established Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2023, 87 FR 74168 (December 2, 2022).

of methylphenidate HCl extended-release tablets. In this letter, FDA advised DEA that on July 26, 2023, FDA added methylphenidate hydrochloride (HCl) extended-release tablets to its drug shortage list pursuant to 21 U.S.C. 356e. Under 21 U.S.C. 356c, manufacturers of drugs that are life-supporting, life-sustaining, or intended for the treatment or prevention of debilitating diseases or conditions must notify FDA of any permanent discontinuation or interruption in manufacturing likely to result in a meaningful disruption of the drug's supply in the United States. That provision further requires FDA to assess whether notifications received from manufacturers concern controlled substances subject to production quotas in accordance with 21 U.S.C. 826.

FDA's August 10th letter requested that DEA increase the APQ and individual manufacturing quotas for methylphenidate to a level that FDA deems necessary to address a shortage based on the best available market data.[2] On September 15, 2023, FDA clarified to DEA that methylphenidate is ''intended for use in the prevention or treatment of a debilitating disease or condition'' and therefore falls under the notification requirements of 21 U.S.C. 356c.

On September 14, 2023, DEA received a request for increased 2023 manufacturing quota pertaining to methylphenidate from a DEA registrant that is a manufacturer of that Schedule II controlled substance. Pursuant to this request, and following the receipt of the letter from FDA on August 10, DEA began its review under the timeframes specified by 21 U.S.C. 826(h)(1).

Analysis for the Adjustment to the 2023 Methylphenidate (for Sale) Aggregate Production Quota

In conducting the review under 21 U.S.C. 826(h) in order to determine the necessity of this adjustment, the Administrator has considered the criteria in accordance with 21 CFR 1303.13 (adjustment of APQ for controlled substances). The Administrator is authorized to increase or reduce the aggregate production quota at any time. 21 CFR 1303.13(a). DEA regulations state that there are five factors that shall be considered in determining to adjust the aggregate production quota. 21 CFR 1303.13(b). Accordingly, the Administrator has taken into account the following factors described below for 2023: (1) changes in the demand for that class, changes in the national rate of net disposal of the class, changes in the rate of net disposal of the class by registrants holding individual manufacturing quotas for that class, and changes in the extent of any diversion in the class; (2) whether any increased demand for that class, the national and/or individual rates of net disposal of that class are temporary, short term, or long term; (3) whether any increased demand for that class can be met through existing inventories, increased individual manufacturing quotas, or increased importation, without increasing the aggregate production quota, taking into account production delays and the probability that other individual manufacturing quotas may be suspended pursuant to 21 CFR 1303.24(b); (4) whether any decreased demand for that class will result in excessive inventory accumulation by all persons registered to handle that class (including manufacturers, distributors, practitioners, importers, and exporters), notwithstanding the possibility that individual manufacturing quotas may be suspended pursuant to 21 CFR 1303.24(b) or abandoned pursuant to 21 CFR 1303.27; and (5) other factors affecting medical, scientific, research, and industrial needs in the United States and lawful export requirements, as the Administrator finds relevant, including changes in the currently accepted medical use in treatment with the class or the substances which are manufactured from it, the economic and physical availability of raw materials for use in manufacturing and for inventory purposes, yield and stability problems, potential disruptions to production (including possible labor strikes), and recent unforeseen emergencies such as floods and fires. 21 CFR 1303.13(b).

DEA reviewed domestic data from the latest IQVIA report on stimulant prescribing that described a 9.1 percent increase in prescribing of methylphenidate HCl products from 2021 to 2022.[3] However, FDA's estimate of domestic medical need for methylphenidate drug products predicted a 0.11 percent increase for 2023 domestic need when compared to 2022 observed need. DEA believes that manufacturers can easily meet this insignificant increase in domestic medical need with currently established quotas.

DEA also reviewed published reporting of methylphenidate production and consumption globally found in the INCB's *Psychotropic Technical Report for 2022*.[4] This report outlines that U.S. production of methylphenidate accounted for 72.5 percent of global production and the U.S. was the leading exporter of methylphenidate in 2021. The number of countries and territories reporting the importation and consumption of methylphenidate drug products increased 5 percent and 8 percent, respectively, from 2020 to 2021. The report states that consumption rates in several European countries increased in 2021. Additionally, DEA reviewed export data extracted from DEA's internal databases and reported to the United Nations as part of the U.S.' treaty obligations for controlled substances. The export data showed that exports of drug products containing methylphenidate increased from 13,083kg in 2021 to 15,792kg in 2022. Extrapolation utilizing previous years' reported export data suggests a similar quantity of drug products containing methylphenidate HCl will be exported from the U.S. in 2023.

After considering these factors, DEA determined that it is necessary to increase the established 2023 APQ for the schedule II-controlled substance methylphenidate (for sale) to be manufactured in the United States to provide for the estimated needs of the United States and export requirements to meet global demand. This adjustment is necessary to ensure that the United States has an adequate and uninterrupted supply of methylphenidate (for sale) to meet legitimate patient needs both domestically and globally.

Additional Legal Considerations

The procedures previously adopted by DEA for adjustment of APQ are set forth in DEA regulations in 21 CFR 1303.13. Under that provision, the Administrator, upon determining that an adjustment of the aggregate production quota of any basic class of controlled substance is necessary, shall publish in the **Federal Register** general notice of an adjustment in the aggregate production quota for that class. The regulation further directs that DEA will allow any interested person to file comments or objections to the adjusted APQ within the time specified by the Administrator in the notice. Section 1303.13 further provides that, ''[a]fter consideration of any comments or objections . . . the Administrator shall issue and publish in the **Federal**

[2] As the FDA's specific requested levels would reveal proprietary manufacturing data, DEA is not specifying the requested levels in this document.

[3] Stimulant Prescription Trends in the United States from 2012–2022. IQVIA Government Solutions, Inc., August 31, 2023.

[4] INCB Psychotropics—Technical Report Psychotropic Substances 2022, Statistics for 2021, Assessments of Annual Medical Scientific Requirements for Substances for 2023.

Register his final order determining the aggregate production quota for the basic class of controlled substance.''

The statutory timeframe applicable to actions taken under 21 U.S.C. 826(h) was enacted by Congress after DEA established its regulations in 21 CFR 1303.13. DEA has determined that it is not possible to increase the APQ within the Congressionally-mandated 30-day period while also complying with the procedures that DEA previously had laid out in 21 CFR 1303.13. Therefore, the Administrator has determined that, in order to comply with the 30-day timeframe in 21 U.S.C. 826(h), this final order must be published without opportunity for comment and made effective immediately.

Determination of 2023 Adjusted Methylphenidate (for Sale) Aggregate Production Quota

In determining the adjustment of the 2023 methylphenidate (for sale) aggregate production quota, DEA has taken into consideration the factors set forth in 21 CFR 1303.13(b) in accordance with 21 U.S.C. 826(a) as well as 826(h). Based on all of the above, the Administrator is adjusting the 2023 aggregate production quota for methylphenidate (for sale).

The Administrator hereby adjusts the 2023 APQ for the following schedule II-controlled substance expressed in grams of anhydrous acid or base, as follows:

Controlled substance	Current APQ (g)	Adjusted APQ (g)
Schedule II		
Methylphenidate (for sale)	41,800,000	53,283,000

The APQ for all other schedule I and II controlled substances included in the 2023 established APQ remain at this time as previously established.

Signing Authority

This document of the Drug Enforcement Administration was signed on September 29, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Heather Achbach,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023–22059 Filed 9–29–23; 4:15 pm]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, And Liability Act

On September 26, 2023, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Southern District of Indiana in the lawsuit entitled *United States* v. *CR-Troy, Inc., et al.,* Case No. 2:23–cv–463.

The proposed Consent Decree settles claims brought by the United States under sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606 and 9607 against four defendants including CR-Troy, Inc. (''CR-Troy,'' formerly Consolidated Recycling Company, Inc.), GCSC Enterprises, Inc. (''GCSC''), Machine Tool Service, Inc. (''MTS''), and Valvoline LLC (''Valvoline'') seeking reimbursement of response costs and performance of remedial measures with respect to the Elm Street Groundwater Contamination Site in Terre Haute, Indiana. The Consent Decree requires Defendants to pay the United States a total of $3,650,000 in response costs and perform the remedial ''Work'' defined in the Scope of Work, attached to the Consent Decree as Appendix B, which consists of soil excavation, groundwater monitoring, and under certain conditions soil vapor extraction to address contamination at the Site.

The publication of this notice opens a period for public comment on the proposed Consent Decrees. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *CR-Troy, Inc. et al.,* D.J. Ref. No. 90–11–3–12377. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.*

We will provide a paper copy of the proposed Consent Decrees upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

For a copy of the Consent Decree, please enclose a check or money order for $43 (172 pages at 25 cents per page reproduction cost) payable to the United States Treasury.

Patricia McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–21755 Filed 10–2–23; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0108]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Complaint Regarding USMS Personnel or Programs

AGENCY: U.S. Marshals Service, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The U.S. Marshals Service (USMS), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously

published in the **Federal Register** on July 7, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until November 2, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Karl Slazer, U.S. Marshals Service Headquarters, 1215 S Clark St., Ste. 10005, Arlington, VA 22202–4387, 703–740–2316; *kslazer@usms.doj.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 agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1105–0108. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of this information collection:

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Complaint Regarding USMS Personnel or Programs..

3. Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number: None. Component: U.S. Marshals Service, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Affected Public: Individuals, or households.

Abstract: This form will allow members of the public to submit information regarding potential misconduct involving USMS personnel or programs.

5. *Obligation to Respond:* Voluntary.

6. *Total Estimated Number of Respondents:* 1,000.

7. *Estimated Time per Respondent:* 5 minutes.

8. *Frequency:* Once/annually.

9. *Total Estimated Annual Time Burden:* 83 hours.

10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218 Washington, DC 20530.

Dated: September 22, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–21886 Filed 10–2–23; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Provider Enrollment Form

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 November 2, 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: OWCP currently requires all service providers to submit all required medical licenses and the additional attestation language requires providers to further affirm that that they possess all appropriate state, county, locality, or jurisdictional business licenses to provide services to OWCP claimants. Together, these changes will reduce the complexity of the form for the form filler, without adding any additional fillable fields. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 29, 2023 (88 FR 42104).

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: Provider Enrollment Form.

OMB Control Number: 1240–0021.

Affected Public: Private sector—businesses or other for-profits.

Total Estimated Number of Respondents: 23,318.

Total Estimated Number of Responses: 23,318.

Total Estimated Annual Time Burden: 9,717 hours.

Total Estimated Annual Other Costs Burden: $816.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,

Senior PRA Analyst.

[FR Doc. 2023–21850 Filed 10–2–23; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0048]

Powered Platforms for Building Maintenance Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Powered Platforms for Building Maintenance.

DATES: Comments must be submitted (postmarked, sent, or received) by December 4, 2023.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov.* Documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number OSHA–2010–0048 for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone 202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

Paragraph (e)(9) of the Standard requires that employers develop and implement a written emergency action plan for each type of powered platform operation. The plan must explain the emergency procedures that workers are to follow if they encounter a disruption of the power supply, equipment failure, or other emergency. Prior to operating a powered platform, employers must notify workers how they can inform themselves about alarm systems and emergency escape routes, and emergency procedures that pertain to the building on which they will be working. Employers are to review with each worker those parts of the emergency action plan that the worker must know to ensure their protection during an emergency; these reviews must occur when the worker receives an initial assignment involving a powered platform operation and after the employer revises the emergency action plan.

According to paragraph (f)(5)(i)(C), employers must affix a load rating plate to a conspicuous location on each suspended unit that states the unit's weight and the rated load capacity. Paragraph (f)(5)(ii)(N) requires employers to mount each emergency electric operating device in a secured compartment and label the device with instructions for its use. After installing a suspension wire rope, paragraphs (f)(7)(vi) and (f)(7)(vii) mandate that employers attach a corrosion-resistant tag with specified information to one of the wire rope fastenings if the rope is to remain at one location. In addition, paragraph (f)(7)(viii) requires employers who resocket a wire rope to either stamp specified information on the original tag or put that information on a supplemental tag and attach it to the fastening.

Paragraphs (g)(2)(i) and (g)(2)(ii) require that building owners, at least annually, have a competent person inspect the supporting structures of their buildings; inspect and, if necessary, test the components of the

powered platforms, including control systems; inspect/test components subject to wear (*e.g.,* wire ropes, bearings, gears, and governors); and certify these inspections and tests. Under paragraph (g)(2)(iii), building owners must maintain and, on request, disclose to OSHA a written certification record of these inspections/tests; this record must include the date of the inspection/test, the signature of the competent person who performed it, and the number/identifier of the building support structure and equipment inspected/tested.

Paragraph (g)(3)(i) mandates that building owners use a competent person to inspect and, if necessary, test each powered platform facility according to the manufacturer's recommendations every 30 days, or prior to use if the work cycle is less than 30 days. Under paragraph (g)(3)(ii), building owners must maintain and, on request, disclose to the agency a written certification record of these inspections/tests; this record is to include the date of the inspection/test, the signature of the competent person who performed it, and the number/identifier of the powered platform facility inspected/tested.

According to paragraph (g)(5)(iii), building owners must use a competent person to thoroughly inspect suspension wire ropes for a number of specified conditions once a month, or before placing the wire ropes into service if the ropes are inactive for 30 days or longer. Paragraph (g)(5)(v) requires building owners to maintain and, on request, disclose to OSHA a written certification record of these monthly inspections; this record must consist of the date of the inspection, the signature of the competent person who performed it, and the number/identifier of the wire rope inspected.

Upon completion of this training, paragraph (i)(1)(v) specifies that employers must prepare a written certification that includes the identity of the worker trained, the signature of the employer or the trainer, and the date the worker completed the training. In addition, the employer must maintain a worker's training certificate for the duration of their employment and, on request, make it available to OSHA.

Emergency action plans allow employers and workers to anticipate, and effectively respond to, emergencies that may arise during powered platform operations. Affixing load rating plates to suspended units, instructions to emergency electric operating devices, and tags to wire rope fasteners prevent workplace accidents by providing information to employers and workers regarding the conditions under which they can safely operate these system components.

Requiring building owners to establish and maintain written certification of inspections and testing conducted on the supporting structures of buildings, powered platform systems, and suspension wire ropes provides employers and workers with assurance that they can operate safely from the buildings using equipment that is in safe operating condition.

The training requirements increase worker safety by allowing them to develop the skills and knowledge necessary to effectively operate, use, and inspect powered platforms, recognize and prevent safety hazards associated with platform operation, respond appropriately under emergency conditions, and maintain and use their fall protection arrest system. In addition, the paperwork requirements specified by the Standard provide the most efficient means for an OSHA compliance officer to determine whether or not employers and building owners are providing the required notification and certification.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Powered Platforms for Building Maintenance Standard. The agency will retain the current number of burden hours of 130,776 for this Information Collection Request.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Powered Platforms for Building Maintenance Standard.

OMB Control Number: 1218–0121.

Affected Public: Business or other for-profits.

Number of Respondents: 900.

Number of Responses: 181,612.

Frequency of Responses: On occasion, initially, monthly, annually.

Average Time per Response: Varies.

Estimated Total Burden Hours: 130,776.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on this Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202–693–1648. or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR OSHA–2010–0048. You may supplement electronic submissions by uploading document files electronically.

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506

et seq.) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC, on September 22, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–21825 Filed 10–2–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2022–0011]

Maritime Advisory Committee on Occupational Safety and Health (MACOSH): Notice of Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of MACOSH meeting.

SUMMARY: The Maritime Advisory Committee on Occupational Safety and Health (MACOSH) will meet on November 14, 2023, in a hybrid format. Committee members will meet in person; the public is invited to participate either in person or virtually via WebEx.

DATES:

MACOSH full Committee meeting: MACOSH will meet from 9:00 a.m. to 12:00 p.m., ET, Tuesday, November 14, 2023.

MACOSH Workgroup meetings: The MACOSH Shipyard and Longshoring Workgroups will meet from 1:00 p.m. to 5:00 p.m., ET, Tuesday, November 14, 2023.

ADDRESSES:

Submission of comments and requests to speak: Comments and requests to speak at the MACOSH meeting, including attachments, must be submitted electronically at *http://www.regulations.gov,* the eRulemaking Portal by October 31, 2023. Comments must be identified by the docket number for this **Federal Register** notice (Docket No. OSHA–2022–0011). Follow the online instructions for submitting comments.

Registration: All persons wishing to attend the meeting in-person or virtually must register via the registration link on the MACOSH web page at *https://www.osha.gov/advisorycommittee/macosh.* Upon registration, in-person attendees will receive directions for participation and virtual attendees will receive a WebEx link for remote access to the meeting. At this time, OSHA will be limiting in-person attendance to 25 members of the public, to be determined based in the order requests are made via the registration link.

Requests for special accommodations: Submit requests for special accommodations, including translation services, for this MACOSH meeting by October 31, 2023, to Ms. Carla Marcellus, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–1865; email: *marcellus.carla.dol.gov.*

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (Docket No. OSHA–2022–0011). OSHA will place comments, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates.

Docket: To read or download documents in the public docket for this MACOSH meeting, go to *www.regulations.gov.* All documents in the public docket are listed in the index; however, some documents (*e.g.,* copyrighted material) are not publicly available to read or download through *www.regulations.gov.* All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

For general information about MACOSH: Ms. Amy Wangdahl, Director, Office of Maritime and Agriculture, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–2066; email: *wangdahl.amy@dol.gov.*

Telecommunication requirements: For additional information about the telecommunication requirements for the meeting, please contact Ms. Carla Marcellus, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–1865; email: *marcellus.carla@dol.gov.*

For copies of this ***Federal Register*** *Notice:* Electronic copies of this **Federal Register** notice are available at *www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available at OSHA's web page *www.osha.gov.*

SUPPLEMENTARY INFORMATION:

I. Meeting Information

MACOSH Meeting

MACOSH will meet from 9:00 a.m. to 12:00 p.m., ET, Tuesday, November 14, 2023. Public attendance will be in a hybrid format, either in person or virtually via WebEx. Meeting information will be posted in the Docket (Docket No. OSHA–2022–0011) and on the MACOSH web page, *https://www.osha.gov/advisorycommittee/macosh,* prior to the meeting.

The tentative agenda for the full Committee meeting will include reports from the Shipyard and Longshoring workgroups, presentations on maritime fall protection and on OSHA's social media and outreach platforms from the Office of Communication, and updates from the Directorate of Standards and Guidance (DSG), DSG's Office of Maritime and Agriculture, and on the Heat Rulemaking initiative.

MACOSH Workgroup Meetings

The MACOSH Shipyard and Longshoring Workgroups will meet from 1:00 p.m. to 5:00 p.m., ET, Tuesday, November 14, 2023.

Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by 29 U.S.C. 655(b)(1) and 656(d), 5 U.S.C. 10, Secretary of Labor's Order No. 8–2020 (85 FR 58393), and 29 CFR part 1912.

Signed at Washington, DC, on September 28, 2023.

James S. Frederick,

Deputy Assistant Secretary for Occupational Safety and Health.

[FR Doc. 2023–21840 Filed 10–2–23; 8:45 am]

BILLING CODE 4510–26–P

LEGAL SERVICES CORPORATION

Sunshine Act Meetings

TIME AND DATE: The Legal Services Corporation (LSC) Board of Directors and its committees will hold their fall 2023 quarterly business meeting over a range of days in October 2023 (on October 4, October 12, and October 15–17, 2023). On Wednesday, October 4, the Institutional Advancement Committee will meet over Zoom, beginning at 3 p.m. eastern time. On Thursday, October 12, the Governance and Performance Review Committee will meet over Zoom, beginning at 1 p.m. eastern time. On Sunday, October 15, the meeting continues, with the first committee meeting (Finance Committee)

at 1:30 p.m. Pacific time, and the next meeting commencing promptly upon adjournment of the immediately preceding meeting. On Monday, October 16, the first meeting will begin at 9 a.m. Pacific time, with the next meeting commencing promptly upon adjournment of the immediately preceding meeting. On Tuesday, October 17, the first meeting will begin at 8 a.m. Pacific time, with the next meeting commencing promptly upon adjournment of the immediately preceding meeting.

PLACE:

Public Notice of Virtual and Hybrid Meetings. LSC will conduct its Oct. 4 and Oct. 12 committee meetings virtually via Zoom video conference. LSC will conduct its October 15–17, 2023, meetings at the Omni Los Angeles Hotel at California Plaza, 251 South Olive Street, Los Angeles, CA, 90012, and virtually via Zoom video conference.

Public Observation: Unless otherwise noted herein, the Board and all committee meetings will be open to virtual public observation via Zoom video conference. Members of the public who wish to participate virtually in the public proceedings may do so by following the directions provided below.

Directions for Open Sessions

Wednesday, October 4, 2023

- *https://lsc-gov.zoom.us/j/82912391089?pwd=YdnQCYVgAzMBhzp1CdbZZpPpK1qRiL.1*
- *Meeting ID:* 829 1239 1089
- *Passcode:* 972865
- To join the Zoom meeting by telephone, please dial one of the following numbers:
- +1 301 715 8592 US (Washington DC)
- +1 312 626 6799 US (Chicago)
- +1 646 876 9923 US (New York)
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 408 638 0968 US (San Jose)
- +1 669 900 6833 US (San Jose)

Thursday, October 12, 2023

- *https://lsc-gov.zoom.us/j/81466270928?pwd=W5aHybjgUVwjGeXTjObv4K7KAzZqtW.1*
- *Meeting ID:* 814 6627 0928
- *Passcode:* 101223
- To join the Zoom meeting by telephone, please dial one of the following numbers:

+1 301 715 8592 US (Washington DC)
+1 312 626 6799 US (Chicago)
+1 646 876 9923 US (New York)
+1 253 215 8782 US (Tacoma)
+1 346 248 7799 US (Houston)
+1 408 638 0968 US (San Jose)
+1 669 900 6833 US (San Jose)

Sunday, October 15, 2023

- *https://lsc-gov.zoom.us/j/81333687382?pwd=yaGeoGTBWn6DdzaLPiogIEpCICf5mX.1*
- *Meeting ID:* 813 3368 7382
- *Passcode:* 101523
- To join the Zoom meeting by telephone, please dial one of the following numbers:
- +1 301 715 8592 US (Washington DC)
- +1 312 626 6799 US (Chicago)
- +1 646 876 9923 US (New York)
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 408 638 0968 US (San Jose)
- +1 669 900 6833 US (San Jose)

Monday, October 16, 2023

- *https://lsc-gov.zoom.us/j/81685427621?pwd=NcSggkEhKoRkfiKuOoNi8DUFecvwVm.1*
- *Meeting ID:* 816 8542 7621
- *Passcode:* 101623
- To join the Zoom meeting by telephone, please dial one of the following numbers:
- +1 301 715 8592 US (Washington DC)
- +1 312 626 6799 US (Chicago)
- +1 646 876 9923 US (New York)
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 408 638 0968 US (San Jose)
- +1 669 900 6833 US (San Jose)

Tuesday, October 17, 2023

- *https://lsc-gov.zoom.us/j/89844252467?pwd=q1LIou2LLb70XK5rwUhyXMJmayhHPv.1*
- *Meeting ID:* 898 4425 2467
- *Passcode:* 101723
- To join the Zoom meeting by telephone, please dial one of the following numbers:
- +1 301 715 8592 US (Washington DC)
- +1 312 626 6799 US (Chicago)
- +1 646 876 9923 US (New York)
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 408 638 0968 US (San Jose)
- +1 669 900 6833 US (San Jose)

If calling from outside the U.S., find your local number here: *https://lsc-gov.zoom.us/u/acCVpRj1FD.*

Once connected to Zoom, please immediately mute your computer or telephone. Members of the public are asked to keep their computers or telephones muted to eliminate background noise. To avoid disrupting the meetings, please refrain from placing the call on hold if doing so will trigger recorded music or other sound.

From time to time, the Board or Committee Chair may solicit comments from the public. To participate in the meeting during public comment, use the 'raise your hand' or 'chat' functions in Zoom and wait to be recognized by the Chair before stating your questions and/or comments.

STATUS: Open, except as noted below.

Institutional Advancement Meeting—Open, except that, upon a vote of the Board of Directors, the meeting may be closed to the public for a briefing on development activities and discussion of prospective new Leaders Council and Emerging Leaders Council members.

Governance and Performance Review Committee—Open, except that, upon a vote of the Board of Directors, the meeting may be closed to the public for a discussion about Board compensation and the LSC President's contract.

Audit Committee—Open, except that, upon a vote of the Board of Directors, the meeting may be closed to the public for a briefing by the Office of Compliance and Enforcement on active enforcement matters(s) and follow-up on open investigation referrals from the Office of Inspector General, and for an update on the audit of LSC's 403(b) plan.

Board of Directors—Open, except that, upon a vote of the Board of Directors, a portion of the meeting may be closed to the public to receive briefings by management and LSC's Inspector General and to consider and act on the General Counsel's report on potential and pending litigation involving LSC. The Board also will receive a briefing on planning for LSC's 50th Anniversary and consider and act on the LSC President's Contract as well as a list of prospective Leaders Council and Emerging Leaders Council members.

Any portion of the closed session consisting solely of briefings does not fall within the Sunshine Act's definition of the term ''meeting'' and, therefore, the requirements of the Sunshine Act do not apply to such portion of the closed session.[1]

A verbatim written transcript will be made of the closed sessions of the Institutional Advancement Committee, Governance and Performance Review Committee, Audit Committee, and Board of Directors meetings. The transcript of any portions of the closed sessions falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(6), (7), (9) and (10), will not be available for public inspection. A copy of the General Counsel's Certification that, in his opinion, the closing is authorized by law will be available upon request.

[1] 5 U.S.C. 552b (a) (2) and (b). See also 45 CFR 1622.2 & 1622.3.

MATTERS TO BE CONSIDERED:

Meeting Schedule

Wednesday, October 4, 2023

Start Time: 3 p.m. eastern time

Institutional Advancement Committee

Portions Open to the Public

1. Approval of Agenda
2. Approval of Minutes of the Institutional Advancement Committee's Open Session Meeting on July 25, 2023
3. Update on Leaders Council and Emerging Leaders Council
4. Development Report
5. Update on Opioid & Veterans Task Force Implementation
6. Update on Housing Task Force
7. Public Comment
8. Consider and Act on Other Business
9. Consider and Act on Motion to Adjourn the Open Session Meeting

Portions Closed to the Public

10. Approval of Minutes of the Institutional Advancement Committee's Closed Session Meeting on July 25, 2023
11. Development Activities Report
12. Consider and Act on Motion to Approve Leaders Council and Emerging Leaders Council Invitees
13. Consider and Act on Other Business
14. Consider and Act on Motion to Adjourn the Meeting

Thursday, October 12, 2023

Start Time: 1 p.m. Eastern Time

Governance and Performance Review Committee

Portions Open to the Public

1. Approval of Agenda
2. Approval of Minutes of the Committee's Open Session Meeting on July 25, 2023
3. Report on U.S. Department of Justice's Access to Justice Office and White House Legal Aid Interagency Roundtable (LAIR)
4. Report on Annual Board and Committee Evaluation Process
5. Discussion of LSC Honorarium Policy
6. Consider and Act on Resolution #2023–XXX: Board of Directors Compensation
7. Consider and Act on Other Business
8. Public Comment
9. Consider and Act on Motion to Adjourn the Open Session Meeting

Portions Closed to the Public

10. Discussion of LSC President's Contract
11. Consider and Act on Motion to Adjourn the Closed Session and Return to Open Session

Portions Open to the Public

12. Discussion and Vote on LSC President's Contract
13. Consider and Act on Motion to Adjourn the Meeting

Sunday, October 15, 2023

Start Time: 1:30 p.m. Pacific Time

Finance Committee

Portions Open to the Public

1. Approval of Meeting Agenda
2. Approval of Minutes of the Committee's Open Session Meeting on July 10, 2023
3. Approval of Minutes of the Committee's Open Session Meetings on July 26, 2023
4. Approval of Minutes of the Committee's Closed Session Meeting on July 26, 2023
5. Presentation of LSC's Preliminary Financial Results for Fiscal Year 2023
6. Report on Fiscal Year 2024 Appropriation and FY 2023 Supplemental Requests
7. Report on Fiscal Year 2024 Management and Grants Oversight Budget
8. Report on Fiscal Year 2025 Budget Request
9. Public Comment
10. Consider and Act on Other Business
11. Consider and Act on Motion to Adjourn the Meeting

Communications Subcommittee

Portions Open to the Public

1. Approval of Agenda
2. Approval of Minutes of the Subcommittee's Open Session Meeting on July 25, 2023
3. Communications and Social Media Update
4. Public Comment
5. Consider and Act on Other Business
6. Consider and Act on Motion to Adjourn the Meeting

Audit Committee

Portions Open to the Public

1. Approval of Agenda
2. Approval of Minutes of Committee's Open Session Meeting on July 26, 2023
3. Upcoming reassessment of the Committee's Charter (Audit Committee Charter section D (2))
4. Update on the scope and plan for LSC's forthcoming required annual financial statement audit (ACC sections VII (1) and VIII A (1))
5. Briefing by the Office of Inspector General, to include:
   a. Presentation of the new OIG draft strategic plan (ACC section VIII A (3))
   b. Status of OIG refresh of priorities and change initiatives (ACC section VIII A (3))
   c. Highlights of planned oversight work for FY2024—and solicitation of Committee feedback on oversight activities (ACC section VIII A (3))
   d. Highlights of recently completed audit/oversight work (*e.g.,* audit reports, advisories, completed investigative cases) (ACC section VIII A (4))
   e. Highlights of key ongoing audit work and fraud prevention activities (ACC section VIII A (4))
6. Management update regarding Risk Management (ACC section VIII C (1))
7. Briefing about follow-up by the Office of Compliance and Enforcement on referrals by the Office of Inspector General regarding Audit reports and annual financial statement audits of grantees (ACC section VIII A (5))
8. Review LSC's efforts, including training and education, to help ensure that LSC employees and grantees act ethically and safeguard LSC Funds (ACC section VIII C (6))
9. Public Comment
10. Consider and Act on Other Business
11. Consider and Act on Motion to Adjourn the Open Session Meeting and Proceed to a Closed Session

Portions Closed to the Public

12. Approval of Minutes of Committee's Closed Session Meeting on July 26, 2023
13. Briefing by Office Compliance and Enforcement on active enforcement matter(s) and follow-up on open Investigation referrals from the Office of Inspector General (ACC section VIII A (5))
14. Briefing on Audit of 403(b) Plan
15. Consider and Act on Motion to Adjourn the Meeting

Monday, October 16, 2023

Start Time: 9 a.m. Pacific time

Operations and Regulations Committee

Portions Open to the Public

1. Approval of Agenda
2. Approval of Minutes of the Committee's Open Session Meeting on July 25, 2023
3. Consider and Act on Notice of Proposed Rulemaking for 45 CFR part 1638—Restriction on Solicitation
4. Report on Preliminary Research into Potential Rulemaking for 45 CFR parts 1621—Client Grievance Procedure and 1624—Discrimination on the Basis of Disability

5. Consider and Act on Recommendation to Extend LSC's 2020–2024 Strategic Plan through 2025
6. Public Comment
7. Consider and Act on Other Business
8. Consider and Act on Adjournment of Meeting

Delivery of Legal Services Committee

Portions Open to the Public

1. Approval of Agenda
2. Approval of Minutes of the Committee's Open Session Meeting on July 25, 2023
3. LSC Performance Criteria Revisions Update
4. Office of Training and Technical Assistance Update
5. Consider and Act on Resolution #2023–XXX: In Memoriam of Gregory Evans Knoll
6. Panel Discussion: LSC's Disaster Grant Program
7. Public Comment
8. Consider and Act on Other Business
9. Consider and Act on a Motion to Adjourn the Meeting

Tuesday, October 17, 2023

Start Time: 8 a.m. Pacific time

Board of Directors Meeting

Portions Open to the Public

1. Pledge of Allegiance
2. Approval of Agenda
3. Approval of Minutes of the Board's Open Session Meeting on July 27, 2023
4. Announcement of Results of Recent Notational Votes
5. Chairman's Report
6. Members' Reports
7. President's Report
8. Update on LSC's 50th Anniversary Campaign
9. Inspector General's Report
10. Consider and Act on the Report of the Institutional Advancement Committee (following virtual meeting on Oct. 4, 2023)
11. Consider and Act on the Report of the Governance and Performance Review Committee (following virtual meeting on Oct. 12, 2023)
12. Consider and Act on Resolution #2023–XXX: Board of Directors Compensation
13. Consider and Act on the Report of the Finance Committee
14. Consider and Act on the Report of the Audit Committee
15. Consider and Act on the Report of the Operations and Regulations Committee
16. Consider and Act on the Report of the Delivery of Legal Services Committee
17. Consider and Act on Resolution #2023–XXX: In Memoriam of Gregory Evans Knoll
18. Public Comment
19. Consider and Act on Other Business
20. Consider and Act on Whether to Authorize a Closed Session of the Board to Address Items Listed Below

Portions Closed to the Public

21. Update on 50th Anniversary Fundraising and Event Planning
22. Approval of Minutes of the Board's Closed Session Meeting on July 27, 2023
23. Management's Briefing
24. Inspector General's Briefing
25. General Counsel's Report on Outside Counsel Expenditures
26. Consider and Act on Potential and Pending Litigation Involving Legal Services Corporation
27. Consider and Act on LSC President's Contract
28. Consider and Act on List of Prospective Leaders Council and Emerging Council Invitees
29. Consider and Act on Motion to Adjourn the Meeting

CONTACT PERSON FOR MORE INFORMATION: Jessica Wechter, Special Assistant to the President, (202) 295–1626. Questions may also be sent by email to *wechterj@lsc.gov*.

Non-Confidential Meeting Materials: Please refer to the LSC website (*https://www.lsc.gov/events/board-committee-meetings*) for the final meeting agendas and materials in electronic format. Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC website.

(Authority: 5 U.S.C. 552b.)

Dated: September 28, 2023.

Stefanie Davis,

Deputy General Counsel & Ethics Officer, Legal Services Corporation.

[FR Doc. 2023–21912 Filed 9–29–23; 11:15 am]

BILLING CODE 7050–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 23–102]

Aerospace Safety Advisory Panel; Meeting

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the Aerospace Safety Advisory Panel (ASAP). The ASAP will hold its Fourth Quarterly Meeting for 2023. This discussion is pursuant to carrying out its statutory duties for which the Panel reviews, identifies, evaluates, and advises on those program activities, systems, procedures, and management activities that can contribute to program risk. Priority is given to those programs that involve the safety of human flight.

DATES: Thursday, October 26, 2023, 2 p.m. to 3:30 p.m., Eastern time.

ADDRESSES: Public attendance will be virtual only. See dial-in information below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Ms. Lisa M. Hackley, ASAP Administrative Officer, NASA Headquarters, Washington, DC 20546, (202) 358–1947 or *lisa.m.hackley@nasa.gov*.

SUPPLEMENTARY INFORMATION: As noted above, this meeting is only available telephonically. Any interested person must use a touch-tone phone to participate in this meeting. Any interested person may call the USA toll free conference call number 888–566–6133; passcode 8343253 and then the # sign. At the beginning of the meeting, members of the public may make a verbal presentation to the Panel limited to the subject of safety in NASA, not to exceed 5 minutes in length. To do so, members of the public must contact Ms. Lisa M. Hackley at *lisa.m.hackley@nasa.gov* or at (202) 358–1947 at least 48 hours in advance. Any member of the public is permitted to file a written statement with the Panel via electronic submission to Ms. Hackley at the email address previously noted. Written statements should be limited to the subject of safety in NASA.

The agenda for the meeting includes the following topics:

—Updates on the International Space Station Program

—Updates on the Commercial Crew Program

—Updates on the Moon to Mars Program

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2023–21868 Filed 10–2–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 23–101]

NASA Federal Advisory Committees; Charter Renewal

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of charter renewal for NASA Federal advisory committee.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), and after consultation with the Committee Management Secretariat, General Services Administration, the NASA Administrator has determined that renewal of the charter of International Space Station Advisory Committee is in the public interest in connection with the performance of duties imposed on NASA by law. The renewed charter is for a two-year period ending September 27, 2025.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Diane Rausch, NASA Advisory Committee Management Officer, NASA Headquarters, Washington, DC 20546; 202–358–4510 or *diane.rausch@nasa.gov.*

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2023–21876 Filed 10–2–23; 8:45 am]

BILLING CODE 7510–13–P

OFFICE OF THE FEDERAL REGISTER

Publication Procedures for FEDERAL REGISTER Documents During a Funding Hiatus

AGENCY: Office of the Federal Register.

ACTION: Notice of special procedures.

SUMMARY: During an appropriations lapse, the Office of the Federal Register (OFR) is required to publish documents directly related to the performance of governmental functions necessary to address imminent threats to the safety of human life or protection of property and documents related to funded programs if delaying publication until the end of the appropriations lapse would prevent or significantly damage the execution of funded functions at the agency. The OFR is prohibited from publishing other agency documents. Since it would be impracticable for the OFR to make case-by-case determinations as to whether certain documents are directly related to activities that qualify for an exemption under the Antideficiency Act, the OFR places responsibility on agencies submitting documents to certify that their documents are authorized under the Act.

FOR FURTHER INFORMATION CONTACT: Miriam Vincent, Acting Director, Legal Affairs and Policy Division, Office of the Federal Register, National Archives and Records Administration, (202) 741–6030 or *Fedreg.legal@nara.gov.*

SUPPLEMENTARY INFORMATION: Due to the possibility of a lapse in appropriations and in accordance with the provisions of the Antideficiency Act, as amended by Public Law 101–508, 104 Stat. 1388 (31 U.S.C. 1341), the OFR announces special procedures for agencies transmitting documents for publication in the **Federal Register**.

During an appropriations lapse, the OFR is required to publish documents directly related to the performance of governmental functions necessary to address imminent threats to the safety of human life or protection of property and documents related to funded programs if delaying publication until the end of the appropriations lapse would prevent or significantly damage the execution of funded functions at the agency. The OFR is prohibited from publishing other agency documents. Since it would be impracticable for the OFR to make case-by-case determinations as to whether certain documents are directly related to activities that qualify for an exemption under the Antideficiency Act, the OFR places responsibility on agencies transmitting documents for publication to certify that their documents are authorized under the Act.

During an appropriations lapse affecting one or more Federal agencies, the OFR remains open to accept and process documents authorized to be published in the daily **Federal Register** in the absence of continuing appropriations. An agency wishing to transmit a document to the OFR during an appropriations lapse must attach an exception letter to the document which certifies that publication in the **Federal Register** is necessary for one of the following reasons:

Unfunded Agencies or Programs

- To safeguard human life, protect property, or
- To provide other emergency services consistent with the performance of functions and services exempted under the Antideficiency Act.

Funded Agencies or Programs

- Because delaying publication until the end of the appropriations lapse would prevent or significantly damage the execution of funded functions at the agency.

Under the August 16, 1995 opinion of the Office of Legal Counsel of the Department of Justice (OLC), *Government Operations in the Event of a Lapse in Appropriations,* exempt functions and services would include activities such as those related to the constitutional duties of the President, food and drug inspection, air traffic control, responses to natural or manmade disasters, law enforcement and supervision of financial markets. Documents related to normal or routine activities of Federal agencies, even if funded under prior year appropriations, will not be published.

In another opinion issued on December 13, 1995, *Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations,* the OLC found that the necessary-implication exception allowed unfunded agencies to provide support to funded agencies or programs under certain conditions. Based on OLC interpretation of the December 13, 1995 opinion, as this applies to the OFR, if an agency with current appropriations submits a document for publication and certifies that delaying publication until the end of the appropriations lapse would prevent or significantly damage the execution of funded functions at the agency, then publication in the **Federal Register** would be a function or service excepted under the Antideficiency Act.

At the onset of an appropriations lapse, the OFR may suspend the regular three-day publication schedule to permit a limited number of exempt personnel to process excepted documents. Agency officials will be informed as to the schedule for filing and publishing individual documents.

OFR has posted frequently asked questions and excepted letter templates on the following website, which will be updated as necessary: *www.archives.gov/federal-register/agencies/shutdown-faqs.*

Authority: The authority for this action is 44 U.S.C. 1502 and 1 CFR 2.4 and 5.1.

Oliver A. Potts,

Director of the Federal Register.

[FR Doc. 2023–21143 Filed 9–29–23; 8:45 am]

BILLING CODE 0099–10–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2023–046]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: We have submitted a request to the Office of Management and Budget (OMB) for approval to continue to use a currently approved information collection, Facility Access Media (FAM) Request, NA Form 6006, used by all individuals requesting recurring access to non-public areas of NARA's facilities and IT network. We invite you to comment on this proposed information collection.

DATES: OMB must receive written comments on or before November 2, 2023.

ADDRESSES: Send any comments and recommendations on the proposed information collection in writing to *www.reginfo.gov/public/do/PRAMain.* You can 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: Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with any requests for additional information.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. We published a notice of proposed collection for this information collection on July 26, 2023 (88 FR 48267) and we received no comments. We are therefore submitting the described information collection to OMB for approval.

If you have comments or suggestions, they should address one or more of the following points: (a) whether the proposed information collection is necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collection and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether this collection affects small businesses.

In this notice, we solicit comments concerning the following information collection:

Title: Facility Access Media (FAM) Request.

OMB number: 3095–0057.

Agency form number: NA Form 6006.

Type of review: Regular.

Affected public: Individuals or households.

Estimated number of respondents: 1,500.

Estimated time per response: 3 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 75 hours.

Abstract: All individuals who require recurring access to non-public areas of NARA's facilities and IT network (such as NARA employees, contractors, volunteers, NARA-related foundation employees, volunteers, interns, and other non-NARA Federal employees, such as Federal agency reviewers), herein referred to as ''applicants,'' complete the Facility Access Media (FAM) Request, NA Form 6006, in order to obtain NARA Facility Access Media (FAM). After we review the request, we issue the applicant a FAM, if approved, and they are then able to access non-public areas of NARA facilities and IT network. Collecting this information is necessary to comply with Homeland Security Presidential Directive (HSPD) 12 requirements for secure and reliable forms of personal identification issued by Federal agencies to their employees, contractors, and other individuals requiring recurring access to non-public areas of Government facilities and information services. We developed this form to comply with this requirement.

Sheena Burrell,

Executive for Information Services/CIO.

[FR Doc. 2023–21804 Filed 10–2–23; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2023–045]

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of a request for comments regarding an information collection request.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the National Archives and Records Administration (NARA) has submitted a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' to OMB for approval under the Paperwork Reduction Act (PRA).

DATES: Comments must be submitted by November 2, 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: To request additional information, please contact Tamee Fechhelm at telephone number 301–837–1694.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB number: 3095–0070.

Abstract: This information collection activity provides a means to gather qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. By qualitative feedback, we mean information that provides useful insights into customers' or stakeholders' perceptions and opinions, but not statistical surveys that yield quantitative results that can be generalized to the population of study. Qualitative feedback provides insights into perceptions, experiences, and expectations, provides an early warning of issues with service, or focuses attention on areas where communication, training or changes in operations might improve delivery of products or services. Collecting this information allows for ongoing, collaborative, and actionable communications between NARA and its customers and stakeholders. It also allows us to contribute feedback directly to improving program management.

We collect feedback in areas of service delivery such as timeliness, appropriateness, accuracy of information, plain language, courtesy, efficiency, and resolution of issues with service delivery. We use customer feedback to plan efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers

and stakeholders on NARA's services will be unavailable.

We will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collection is voluntary;
- The collection is low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and is low-cost for both the respondents and the Federal Government;
- The collection is non-controversial and does not raise issues of concern to other Federal agencies;
- It is targeted to solicit opinions from respondents who have experience with the program or may have experience with the program in the near future;
- It collects personally identifiable information (PII) only to the extent necessary and we will not retain it;
- We will use the information gathered only internally, for general service improvement and program management purposes, and do not intend to release it outside of the agency;
- We will not use the information gathered for substantially informing influential policy decisions; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results, but do not fall under the current generic collection.

The Agency received no comments in response to the 60-day notice published in the **Federal Register** of August 3, 2023 (88 FR 51356).

As a general matter, information collections under this generic collection request will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Current Actions: OGIS FOIA Program Compliance Review, NPRC Survey of Customer Satisfaction, and Training and Event Evaluations.

Type of Review: Regular.

Affected Public: Individuals and households, businesses and organizations, State, local or Tribal government.

Estimated Number of Respondents: 25,000.

Below, we provide projected average estimates for the next three years:

Average expected annual number of activities: 20.

Average number of respondents per activity: 1,250.

Annual responses: 1.

Frequency of response: Once per request.

Average minutes per response: 30.

Burden hours: 12,500.

Sheena Burrell,

Executive for Information Services/CIO.

[FR Doc. 2023–21867 Filed 10–2–23; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0082]

Information Collection: Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada.''

DATES: Submit comments by December 4, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

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

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0082. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David C. Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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

FOR FURTHER INFORMATION CONTACT: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0082 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0082.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML23156A241.
- *NRC's PDR:* You may examine and order copies of public documents, by

appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0082, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

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

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* 10 CFR part 63, Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada.

2. *OMB approval number:* 3150–0199.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* One time.

6. *Who will be required or asked to respond:* The State of Nevada, local governments, or affected Indian Tribes, or their representatives, requesting consultation with the NRC staff regarding review of the potential high level waste geologic repository site, or wishing to participate in a license application review for the potential geologic repository.

7. *The estimated number of annual responses:* 12.

8. *The estimated number of annual respondents:* 12.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 1,452 for reporting. There are no recordkeeping requirements.

10. *Abstract:* Part 63 of title 10 of the *Code of Federal Regulations,* requires the State of Nevada, local governments, or affected Indian Tribes to submit information to the NRC that describes their request for any consultation with the NRC staff concerning review of the potential repository site, or NRC's facilitation for their participation in a license application review for the potential repository. Representatives of the State of Nevada, local governments, or affected Indian Tribes must submit a statement of their authority to act in such a representative capacity. The information submitted by the State of Nevada, local governments, or affected Indian Tribes is used by the Director of the Office of Nuclear Material Safety and Safeguards as a basis for decisions about the commitment of the NRC staff resources to the consultation and participation efforts.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: September 28, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–21878 Filed 10–2–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[[NRC–2023–0165]

Monthly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Monthly notice.

SUMMARY: Pursuant to section 189.a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular monthly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration (NSHC), notwithstanding the pendency before the Commission of a request for a hearing from any person.

DATES: Comments must be filed by November 2, 2023. A request for a hearing or petitions for leave to intervene must be filed by December 4, 2023. This monthly notice includes all amendments issued, or proposed to be issued, from August 18, 2023, to September 14, 2023. The last monthly notice was published on September 5, 2023.

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

• *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0165. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory

Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT: Kathleen Entz, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–2464; email: *Kathleen.Entz@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0165, facility name, unit number(s), docket number(s), application date, and subject when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0165.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov*. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0165, facility name, unit number(s), docket number(s), application date, and subject, in your comment submission.

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

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

II. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

For the facility-specific amendment requests shown in this notice, the Commission finds that the licensees' analyses provided, consistent with section 50.91 of title 10 of *the Code of Federal Regulations* (10 CFR) ''Notice for public comment; State consultation,'' are sufficient to support the proposed determinations that these amendment requests involve NSHC. Under the Commission's regulations in 10 CFR 50.92, operation of the facilities in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Commission is seeking public comments on these proposed determinations. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determinations.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue any of these license amendments before expiration of the 60-day period provided that its final determination is that the amendment involves NSHC. In addition, the Commission may issue any of these amendments prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. If the Commission takes action on any of these amendments prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final NSHC determination for any of these amendments, any hearing will take place after issuance. The Commission expects that the need to take action on any amendment before 60 days have elapsed will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by any of these actions may file a request for a hearing and petition for leave to intervene (petition) with respect to that action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration, which will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place

before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (*https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053*) and on the NRC's public website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate.*

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)–(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

The following table provides the plant name, docket number, date of application, ADAMS accession number, and location in the application of the licensees' proposed NSHC determinations. For further details with respect to these license amendment applications, see the applications for amendment, which are available for public inspection in ADAMS. For additional direction on accessing information related to this document, see the ''Obtaining Information and Submitting Comments'' section of this document.

Constellation Energy Generation, LLC; Braidwood Station, Units 1 and 2, Will County, IL; Byron Station, Unit Nos. 1 and 2, Ogle County, IL

Docket No(s)	50–454, 50–455, 50–456, 50–457.

Application date	June 7, 2023.
ADAMS Accession No	ML23158A296.
Location in Application of NSHC	Page 2 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendments would extend the completion time from 1 hour to 24 hours for Condition B of Technical Specification 3.5.1, ''Accumulators.'' The changes are consistent with Technical Specification Task Force (TSTF) traveler TSTF–370, ''Risk Informed Evaluation of an Extension to Accumulator Completion Times for Westinghouse Plants.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 4300 Winfield Road Warrenville, IL 60555.
NRC Project Manager, Telephone Number.	Joel Wiebe, 301–415–6606.

Entergy Louisiana, LLC, and Entergy Operations, Inc.; River Bend Station, Unit 1; West Feliciana Parish, LA; Entergy Operations, Inc., System Energy Resources, Inc., Cooperative Energy, A Mississippi Electric Cooperative, and Entergy Mississippi, LLC; Grand Gulf Nuclear Station, Unit 1; Claiborne County, MS; Entergy Operations, Inc.; Arkansas Nuclear One, Unit 2; Pope County, AR

Docket No(s)	50–368, 50–416, 50–458.
Application date	July 27, 2023.
ADAMS Accession No	ML23208A211.
Location in Application of NSHC	Pages 10–12 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would revise technical specifications (TSs) to adopt Technical Specifications Task Force (TSTF) Traveler TSTF–205–A, Revision 3, ''Revision of Channel Calibration, Channel Functional Test, and Related Definitions'' for Arkansas Nuclear One, Unit 2 (ANO–2), Grand Gulf Nuclear Station, Unit 1 (Grand Gulf), and River Bend Station, Unit 1 (River Bend). The proposed changes would revise ANO–2, Grand Gulf, and River Bend TS definitions for CHANNEL CALIBRATION and CHANNEL FUNCTIONAL TEST. In addition, the TS definition of LOGIC SYSTEM FUNCTIONAL TEST would be revised for Grand Gulf and River Bend.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Anna Vinson Jones, Assistant General Counsel/Legal Department, Entergy Operations, Inc.,101 Constitution Avenue, NW, Washington, DC 20001.
NRC Project Manager, Telephone Number.	Siva Lingam, 301–415–1564.

Pacific Gas and Electric Company; Diablo Canyon Power Plant, Units 1 and 2; San Luis Obispo County, CA

Docket No(s)	50–275, 50–323.
Application date	July 13, 2023.
ADAMS Accession No	ML23194A228.
Location in Application of NSHC	Pages 5–7 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would revise technical specifications to adopt Technical Specifications Task Force (TSTF) Traveler TSTF–505, Revision 2, ''Provide Risk-Informed Extended Completion Times—RITSTF [Risk-Informed TSTF] Initiative 4b'' (ADAMS Accession No. ML18183A493). The NRC issued a final revised model safety evaluation approving TSTF–505, Revision 2, on November 21, 2018 (ADAMS Package Accession No. ML18269A041).
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	Jennifer Post, Esq., Pacific Gas and Electric Co., 77 Beale Street, Room 3065, Mail Code B30A, San Francisco, CA 94105.
NRC Project Manager, Telephone Number.	Samson Lee, 301–415–3168.

Tennessee Valley Authority; Sequoyah Nuclear Plant, Units 1 and 2; Hamilton County, TN; Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN

Docket No(s)	50–327, 50–328, 50–390, 50–391.
Application date	August 2, 2023.
ADAMS Accession No	ML23214A385.
Location in Application of NSHC	Pages 3–5 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendments would adopt Technical Specifications Task Force (TSTF) Traveler TSTF–567–A, Revision 1, ''Add Containment Sump TS [Technical Specifications] to Address GSI [Generic Safety Issue]-191 Issues,'' into the Sequoyah Nuclear Plant, Units 1 and 2, and the Watts Bar Nuclear Plant, Units 1 and 2, TS by adding a new TS 3.6.16, ''Containment Sump,'' and adding an Action to address the condition of the containment sump made inoperable due to containment accident generated and transported debris exceeding the analyzed limits. The action provides time to correct or evaluate the condition in lieu of an immediate plant shutdown.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address.	David Fountain, Executive VP and General Counsel, Tennessee Valley Authority, 6A West Tower, 400 West Summit Hill Drive, Knoxville, TN 37902.
NRC Project Manager, Telephone Number.	Perry Buckberg, 301–415–1383.

III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last monthly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed NSHC determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated in the safety evaluation for each amendment.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated in the safety evaluation for the amendment.

For further details with respect to each action, see the amendment and associated documents such as the Commission's letter and safety evaluation, which may be obtained using the ADAMS accession numbers indicated in the following table. The safety evaluation will provide the ADAMS accession numbers for the application for amendment and the **Federal Register** citation for any environmental assessment. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

Constellation Energy Generation, LLC; Calvert Cliffs Nuclear Power Plant, Unit 1; Calvert County, MD; Constellation Energy Generation, LLC; Calvert Cliffs Nuclear Power Plant, Unit 2; Calvert County, MD; Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Unit 2; Oswego County, NY

Docket No(s)50–317, 50–318, 50–410.	
Amendment Date	August 21, 2023.
ADAMS Accession No	ML23151A347.
Amendment No(s)	Calvert Cliffs 347 (Unit 1), 325 (Unit 2); Nine Mile Point 194 (Unit 2).
Brief Description of Amendment(s)	The amendments incorporated the NRC-approved Technical Specification Task Force (TSTF) Improved Standard Technical Specifications Change Traveler TSTF–295–A, ''Modify Note 2 to Actions of PAM [Post-Accident Monitoring] Table to Allow Separate Condition Entry for Each Penetration.''
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Constellation Energy Generation, LLC; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert County, MD; Constellation Energy Generation, LLC; Peach Bottom Atomic Power Station, Units 2 and 3; York County, PA; Constellation Energy Generation, LLC; R. E. Ginna Nuclear Power Plant; Wayne County, New York

Docket No(s)	50–317, 50–318, 50–277, 50–278, 50–244.
Amendment Date	August 30, 2023.
ADAMS Accession No	ML23158A195.
Amendment No(s)	Calvert Cliffs—348 (Unit 1), 326 (Unit 2); Peach Bottom—343 (Unit 2), 346 (Unit 3); Ginna—156.
Brief Description of Amendment(s)	The amendments revised the technical specifications (TSs) for each facility based on Technical Specification Task Force (TSTF) Traveler TSTF–273–A, Revision 2, ''Safety Function Determination Program Clarifications,'' dated July 16, 1999 (ADAMS Accession No. ML040611069). The NRC approved TSTF–273–A, Revision 2, on August 16, 1999 (ADAMS Accession No. ML16237A031). These amendments revised TSs to add explanatory text to the programmatic description of the safety function determination program to provide clarification that when determining loss of function, a loss of power does not need to be considered.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Duke Energy Carolinas, LLC; Catawba Nuclear Station, Units 1 and 2; York County, SC; Duke Energy Carolinas, LLC; McGuire Nuclear Station, Units 1 and 2; Mecklenburg County, NC; Duke Energy Carolinas, LLC; Oconee Nuclear Station, Units 1, 2, and 3; Oconee County, SC; Duke Energy Progress, LLC; Brunswick Steam Electric Plant, Units 1 and 2; Brunswick County, NC; Duke Energy Progress, LLC; H. B. Robinson Steam Electric Plant, Unit No. 2; Darlington County, SC; Duke Energy Progress, LLC; Shearon Harris Nuclear Power Plant, Unit 1; Wake and Chatham Counties, NC

Docket No(s)	50–261, 50–269, 50–270, 50–287, 50–324, 50–325, 50–369, 50–370, 50–400, 50–413, 50–414.
Amendment Date	August 29, 2023.
ADAMS Accession No	ML23195A078.
Amendment No(s)	Brunswick 312 (Unit 1), 340 (Unit 2); Catawba 317 (Unit 1), 313 (Unit 2); Harris 198 (Unit 1); McGuire 328 (Unit 1), 307 (Unit 2); Oconee 428 (Unit 1), 430 (Unit 2), 429 (Unit 3); Robinson 276 (Unit 2).
Brief Description of Amendment(s)	The amendments adopted Technical Specifications Task Force (TSTF) Traveler TSTF–554, Revision 1, ''Revise Reactor Coolant Leakage Requirements.''
Public Comments Received as to Proposed NSHC (Yes/No).	No.

NextEra Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2; Manitowoc County, WI

Docket No(s)	50–266, 50–301.
Amendment Date	August 21, 2023.
ADAMS Accession No	ML23160A064.

Amendment No(s)	272 (Unit 1) and 274 (Unit 2).
Brief Description of Amendment(s)	The amendments revised Technical Specification (TS) 3.2.4, ''Quadrant Power Tilt Ratio (QPTR),'' and TS 3.3.1, ''Reactor Protection System (RPS) Instrumentation,'' to allow the use of an alternate means of determining power distribution information. Specifically, these TS changes allow the use of a dedicated online core power distribution monitoring system (PDMS) to perform surveillance of core thermal limits. The PDMS to be used at Point Beach is the Westinghouse proprietary core analysis system called Best Estimate Analyzer for Core Operations—Nuclear.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

NextEra Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2; Manitowoc County, WI

Docket No(s)	50–266, 50–301.
Amendment Date	August 28, 2023.
ADAMS Accession No	ML23208A095.
Amendment No(s)	273 (Unit 1); 275 (Unit 2).
Brief Description of Amendment(s)	The amendments revised the licensing basis described in the Point Beach Final Safety Analysis Report to allow the use of a risk informed approach to address safety issues discussed in Generic Safety Issue (GSI) 191, ''Assessment of Debris Accumulation on PWR [Pressurized Water Reactor] Sump Performance,'' and respond to Generic Letter (GL) 2004–02, ''Potential Impact of Debris Blockage on Emergency Recirculation during Design Basis Accidents at Pressurized Water Reactors.'' In addition to the license amendments, an exemption was simultaneously approved to allow use of a risk-informed methodology instead of the traditional deterministic methodology to resolve the concerns associated with GSI-191 and respond to GL 2004–02 for Point Beach. The exemption has separately been forwarded to the Office of the Federal Register for publication.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 1 and 2; Burke County, GA

Docket No(s)	50–424, 50–425.
Amendment Date	August 1, 2023.
ADAMS Accession No	ML23093A028.
Amendment No(s)	220 (Unit 1), 203 (Unit 2).
Brief Description of Amendment(s)	The amendments allowed the use of four Accident Tolerant Fuel Lead Test Assemblies (LTAs) to be placed in limiting core locations without completion of representative testing for up to two cycles of operation in Vogtle, Unit 2, except that the LTAs may not be placed in core regions that have been shown to be limiting with respect to the control rod ejection analysis. The amendments revised License Condition 2.D, and the following technical specifications (TS): (1) TS 3.7.18, ''Fuel Assembly Storage in the Fuel Storage Pool,'' (2) TS 4.2.1, ''Fuel Assemblies,'' and (3) TS 4.3, ''Fuel Storage,'' for Vogtle, Units 1 and 2.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Virginia Electric and Power Company, Dominion Nuclear Company; North Anna Power Station, Units 1 and 2; Louisa County, VA

Docket No(s)	50–338, 50–339.
Amendment Date	August 22, 2023.
ADAMS Accession No	ML23181A135.
Amendment No(s)	295 (Unit 1), 278 (Unit 2).
Brief Description of Amendment(s)	The amendments revised the North Anna Power Station, Units 1 and 2, technical specifications to eliminate the Refueling Water Chemical Addition Tank and allow the use of sodium tetraborate decahydrate to replace sodium hydroxide as a chemical additive (buffer) for containment sump pH control.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Wolf Creek Nuclear Operating Corporation; Wolf Creek Generating Station, Unit 1; Coffey County, KS

Docket No(s)	50–482.
Amendment Date	August 31, 2023.
ADAMS Accession No	ML23165A250.
Amendment No(s)	237.
Brief Description of Amendment(s)	The amendment allowed the use of hard hat mounted portable lights as the primary emergency lighting means in certain fire areas for illuminating safe shutdown equipment and access and egress routes to the equipment.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

IV. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Circumstances or Emergency Situation)

Since publication of the last monthly notice, the Commission has issued the following amendment. The Commission has determined for this amendment that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

Because of exigent circumstances or emergency situation associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual notice of consideration of issuance of amendment, proposed NSHC determination, and opportunity for a hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of NSHC. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its NSHC determination. In such case, the license amendment has been issued without opportunity for comment prior to issuance. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that NSHC is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendments involve NSHC. The basis for this determination is contained in the documents related to each action. Accordingly, the amendment has been issued and made effective as indicated. For those amendments that have not been previously noticed in the **Federal Register**, within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the guidance concerning the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2 as discussed in section II.A of this document.

Unless otherwise indicated, the Commission has determined that the amendment satisfies the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for this amendment. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated in the safety evaluation for the amendment.

For further details with respect to these actions, see the amendment and associated documents such as the Commission's letter and safety evaluation, which may be obtained using the ADAMS accession number indicated in the following table. The safety evaluation will provide the ADAMS accession number for the application for amendment and the **Federal Register** citation for any environmental assessment. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

DTE Electric Company; Fermi, Unit 2; Monroe County, MI

Docket No(s)	50–341.
Amendment Date	August 17, 2023.
ADAMS Accession No	ML23229A012.
Amendment No(s)	224.
Brief Description of Amendment(s)	The amendment revised Technical Specification 3.6.3.1, ''Primary Containment Oxygen Concentration,'' to adopt Technical Specification Task Force (TSTF) traveler TSTF–568, Revision 2. The license amendment is issued under emergency circumstances as provided in the provisions of 10 CFR 50.91(a)(5) of because failure to act in a timely way would result in the derating or shutdown of Fermi 2.
Local Media Notice (Yes/No)	No.
Public Comments Requested as to Proposed NSHC (Yes/No).	No.

Dated: September 20, 2023.

For the Nuclear Regulatory Commission.

Victor G. Cusumano,

Acting Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2023–20670 Filed 10–2–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 99902052; NRC–2023–0143]

NuScale Power, LLC, Carbon Free Power Project, LLC, Carbon Free Power Project

AGENCY: Nuclear Regulatory Commission.

ACTION: Limited work authorization application; notice of hearing; opportunity to request a hearing and petition for leave to intervene; order imposing procedures.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is providing notice that an uncontested hearing will be held on the Carbon Free Power Project (CFPP), LLC limited work authorization (LWA) application that proposes certain early construction activities at the CFPP site located in the Idaho National Laboratory complex, near Idaho Falls, Idaho, at a time and place to be set in the future by the Commission or by a designated Atomic Safety and Licensing Board; a further notice of hearing, providing such information, will be issued in the future. This notice also provides the public an opportunity to request a hearing and petition for leave to intervene with respect to that application. The NRC staff is currently conducting a detailed technical review of the LWA application. If the NRC issues a LWA, the applicant, CFPP, would be authorized to conduct certain early construction activities at its proposed small modular reactor site in accordance with the provisions of the limited work authorization. Because the LWA application contains Sensitive Unclassified Non-Safeguards Information (SUNSI), this notice includes an order imposing procedures to obtain access to SUNSI for contention preparation.

DATES: A request for a hearing or petition for leave to intervene must be filed by December 4, 2023. Any potential party, as defined in section 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR), who believes access to SUNSI is necessary to respond to this notice must request document access by October 13, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0143 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0143. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Omid Tabatabai, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2062, email: *Omid.Tabatabai@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

On July 31, 2023, Carbon Free Power Project, LLC (CFPP) submitted a Limited Work Authorization (LWA) application (ADAMS Package Accession No. ML23212A007) to the NRC for review and approval pursuant to part 50 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities,'' section 50.10(d), ''Request for limited work authorization.'' A related request (ADAMS Accession No. ML23212A003), was submitted by NuScale Power, LLC, on behalf of CFPP, for an exemption from certain requirements in 10 CFR 50.10(c), ''Requirement for construction permit, early site permit authorizing limited work authorization activities, combined license, or limited work authorization.'' A notice of receipt and availability of the LWA application and the exemption request was previously published in the **Federal Register** on August 17, 2023 (88 FR 56054).

CFPP plans to submit a combined license application to request authorization to construct and operate a proposed nuclear power plant at the CFPP site. The nuclear power plant would consist of six small modular reactors based on the US460 NuScale Power Plant design, which is currently undergoing NRC review. The NRC staff will perform a detailed technical review of the LWA application and will document its safety and environmental findings in a safety evaluation report and an environmental impact statement, respectively. The NRC staff accepted CFPP's LWA application for docketing under Docket No. 99902052. A notice of the acceptability of the LWA application for docketing was published in the **Federal Register** on September 11, 2023 (88 FR 62408).

The NRC is considering issuance of a limited work authorization to CFPP that would authorize certain early construction activities for the proposed facility, to be located at the Idaho National Laboratory, near Idaho Falls, Idaho.

II. Hearing

Pursuant to the Atomic Energy Act of 1954, as amended, and 10 CFR part 2, ''Agency Rules of Practice and Procedure,'' notice is hereby given that an uncontested (*i.e.,* mandatory) hearing will be held, at a time and place to be set in the future by the Commission or a designated Atomic Safety and Licensing Board (Board). A further notice of hearing, providing such information regarding the uncontested hearing, will be issued in the future.

The hearing on the application for a limited work authorization pursuant to 10 CFR part 2 will be conducted by the Commission or by an Atomic Safety and Licensing Board that will be designated by the Chief Judge of the Atomic Safety and Licensing Board Panel. If the hearing is conducted by a Board, notice as to the membership of the Board will be published in the **Federal Register** at a later date. The NRC staff will complete a detailed technical review of the application and will document its findings in a safety evaluation report. The NRC staff will also complete an environmental review of the application and will document its findings in an environmental impact statement in accordance with the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.''

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult 10 CFR 2.309. If a petition is filed, the presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

A State, local governmental body, federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (*https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053*) and the NRC's public website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate*.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html*.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)-(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this

proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request access to SUNSI. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Deputy General Counsel for Licensing, Hearings, and Enforcement, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email addresses for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *RidsOgcMailCenter.Resource@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C, the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2), the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff after a determination on standing and requisite need, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if this individual is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

(3) Further appeals of decisions under this paragraph must be made pursuant to 10 CFR 2.311.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within 5 days of the notification by the NRC staff of its grant of access and must be filed with: (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if this individual is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. The attachment to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated: September 28, 2023.

For the Nuclear Regulatory Commission.

Russell E. Chazell,

Acting Secretary of the Commission.

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012, 78 FR 34247, June 7, 2013) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/activity
0	Publication of FEDERAL REGISTER notice of hearing or opportunity for hearing, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) demonstration of standing; and (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	U.S. Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no ''need'' or no likelihood of standing, the deadline for petitioner/requestor to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Agreement or Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement or Affidavit for SUNSI.
A	If access granted: issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Agreements or Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or notice of opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2023–21801 Filed 10–2–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2020–182; CP2023–31]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 5, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2020–182; *Filing Title:* Notice of the United States Postal Service of Filing Modification Three to Global Reseller Expedited Package 2 Negotiated Service Agreement; *Filing Acceptance Date:* September 27, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* October 5, 2023.

2. *Docket No(s).:* CP2023–31; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 10; *Filing Acceptance Date:* September 27, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* October 5, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–21835 Filed 10–2–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98567; File No. SR–NYSEARCA–2023–63]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of a Proposed Rule Change To List and Trade Shares of the Grayscale Ethereum Futures Trust (ETH) ETF Under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts)

September 27, 2023.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on September 19, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the Grayscale Ethereum Futures Trust (ETH) ETF under NYSE Arca Rule 8.200–E, Commentary .02 (''Trust Issued Receipts''). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (''Shares'') of the Grayscale Ethereum Futures Trust (ETH) ETF (the ''Trust'') under NYSE Arca Rule 8.200–E, Commentary .02, which governs the listing and trading of Trust Issued Receipts.[4]

The Trust is managed by Grayscale Advisors, LLC (''Sponsor''). The Sponsor is in the process of becoming registered as a commodity pool operator with the Commodity Futures Trading Commission (''CFTC'') and is in the process of becoming a member of the National Futures Association. The Sponsor has engaged Videnct Advisory, LLC, as subadviser, to serve as the Trust's commodity trading adviser (''CTA'').

The Sponsor is not registered as a broker-dealer but is affiliated with a broker-dealer. The Sponsor has implemented and will maintain a ''fire wall'' with respect to such broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the portfolio. In the event that (a) the Sponsor becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new sponsor or sub-adviser is registered as a broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or personnel of the broker-dealer affiliate, as applicable, regarding access to information concerning the composition of and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.

The Trust's Investment Objective and Strategy

According to the Sponsor, the CME currently offers two Ethereum futures contracts, one contract representing 50 Ether (''ETH Contracts'') and another contract representing 0.10 Ether (''MET Contracts''). ETH Contracts began trading on the CME Globex trading platform on February 8, 2021 under the ticker symbol ''ETH'' and are cash-settled in U.S. dollars. MET Contracts began trading on the CME Globex trading platform on December 6, 2021 under the ticker symbol ''MET'' and are also cash-settled in U.S. dollars.[5]

ETH Contracts and MET Contracts each trade six consecutive monthly contracts plus two additional December contract months (if the 6 consecutive months include December, only one additional December contract month is listed). Because ETH Contracts and MET Contracts are exchange-listed, they allow investors to gain exposure to Ether without having to hold the underlying cryptocurrency. Like a futures contract on a traditional commodity or stock index, ETH Contracts and MET Contracts allow investors to hedge investment positions or speculate on the future price of Ether.

According to the Sponsor, the investment objective of the Trust is to have the daily changes in the net asset value (''NAV'') of the Trust's Shares reflect the daily changes in the price of a specified benchmark (the ''Benchmark''). The Benchmark is the average of the closing settlement prices

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Commentary .02 to NYSE Arca Rule 8.200–E applies to Trust Issued Receipts that invest in ''Financial Instruments.'' The term ''Financial Instruments,'' as defined in Commentary .02(b)(4) to NYSE Arca Rule 8.200–E, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars, and floors; and swap agreements.

[5] The daily settlements in MET are derived directly from the settlements in ETH for each contract listing. *See https://www.cmegroup.com/confluence/display/EPICSANDBOX/Bitcoin#Bitcoin-NormalDailySettlementProcedure.1.*

for the first to expire and second to expire ETH Contracts listed on the Chicago Mercantile Exchange, Inc. (''CME''). The first to expire and second to expire ETH Contracts and MET Contracts are referred to as the Ether Futures Contracts. Under normal market conditions,[6] the Trust will invest in Ether Futures Contracts and in cash and cash equivalents.[7]

According to the Sponsor, the Trust seeks to maintain its holdings in Ether Futures Contracts with a roughly constant expiration profile. Therefore, the Trust's positions will be changed or ''rolled'' on a regular basis in order to track the changing nature of the Benchmark by closing out first to expire contracts prior to settlement that are no longer part of the Benchmark, and then entering into second to expire contracts. Accordingly, the Trust will never carry futures positions all the way to cash settlement; the Trust will price only off of the daily settlement prices of the Ether Futures Contracts.[8] To achieve this, the Trust will roll its futures holdings prior to cash settlement of the expiring contract.

In seeking to achieve the Trust's investment objective, the Sponsor will employ a ''neutral'' investment strategy that is intended to track the changes in the Benchmark regardless of whether the Benchmark goes up or goes down. The Trust will endeavor to trade in Ether Futures Contracts so that the Trust's average daily tracking error against the Benchmark will be less than 10 percent over any period of 30 trading days. The Trust's ''neutral'' investment strategy is designed to permit investors generally to purchase and sell the Trust's Shares for the purpose of investing in the Ether Futures Contracts (as discussed below). Such investors may include participants in the Ether market seeking to hedge the risk of losses in their Ether-related transactions, as well as investors seeking price exposure to the Ether market.

According to the Sponsor, one factor determining the total return from investing in futures contracts is the price relationship between soon to expire contracts and later to expire contracts. If the futures market is in a state of backwardation (*i.e.,* when the price of ETH Contracts and MET Contracts in the future is expected to be less than the current price), the Trust will buy later to expire contracts for a lower price than the sooner to expire contracts that it sells. Hypothetically, and assuming no changes to either prevailing ETH Contracts and MET Contracts' prices or the price relationship between soon to expire contracts and later to expire contracts, the value of a contract will rise as it approaches expiration. Over time, if backwardation remained constant, the performance of a portfolio would continue to be affected. If the futures market is in contango, the Trust will buy later to expire contracts for a higher price than the sooner to expire contracts that it sells. Hypothetically, and assuming no other changes to either prevailing ETH Contracts and MET Contracts' prices or the price relationship between the spot price, soon to expire contracts and later to expire contracts, the value of a contract will fall as it approaches expiration. Over time, if contango remained constant, the performance of a portfolio would continue to be affected. Frequently, whether contango or backwardation exists is a function, among other factors, of the prevailing market conditions of the underlying market and government policy.

The Trust's investments will be consistent with the Trust's investment objective and will not be used to enhance leverage. That is, the Trust's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2Xs, 3Xs, −2Xs, and −3Xs) of the Trust's Benchmark.

Summary of the Application

The CME is a regulated futures exchange with the requisite oversight, controls, and regulatory scrutiny necessary to maintain, promote, and effectuate fair and transparent trading of its listed products, including the ETH Contracts and MET Contracts. As proposed, under no circumstances will the Trust hold and/or invest in any assets other than ETH Contracts and MET Contracts, cash, and cash equivalents, and as such, would be an investment product similar to any other exchange-traded product (''ETP'') whose component holdings are futures contracts traded on a regulated exchange. Therefore, investors would be afforded all of the protections that exchanges provide, including bilateral surveillance agreements between the listing exchange of the ETP and the listing exchange of the ETP's futures-based components.

The Ether Industry and Market Transactions

According to the Sponsor and as discussed in further detail below, Ethereum, or ETH, is a digital asset that is created and transmitted through the operations of the peer-to-peer ''Ethereum Network,'' a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Ethereum Network, the infrastructure of which is collectively maintained by a decentralized user base. The Ethereum Network allows people to exchange tokens of value, called Ether, which are recorded on a public transaction ledger known as a blockchain. ETH can be used to pay for goods and services, including computational power on the Ethereum network, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on ''Digital Asset Exchanges'' [9] that trade ETH or in individual end-user-to-end-user transactions under a barter system.

Furthermore, the Ethereum Network also allows users to write and implement smart contracts—that is, general-purpose code that executes on every computer in the network and can instruct the transmission of information and value based on a sophisticated set of logical conditions. Using smart contracts, users can create markets, store registries of debts or promises, represent the ownership of property, move funds in accordance with conditional instructions and create digital assets other than ETH on the Ethereum Network. Smart contract operations are executed on the Ethereum Blockchain in exchange for payment of ETH. The Ethereum Network is one of a number of projects intended to expand blockchain use beyond just a peer-to-peer money system.

The Ethereum Network went live on July 30, 2015. Unlike other digital

[6] The term ''normal market conditions'' includes, but is not limited to, the absence of: trading halts in the applicable financial markets generally; operational issues (*e.g.,* systems failure) causing dissemination of inaccurate market information; or force majeure type events such as a natural or manmade disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. *See* NYSE Arca Rule 8.600–E(c)(5).

[7] The term ''cash equivalents'' includes short term Treasury bills, money market funds, demand deposit accounts and commercial paper.

[8] As discussed in more detail below, the CME determines the daily settlements for Bitcoin futures based on trading activity on CME Globex between 14:59:00 and 15:00:00 Central Time (CT), which is the ''settlement period.''

[9] A ''Digital Asset Market'' is a ''Brokered Market,'' ''Dealer Market,'' ''Principal-to-Principal Market'' or ''Exchange Market,'' as each such term is defined in the Financial Accounting Standards Board Accounting Standards Codification Master Glossary. The ''Digital Asset Exchange Market'' is the global exchange market for the trading of ETH, which consists of transactions on electronic Digital Asset Exchanges. A ''Digital Asset Exchange'' is an electronic marketplace where exchange participants may trade, buy and sell ETH based on bid-ask trading. The largest Digital Asset Exchanges are online and typically trade on a 24-hour basis, publishing transaction price and volume data.

assets, such as Bitcoin, which are solely created through a progressive mining process, 72.0 million ETH were created in connection with the launch of the Ethereum Network. At the time of the network launch, a non-profit called the Ethereum Foundation was the sole organization dedicated to protocol development.

The Ethereum Network is decentralized in that it does not require governmental authorities or financial institution intermediaries to create, transmit, or determine the value of ETH. Rather, following the initial distribution of ETH, ETH is created, burned, and allocated by the Ethereum Network protocol through a process that is currently subject to an issuance and burn rate. The value of ETH is determined by the supply of and demand for ETH on the Digital Asset Exchanges or in private end-user-to-end-user transactions.

New ETH are created and rewarded to the validators of a block in the Ethereum Blockchain for verifying transactions. The Ethereum Blockchain is effectively a decentralized database that includes all blocks that have been validated, and it is updated to include new blocks as they are validated. Each ETH transaction is broadcast to the Ethereum Network and, when included in a block, recorded in the Ethereum Blockchain. As each new block records outstanding ETH transactions, and outstanding transactions are settled and validated through such recording, the Ethereum Blockchain represents a complete, transparent and unbroken history of all transactions of the Ethereum Network.

Among other things, ETH is used to pay for transaction fees and computational services (*i.e.,* smart contracts) on the Ethereum Network; users of the Ethereum Network pay for the computational power of the machines executing the requested operations with ETH. Requiring payment in ETH on the Ethereum Network incentivizes developers to write quality applications and increases the efficiency of the Ethereum Network because wasteful code costs more, while also ensuring that the Ethereum Network remains economically viable by compensating for contributed computational resources.

To date, several ETH-based exchange-traded funds (''ETFs'') that would be registered under the Investment Company Act of 1940 (the '' '40 Act'') have filed registration statements with the Commission. These ETFs would hold ETH futures contracts that trade on the CME and settle using the CME CF Ethereum Reference Rate (''ERR''). In other words, these ETFs offer identical exposure to that of the Trust. Therefore, the Sponsor believes that if the Commission allows these ETFs to begin trading, then it should also approve the Trust for trading.

The Trust Will Not Transact in Ether and Will Not Be Required To Retain an Ether Custodian

The Sponsor notes that individual users, institutional investors and investment funds that want to provide exposure to Ether by investing directly in Ether, and therefore must transact in Ether, must use the Ether Network to download specialized software referred to as a ''Ether wallet.'' This wallet may be used to send and receive Ether through users' unique ''Ether addresses.'' The amount of Ether associated with each Ether address, as well as each Ether transaction to or from such address, is captured on the Blockchain. Ether transactions are secured by cryptography known as public-private key cryptography, represented by the Ether addresses and digital signature in a transaction's data file. Each Ether Network address, or wallet, is associated with a unique ''public key'' and ''private key'' pair, both of which are lengthy alphanumeric codes, derived together and possessing a unique relationship. The private key is a secret and must be kept in accordance with appropriate controls and procedures to ensure it is used only for legitimate and intended transactions. If an unauthorized third person learns of a user's private key, that third person could forge the user's digital signature and send the user's Ether to any arbitrary Ether address, thereby stealing the user's Ether. Similarly, if a user loses his private key and cannot restore such access (*e.g.,* through a backup), the user may permanently lose access to the Ether contained in the associated address.

According to the Sponsor, institutional purchasers of Ether, including other Ether funds that provide exposure to Ether by investing directly in Ether, generally maintain their Ether account with an Ether custodian. Ether custodians are financial institutions that have implemented a series of specialized security precautions, including holding Ether in ''cold storage,'' to try to ensure the safety of an account holder's Ether. These Ether custodians must carefully consider the design of the physical, operational, and cryptographic systems for secure storage of private keys in an effort to lower the risk of loss or theft, and many use a multi-factor security system under which actions by multiple individuals working together are required to access the private keys necessary to transfer such digital assets and ensure exclusive ownership.

The nature of the Ether Futures Contracts that the Trust will hold is such that the Trust will not be required to use an Ether custodian. According to the Sponsor, the Trust will deposit an initial margin amount to initiate an open position in futures contracts. A margin deposit is like a cash performance bond. It helps assure the trader's performance of the futures contracts that he or she purchases or sells. Futures contracts are marked to market at the end of each trading day and the margin required with respect to such contracts is adjusted accordingly. The remainder of the Trust's assets will be held in cash and cash equivalents at the Trust custodian or other financial institutions. The Trust will only hold Ether Futures Contracts described above. Accordingly, the Trust will not need an Ether custodian because it will never hold actual Ether.

The Structure and Operation of the Trust Satisfies Commission Requirements for Ether-Based Exchange Traded Products

In the context of prior spot digital asset ETP proposal disapproval orders for Bitcoin, the Commission expressed concerns about the underlying Digital Asset Market due to the potential for fraud and manipulation and outlined the reasons why such proposals have been unable to satisfy these concerns (the ''Prior Spot Digital Asset ETP Disapproval Orders'').[10] In the Prior

[10] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (the ''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 87267 (Oct. 9, 2019), 84 FR 55382 (Oct. 16, 2019) (SR–NYSEArca–2019–01) (the ''Bitwise Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR–NYSEArca–2019–39) (the ''Wilshire Phoenix Order''); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR–NYSEArca–2017–139) (the ''ProShares Order''); Order Disapproving a Proposed Rule Change Relating to Listing and Trading of the Direxion Daily Bitcoin Bear 1X Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin

Continued

Spot Digital Asset ETP Disapproval Orders, the Commission outlined that a proposal relating to a digital asset-based ETP could satisfy its concerns regarding potential for fraud and manipulation by demonstrating:

(1) *Inherent Resistance to Fraud and Manipulation:* that the underlying commodity market is inherently resistant to fraud and manipulation;

(2) *Other Means to Prevent Fraud and Manipulation:* that there are other means to prevent fraudulent and manipulative acts and practices that are sufficient; or

(3) *Surveillance Sharing:* that the listing exchange has entered into a surveillance sharing agreement with a regulated market of significant size relating to the underlying or reference assets.

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the Commission may have with respect to potential fraud and manipulation in the context of an ETH-based ETP.

Surveillance Sharing Agreements With a Market of Significant Size

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission noted its concerns that the Bitcoin market could be subject to manipulation.[11] In these orders, the Commission cited numerous precedents[12] in which listing proposals were approved based on findings that the particular market was either inherently resistant to manipulation or that the listing exchange had entered into a surveillance sharing agreement with a market of significant size.[13] The Commission noted that, for commodity-trust ETPs ''there has been in every case at least one significant, regulated market for trading futures in the underlying commodity—whether gold, silver, platinum, palladium or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group (the ''ISG'') membership in common with, that market.'' [14]

Like the Exchange, the CME [15] is a member of the ISG, the purpose of which is ''to provide a framework for the sharing of information and the coordination of regulatory efforts among exchanges trading securities and related products to address potential intermarket manipulations and trading abuses.'' [16] Membership of a relevant futures exchange in ISG is sufficient to meet the surveillance-sharing requirement.[17]

The Commission has previously noted that the existence of a surveillance-sharing agreement by itself is not sufficient for purposes of meeting the requirements of Section 6(b)(5); the surveillance-sharing agreement must be with a market of significant size.[18] The Commission has also provided an example of how it interprets the terms ''significant market'' and ''market of significant size,'' though that definition is meant to be illustrative and not exclusive: ''the terms 'significant market' and 'market of significant size' . . . include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP so that a surveillance sharing agreement would assist the ETP listing market in detecting and deterring misconduct and it is unlikely that trading in the ETP would be the predominant influence on prices in that market.'' [19]

Further, as the Commission explained in the order approving the first Bitcoin-based ETP (the ''Teucrium Order''), ''the CME is a 'significant market' related to CME bitcoin futures contracts, which would be the exclusive noncash holdings of the proposed ETP.'' [20] In the Teucrium Order, the Commission further elaborated that:

> [w]ith respect to the proposed ETP, the underlying bitcoin assets are CME bitcoin futures contracts. The relevant analysis, therefore, is whether Arca has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts . . . [T]aking into consideration the direct relationship between the regulated market with which Arca has a surveillance-sharing agreement and the assets held by the proposed ETP, as well as developments with respect to the CME bitcoin futures market—including the launch of exchange-traded funds registered under the Investment Company Act of 1940 (''1940 Act'') that hold CME bitcoin futures (''Bitcoin Futures ETFs'')—the Commission concludes that the Exchange has the requisite surveillance-sharing agreement.'' [21]

Key to the Commission's approval was that the significant regulated market (*i.e.,* the CME) with which the listing exchange had a surveillance-sharing agreement, was the same market on which the assets in the ETP trade.

The Sponsor believes that the facts and circumstances of this proposal are the same as that of the Teucrium Order. CME Ether Futures Contracts are the exclusive holdings of the Trust. The relevant analysis, therefore, is whether the Exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size

1.5X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares Under NYSE Arca Rule 8.200–E, Securities Exchange Act Release No. 83912 (Aug. 22, 2018), 83 FR 43912 (Aug. 28, 2018) (SR–NYSEArca–2018–02) (the ''Direxion Order''); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–01) (the ''GraniteShares Order'').

[11] *See* Winklevoss I Order and Winklevoss II Order. The Sponsor notes that some of the concerns raised are that a significant portion of Bitcoin trading occurs on unregulated platforms and that there is a concentration of a significant number of Bitcoin in the hands of a small number of holders. However, the Sponsor believes that these facts are not unique to Bitcoin and are true of a number of commodity and other markets. For instance, some gold bullion trading takes place on unregulated OTC markets and a significant percentage of gold is held by a relative few. According to estimates of the World Gold Council, approximately 22% of total above ground gold stocks are held by private investors and 17% are held by foreign governments. *See https://www.gold.org/goldhub/data/above-ground-stocks.* By comparison, 13.61% of Bitcoin are held by the 86 largest Bitcoin addresses, some of which are known to be cold storage addresses of large centralized cryptocurrency trading platforms. *See https://bitinfocharts.com/top-100-richest-bitcoin-addresses.html.*

[12] For an extensive listing of such precedents, *see* Winklevoss I Order, 82 FR at 14083 n. 96.

[13] The Exchange to date has not entered into surveillance sharing agreements with any cryptocurrency platform. However, the CME, which calculates the CME CF BRR, and which has offered contracts for Bitcoin futures products since 2017, is, as noted below, a member of the Intermarket Surveillance Group (''ISG''). In addition, each Constituent Platform has entered into a data sharing agreement with CME. *See https://docs-cfbenchmarks.s3.amazonaws.com/CME+CF+Constituent+Exchanges+Criteria.pdf.*

[14] *See* Winklevoss II Order, 83 FR at 37594.

[15] The CME is regulated by the CFTC, which has broad reaching anti-fraud and anti-manipulation authority including with respect to the Bitcoin market since Bitcoin has been designated as a commodity by the CFTC. *See* A CFTC Primer on Virtual Currencies (October 17, 2017), *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf* (the ''CFTC Primer on Virtual Currencies'') (''The CFTC's jurisdiction is implicated when a virtual currency is used in a derivatives contract or if there is fraud or manipulation involving a virtual currency traded in interstate commerce.''). *See also* 7 U.S.C. 7(d)(3) (''The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.'').

[16] *See https://isgportal.org/overview.*

[17] *See, e.g.,* Winklevoss II Order, 83 FR at 37594.

[18] *See, e.g.,* id. at 37589–90.

[19] *Id.* at 37594; *see also* GraniteShares Order, 83 FR at 43930 n. 85 and accompanying text.

[20] Securities Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (Apr. 12, 2022) (SR–NYSEArca–2021–53) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts)).

[21] *See id.* at 21678.

related to CME Ether Futures Contracts, which it does by way of the ISG.

The Sponsor also believes it is unlikely that the ETP would become the predominant influence on prices in the market. While future inflows to the proposed Trust cannot be predicted, to provide comparable data, the Sponsor examined the change in market capitalization of ETH with net inflows into Grayscale Ethereum Trust (ETH) (the ''ETH Trust''), an Ethereum fund that the Sponsor's affiliate, Grayscale Investments, LLC, manages. The ETH Trust currently trades on OTC Markets and is largest and most liquid ETH investment product in the world.[22] From November 1, 2019 to August 31, 2023, the market capitalization of ETH grew from $20 billion to $198 billion, a $178 billion increase. Over the same period, the Trust experienced $1.2 billion of inflows. The cumulative inflow into the Trust over the stated time period was only 0.6% of the aggregate growth of ETH's market capitalization.

Additionally, the Trust experienced approximately $70.2 billion of trading volume from November 1, 2019 to August 31, 2023, only 19% of the CME futures market and 10% of the Index over the same period.

In summary, based on the Commission's prior reasoning, the Sponsor believes that the Trust satisfies the Commission's requirements under the Exchange Act because the CME is the same market on which the assets of the Trust trade, and the Trust would not otherwise become the predominant influence in prices in the market.[23]

Settlement of ETH Contracts and MET Contracts

According to the Sponsor, each ETH Contract and MET Contract settles daily to the ETH Contract volume-weighted average price (''VWAP'') of all trades that occur between 2:59 p.m. and 3:00 p.m. Central Time, the settlement period, rounded to the nearest tradable tick.[24]

ETH Contracts and MET Contracts each expire on the last Friday of the contract month and are settled with cash. The final settlement value is based on the CME CF ERR at 4:00 p.m. London time on the expiration day of the futures contract.

As proposed, the Trust will rollover its soon to expire Ether Futures Contracts to extend the expiration or maturity of its position forward by closing the initial contract holdings and opening a new longer-term contract holding for the same underlying asset at the then-current market price. The Trust does not intend to hold any Ether futures positions into cash settlement.

Net Asset Value

According to the Sponsor, the Trust's NAV per Share will be calculated by taking the current market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares.

The Administrator of the Trust will calculate the NAV once each trading day, as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. Eastern Standard Time (EST).

According to the Sponsor, to determine the value of Ether Futures Contracts, the Trust's Administrator will use the Ether Futures Contract settlement price on the exchange on which the contract is traded, except that the ''fair value'' of Ether Futures Contracts (as described in more detail below) may be used when Ether Futures Contracts close at their price fluctuation limit for the day. The Trust's Administrator will determine the value of Trust investments as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. EST. The Trust's NAV will include any unrealized profit or loss on open Ether Futures Contacts and any other credit or debit accruing to the Trust but unpaid or not received by the Trust.

According to the Sponsor, the fair value of the Trust's holdings will be determined by the Trust's Sponsor in good faith and in a manner that assesses the future Ether market value based on a consideration of all available facts and all available information on the valuation date. When an Ether Futures Contract has closed at its price fluctuation limit, the fair value determination will attempt to estimate the price at which such Ether Futures Contract would be trading in the absence of the price fluctuation limit (either above such limit when an upward limit has been reached or below such limit when a downward limit has been reached). Typically, this estimate will be made primarily by reference to exchange traded instruments at 4:00 p.m. EST on settlement day. The fair value of ETH Contracts and MET Contracts may not reflect such security's market value or the amount that the Trust might reasonably expect to receive for the ETH Contracts and MET Contracts upon its current sale.

Indicative Trust Value

According to the Sponsor, in order to provide updated information relating to the Trust for use by investors and market professionals, ICE Data Indices, LLC will calculate an updated Indicative Trust Value (''ITV''). The ITV will be calculated by using the prior day's closing NAV per Share of the Trust as a base and will be updated throughout the Core Trading Session of 9:30 a.m. E.T. to 4 p.m. E.T. to reflect changes in the value of the Trust's holdings during the trading day.

The ITV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session.[25]

Creation and Redemption of Shares

According to the Sponsor, the Shares issued by the Trust may only be purchased by Authorized Purchasers and only in blocks of 10,000 Shares called ''Creation Baskets.'' The amount of the purchase payment for a Creation Basket is equal to the total NAV of Shares in the Creation Basket. Similarly, only Authorized Purchasers may redeem Shares and only in blocks of 10,000 Shares called ''Redemption Baskets.'' The amount of the redemption proceeds for a Redemption Basket is equal to the total NAV of Shares in the Redemption Basket. The purchase price

[22] To further illustrate the size and liquidity of the Trust, as of September 6, 2023, compared with global commodity ETPs, the Trust would rank 24th in assets under management and 83rd in notional trading volume for the preceding 30 days.

[23] While the Commission also considered the launch of exchange-traded funds registered under the '40 Act as a reason for its approval in the Teucrium Order, the Sponsor does not believe this distinction is relevant given the otherwise satisfaction of the Significant Market Test.

[24] VWAP is calculated based first on Tier 1 (if there are trades during the settlement period); then Tier 2 (if there are no trades during the settlement period); and then Tier 3 (in the absence of any trade activity or bid/ask in a given contract month during the current trading day), as follows. For Tier 1, each contract month settles to its VWAP of all trades that occur between 14:59:00 and 15:00:00 CT, the settlement period, rounded to the nearest tradable tick. If the VWAP is exactly in the middle of two tradable ticks, then the settlement will be the tradable price that is closer to the contract's prior day settlement price. For Tier 2, if no trades occur on CME Globex between 14:59:00 and 15:00:00 CT, the settlement period, then the last trade (or the contract's settlement price from the previous day in the absence of a last trade price) is used to determine whether to settle to the bid or the ask during this period. If the last trade price is outside of the bid/ask spread, then the contract month settles to the nearest bid or ask price. If the last trade price is within the bid/ask spread, or if a bid/ask spread is not available, then the contract month settles to the last trade price. For Tier 3, in the absence of any trade activity or bid/ask in a given contract month during the current trading day, the daily settlement price will be determined by applying the net change from the preceding contract month to the given contract month's prior daily settlement price.

[25] Several major market data vendors display and/or make widely available ITVs taken from the Consolidated Tape Association (''CTA'') or other data feeds.

for Creation Baskets and the redemption price for Redemption Baskets are the actual NAV calculated at the end of the business day when a request for a purchase or redemption is received by the Trust.

''Authorized Purchasers'' will be the only persons that may place orders to create and redeem Creation Baskets. Authorized Purchasers must be (1) either registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions, and (2) DTC Participants. An Authorized Purchaser is an entity that has entered into an Authorized Purchaser Agreement with the Sponsor.

Creation Procedures

According to the Sponsor, on any ''Business Day,'' an Authorized Purchaser may place an order with the Transfer Agent to create one or more Creation Baskets. For purposes of processing both purchase and redemption orders, a ''Business Day'' means any day other than a day when the CME or the New York Stock Exchange is closed for regular trading. Purchase orders for Creation Baskets must be placed by 3:00 p.m. EST or one hour prior to the close of trading on the New York Stock Exchange, whichever is earlier. The day on which the Distributor receives a valid purchase order is referred to as the purchase order date. If the purchase order is received after the applicable cut-off time, the purchase order date will be the next Business Day. Purchase orders are irrevocable.

By placing a purchase order, an Authorized Purchaser agrees to deposit cash with the Custodian.

Redemption Procedures

According to the Sponsor, the procedures by which an Authorized Purchaser can redeem one or more Creation Baskets will mirror the procedures for the creation of Creation Baskets. On any Business Day, an Authorized Purchaser may place an order with the Transfer Agent to redeem one or more Creation Baskets.

The redemption procedures allow Authorized Purchasers to redeem Creation Baskets. Individual shareholders may not redeem directly from the Trust. By placing a redemption order, an Authorized Purchaser agrees to deliver the Creation Baskets to be redeemed through DTC's book entry system to the Trust by the end of the next Business Day following the effective date of the redemption order or by the end of such later business day.

Determination of Redemption Distribution

According to the Sponsor, the redemption distribution from the Trust will consist of an amount of cash, cash equivalents, and/or exchange listed Ether futures that is in the same proportion to the total assets of the Trust on the date that the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received.

Delivery of Redemption Distribution

According to the Sponsor, an Authorized Purchaser who places a purchase order will transfer to the Custodian the required amount of cash, cash equivalents, and/or Ether futures by the end of the next business day following the purchase order date or by the end of such later business day, not to exceed three business days after the purchase order date, as agreed to between the Authorized Purchaser and the Custodian when the purchase order is placed (the ''Purchase Settlement Date''). Upon receipt of the deposit amount, the Custodian will direct DTC to credit the number of Creation Baskets ordered to the Authorized Purchaser's DTC account on the Purchase Settlement Date.

Availability of Information

The NAV for the Trust's Shares will be disseminated daily to all market participants at the same time. The intraday, closing, and settlement prices of the Ether Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors. Information regarding the market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Complete real-time data for the Ether Futures Contracts will be available by subscription through on-line information services. ICE Futures U.S. and CME also provide delayed futures and options on futures information on current and past trading sessions and market news free of charge on their respective websites. The specific contract specifications for Ether Futures Contracts will also be available on such websites, as well as other financial informational sources. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. Quotation information for cash equivalents and commodity futures may be obtained from brokers and dealers who make markets in such instruments. Intra-day price and closing price level information for the Benchmark will be available from major market data vendors. The Benchmark value will be disseminated once every 15 seconds during the Core Trading Session. The Benchmark components and methodology will be made publicly available on the CME's website [26] and the Trust's website (*www.grayscale.com*).

In addition, the Trust's website will display the applicable end of day closing NAV. The daily holdings of the Trust will be available on the Trust's website. The Trust's website will also include a form of the prospectus for the Trust that may be downloaded. The website will include the Shares' ticker and CUSIP information along with additional quantitative information updated on a daily basis, including: (1) the prior Business Day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the bid/ask spread at the time of NAV calculation (the ''Bid/Ask Price'') against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of the Trust's holdings, (ii) the counterparty to and value of forward contracts and any other financial instruments tracking the Benchmark, and (iii) the total cash and cash equivalents held in the Trust's portfolio, if applicable.

The Trust's website will be publicly available at the time of the public offering of the Shares and accessible at no charge.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Trust.[27] Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be

[26] *See https://www.cmegroup.com/markets/cryptocurrencies/ether/ether.html?gad=1&gclid=CjwKCAjwjaWoBhAmEiwAXz8DBd0hAnxJD205R-TSC-c44r2Ir7YEssof0NkSOiL1zIwJcv7jsAibNhoCglQQAvD_BwE&gclsrc=aw.ds.*

[27] *See* NYSE Arca Rule 7.12–E.

halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in ETH and/or MET Contracts and the securities and/or the financial instruments composing the daily disclosed portfolio of the Trust; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The Exchange may halt trading during the day in which an interruption to the dissemination of the ITV or the value of the Benchmark occurs. The Benchmark value will be disseminated once every 15 seconds during the Core Trading Session. The Benchmark components and methodology will be made publicly available. If the interruption to the dissemination of the ITV, or to the value of the Benchmark persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated and disseminated daily and will be made available to all market participants at the same time.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. in accordance with NYSE Arca Rule 7.34–E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.200–E. The trading of the Shares will be subject to NYSE Arca Rule 8.200–E, Commentary .02(e), which sets forth certain restrictions on Equity Trading Permit Holders (''ETP Holders'') acting as registered Market Makers in Trust Issued Receipts to facilitate surveillance. For initial and continued listing, the Trust will be in compliance with Rule 10A–3 under the Act,[28] and the Trust will rely on the exception contained in Rule 10A–3(c)(7).[29] A minimum of 50,000 Shares of the Trust will be outstanding at the commencement of trading on the Exchange.

Pursuant to NYSE Arca Rule 8.200–E, Commentary .02(e), the ETP Holder acting as a registered Market Maker in Trust Issued Receipts must file, with the Exchange, in a manner prescribed by the Exchange, and keep current a list identifying all accounts for trading the underlying physical asset or commodity, related futures or options on futures, or any other related derivatives, which the ETP Holder acting as registered Market Maker may have or over which it may exercise investment discretion. No ETP Holder acting as registered Market Maker in the Trust Issued Receipts shall trade in the underlying physical asset or commodity, related futures or options on futures, or any other related derivatives, in an account in which an ETP Holder acting as a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, *e.g.,* Rule 4.4–E), the ETP Holder acting as a registered Market Maker in Trust Issued Receipts shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts in the underlying physical asset or commodity, related futures or options on futures, or any other related derivatives, as may be requested by the Exchange.

Surveillance

The Exchange represents that trading in the Shares of the Trust will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[30] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Trust's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Trust's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Trust's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and the Trust's holdings through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in futures contracts) occurring on US futures exchanges, which are members of the ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Trust will only hold Ether Futures Contracts that are listed on an exchange that is a member of the ISG or

[28] 17 CFR 240.10A–3.

[29] *See* Rule 10A–3(c)(7), 17 CFR 240.10A–3(c)(7) (stating that a listed issuer is not subject to the requirements of Rule 10A–3 if the issuer is organized as an unincorporated association that does not have a board of directors and the activities of the issuer are limited to passively owning or holding securities or other assets on behalf of or for the benefit of the holders of the listed securities).

[30] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

is a market with which the Exchange has a CSSA.[31]

All statements and representations made in this filing regarding (a) the description of the portfolios of the Trust or Benchmark, (b) limitations on portfolio holdings or the Benchmark, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an information bulletin (''Information Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) the risks involved in trading the Shares during the Early and Late Trading Sessions when an updated ITV will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares in Creation Baskets and Redemption Baskets (and that Shares are not individually redeemable); (3) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (4) how information regarding the ITV is disseminated; (5) how information regarding portfolio holdings is disseminated; (6) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (7) trading information.

In addition, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Trust. The Exchange notes that investors purchasing Shares directly from the Trust will receive a prospectus. ETP Holders purchasing Shares from the Trust for resale to investors will deliver a prospectus to such investors. The Information Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses described in the Registration Statement.

The Information Bulletin will also disclose the trading hours of the Shares and that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day. The Information Bulletin will disclose that information about the Shares will be publicly available on the Trust's website.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[32] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.200–E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Trust's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Trust's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Trust's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and the Trust's holdings through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in Ether Futures Contracts) occurring on US futures exchanges, which are members of the ISG. The intraday, closing prices, and settlement prices of the Ether Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors website or on-line information services. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Complete real-time data for the Ether Futures Contracts will be available by subscription from on-line information services. ICE Futures U.S. and CME also provide delayed futures information on current and past trading sessions and market news free of charge on the Trust's website. The specific contract specifications for Ether Futures Contracts will also be available on such websites, as well as other financial informational sources. Information regarding options will be available from the applicable exchanges or major market data vendors. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The ITV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the NYSE Arca Core Trading Session. The Trust's website will also include a form of the prospectus for the Trust that may be downloaded. The website will include the Share's ticker and CUSIP information along with additional quantitative information updated on a daily basis, including, for the Trust: (1) the prior business day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of Ether Futures

[31] For a list of the current members of ISG, *see www.isgportal.org*. The Exchange notes that not all components of the Trust may trade on markets that are members of ISG or with which the Exchange has in place a CSSA.

[32] 15 U.S.C. 78f(b)(5).

Contracts, (ii) the counterparty to and value of forward contracts, and (iii) other financial instruments, if any, and the characteristics of such instruments and cash equivalents, and amount of cash held in the Trust's portfolio, if applicable.

Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in ETH and/or MET Contracts and the securities and/or the financial instruments composing the daily disclosed portfolio of the Trust; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of Trust Issued Receipts based on Ether that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of Trust Issued Receipts based on Ether and that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEARCA–2023–63 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEARCA–2023–63. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEARCA–2023–63 and should be submitted on or before October 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21792 Filed 10–2–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98558; File No. SR–FICC–2023–012]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Margin Liquidity Adjustment Charge

September 27, 2023.

I. Introduction

On August 3, 2023, Fixed Income Clearing Corporation (''FICC'') 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] proposed rule change SR–FICC–2023–012 to amend FICC's Government Securities Division (''GSD'') Rulebook (''GSD Rules'') and Mortgage-Backed Securities Division (''MBSD'') Clearing Rules (''MBSD Rules,'' and collectively with the GSD Rules, the ''Rules'')[3] to enhance FICC's margin methodology with respect to the Margin Liquidity Adjustment Charge (''MLA Charge''). The proposed rule change was published for public comment in the **Federal Register** on August 24, 2023.[4] The Commission has received no comments on the proposed rule change. On August 22, 2023, FICC filed Amendment No. 1 to the proposed rule change, to make clarifications to the proposed rule change.[5] The proposed

[33] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Terms not defined herein are defined in the GSD Rules and MBSD Rules, as applicable, *available at www.dtcc.com/legal/rules-and-procedures.*

[4] *See* Securities Exchange Act Release No. 98163 (Aug. 18, 2023), 88 FR 58004 (Aug. 24, 2023) (File No. SR–FICC–2023–012) (''Notice of Filing'').

[5] Amendment No. 1 made clarifications and corrections to Exhibit 3b of the filing (Proposed Changes to the Depository Trust and Clearing Corporation (''DTCC'') Model Development

Continued

rule change, as modified by Amendment No. 1, is hereinafter referred to as the ''Proposed Rule Change.'' The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons, and, for the reasons discussed below, the Commission is approving the Proposed Rule Change on an accelerated basis.

II. Background

FICC operates two divisions: GSD and MBSD. GSD provides trade comparison, netting, risk management, settlement, and central counterparty (''CCP'') services for the U.S. Government securities market. MBSD provides the same services for the U.S. mortgage-backed securities market. GSD and MBSD maintain separate sets of rules, margin models, and clearing funds. As a CCP, FICC interposes itself as the buyer to every seller and seller to every buyer for the financial transactions it clears. As such, FICC is exposed to the risk that one or more of its members may fail to make a payment or to deliver securities.

A key tool that FICC uses to manage its credit exposures to its members is the daily collection of the Required Fund Deposit (*i.e.,* margin) from each member. A member's margin is designed to mitigate potential losses associated with liquidation of the member's portfolio in the event of that member's default. The aggregated amount of all GSD and MBSD members' margin constitutes the GSD Clearing Fund and MBSD Clearing Fund, respectively, which FICC would be able to access should a defaulted member's own margin be insufficient to satisfy losses to FICC caused by the liquidation of that member's portfolio. Each member's margin consists of several components, each of which is designed to address specific risks faced by FICC arising out of its members' trading activity. One of these components is the MLA Charge. As described more fully below, the MLA Charge is designed to address the risk presented to FICC by member portfolios that contain large net unsettled positions in a particular group of securities with a similar risk profile or in a particular transaction type.

In the event of a member default, the Rules [6] provide FICC with the authority to close out and manage the positions in a defaulted member's portfolio. The process of closing out a defaulted member's portfolio typically involves buying and selling securities that the defaulted member was obligated to deliver and receive to and from FICC, or otherwise liquidating the portfolio.[7] FICC's transaction costs to liquidate the securities in a defaulted member's portfolio are affected by, among other things, the marketability of such securities (''market impact costs''). As a general matter, less marketable securities are more difficult and costly to liquidate within the three-day assumed period of risk. One factor that could reduce the marketability of the securities in a defaulted member's portfolio is if the portfolio were to contain a large concentration of net unsettled positions in a particular group of securities with a similar risk profile or in a particular transaction type. Therefore, such portfolios create the risk that FICC may face increased transaction costs to liquidate in the event of a member default. The MLA Charge is the margin component designed to mitigate the foregoing risk.

A. Current MLA Charge

To calculate the MLA Charge, FICC categorizes securities into asset groups that share similar risk profiles. Under the current GSD Rules, the asset groups include: (a) U.S. Treasury securities, which are further categorized into subgroups by maturity—those maturing in (i) less than one year, (ii) equal to or more than one year and less than two years, (iii) equal to or more than two years and less than five years, (iv) equal to or more than five years and less than ten years, and (v) equal to or more than ten years; (b) Treasury-Inflation Protected Securities (''TIPS''), which are further categorized into subgroups by maturity—those maturing in (i) less than two years, (ii) equal to or more than two years and less than six years, (iii) equal to or more than six years and less than eleven years, and (iv) equal to or more than eleven years; (c) U.S. agency bonds; and (d) mortgage pools transactions.[8] Under the current MBSD Rules, there is currently one mortgage-backed securities asset group.[9]

FICC designed the MLA Charge calculation to compare the total market value of a portfolio's net unsettled positions in a particular asset group to the available trading volume of that asset group (or subgroup) in the market.[10] If the market value of the portfolio's net unsettled positions in an asset group is large in comparison to the available trading volume of that asset group, then FICC faces the risk of increased transaction costs to liquidate those positions in the event of a member default.[11]

Calculation of the MLA Charge involves several steps, which are generally described as part of the definition of the MLA Charge in Rule 1.[12] First, FICC calculates the market impact cost with respect to the member's net unsettled positions in each asset group.[13] To determine the market impact cost for net unsettled positions in Treasuries maturing in less than one year and TIPS at GSD, FICC uses the directional market impact cost, which is a function of the net unsettled positions' net directional market value.[14] To determine the market impact cost for all other net unsettled positions at GSD and MBSD, FICC adds together two components: (1) the directional market impact cost, as described above, and (2) the basis cost, which is based on the net unsettled positions' gross market value.[15] The calculation of market impact cost for net unsettled positions in Treasuries maturing in less than one year and TIPS does not include basis cost because basis risk is negligible for

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Documentation—FICC Market Liquidity Adjustment Model and Bid-ask Charge Model) to include a description of a term used in a calculation and to remove an unnecessary chart. These clarifications and corrections do not substantively change proposed rule change. FICC has requested confidential treatment of Exhibit 3b, pursuant to 17 CFR 240.24b-2.

[6] *See* GSD Rule 22A (Procedures for When the Corporation Ceases to Act) and MBSD Rule 17 (Procedures for When the Corporation Ceases to Act), *supra* note 3.

[7] FICC's margin methodology assumes that a defaulted member's portfolio would take three days to liquidate in normal market conditions.

[8] *See* GSD Rule 1 (definition of ''Margin Liquidity Adjustment Charge''), *supra* note 3. Additional details regarding the calculation of the MLA Charge are set forth in the DTCC Model Development Documentation—FICC Market Liquidity Adjustment Model and Bid-ask Charge Model (''Model Development Documentation''). FICC would revise the Model Development Document to incorporate the changes in the Proposed Rule Change and included copies of changes to the Model Development Document in Exhibit 3b to the Proposed Rule Change. Pursuant to 17 CFR 240.24b-2, FICC requested confidential treatment of Exhibit 3b.

[9] *See* MBSD Rule 1 (definition of ''Margin Liquidity Adjustment Charge''), *supra* note 3.

[10] FICC determines average daily trading volume by reviewing data that is made publicly available by the Securities Industry and Financial Markets Association (''SIFMA''), *at https://www.sifma.org/resources/archive/research/statistics. See* Notice of Filing, *supra* note 4, at 58006.

[11] *See id.*

[12] *See supra* notes 8 and 9.

[13] *See id.*

[14] The net directional market value of an asset group within a portfolio equals the absolute difference between the market value of the long net unsettled positions in that asset group, and the market value of the short net unsettled positions in that asset group. For example, if the market value of the long net unsettled positions is $100,000, and the market value of the short net unsettled positions is $150,000, the net directional market value of the asset group is $50,000. *See id.*

[15] To determine the gross market value of the net unsettled positions in each asset group, FICC sums the absolute value of each CUISP in the asset group. *See id.*

these types of positions.[16] For all asset groups, when determining the market impact cost at GSD and MBSD, the net directional market value and the gross market value of the net unsettled positions are divided by the average daily volumes of the securities in that asset group over a lookback period.[17]

Next, FICC compares the calculated market impact cost to a portion of the Value at Risk (''VaR'') Charge (''VaR Charge'') that is allocated to the net unsettled positions in those asset groups.[18] If the ratio of the calculated market impact cost to a portion of the VaR Charge is greater than a prescribed threshold,[19] FICC applies an MLA Charge to that asset group.[20] If the ratio of these two amounts is equal to or less than the threshold, FICC does not apply an MLA Charge to that asset group.[21] In addition, FICC may apply a downward adjusting scaling factor in the calculation of the MLA Charge based on the ratio of the calculated market impact cost to the 1-day VaR Charge.[22]

For each member portfolio, FICC adds together the MLA Charges (if any) for each asset group to determine the total MLA Charge for the member portfolio.[23] FICC calculates the final MLA Charge daily, and if applicable, includes the MLA Charge as a margin component.[24]

[16] *See id.*

[17] *See supra* note 10.

[18] The VaR Charge is a margin component designed to mitigate the risk that market volatility could cause the price of securities in a member's portfolio to change between trade execution and settlement. *See* GSD Rule 1 (definition of ''VaR Charge''); MBSD Rule 1 (definition of ''VaR Charge''), *supra* note 3. The VaR Charge is typically the largest component of a member's margin requirement. For purposes of calculating the MLA Charge, FICC uses a portion of the VaR Charge that is based on a one-day assumed period of risk and calculated by applying a simple square-root of time scaling, referred to herein as the ''1-day VaR Charge.'' *See* Notice of Filing, *supra* note 4, at 58006.

[19] The threshold is based on an estimate of the market impact cost that is incorporated into the calculation of the 1-day VaR Charge, such that FICC only applies an MLA Charge when the calculated market impact cost exceeds this prescribed threshold. FICC reviews its method for calculating the thresholds from time to time. Any changes that FICC deems appropriate would be subject to FICC's model risk management governance procedures set forth in the Clearing Agency Model Risk Management Framework (''Model Risk Management Framework''). *See* Securities Exchange Act Release Nos. 81485 (Aug. 25, 2017), 82 FR 41433 (Aug. 31, 2017) (SR–FICC–2017–014); 84458 (Oct. 19, 2018), 83 FR 53925 (Oct. 25, 2018) (SR–FICC–2018–010); 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (SR–FICC–2020–004); 92380 (July 13, 2021), 86 FR 38140 (July 19, 2021) (SR–FICC–2021–006); 94271 (Feb. 17, 2022), 87 FR 10411 (Feb. 24, 2022) (SR–FICC–2022–001); and 97890 (July 13, 2023), 88 FR 46287 (July 19, 2023) (SR–FICC–2023–008).

[20] Notice of Filing, *supra* note 4, at 58006.

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

B. Current MLA Charge and MLA Excess Amount for Sponsored Members

A Sponsoring Member is permitted to submit to FICC, for comparison, novation, and netting, certain eligible securities transactions of its Sponsored Members.[25] A Sponsored Member may be sponsored by a single Sponsoring Member or by multiple Sponsoring Members. FICC requires each Sponsoring Member to establish an omnibus account at FICC (separate from its regular netting account) for Sponsored Member trading activity.[26] Sponsored Members are generally required to meet the definition of a qualified institutional buyer (''QIB''), as defined in Rule 144A [27] under the Securities Act of 1933.[28]

For operational and administrative purposes, FICC interacts solely with the Sponsoring Member as agent for purposes of the day-to-day satisfaction of its Sponsored Members' obligations to and from FICC, including their securities and funds-only settlement obligations.[29] Sponsoring Members are also responsible for providing FICC with a Sponsoring Member Guaranty, whereby the Sponsoring Member guarantees to FICC the payment and performance by its Sponsored Members of their obligations under the GSD Rules.[30] Although Sponsored Members are principally liable to FICC for their own settlement obligations under the GSD Rules, the Sponsoring Member Guaranty requires the Sponsoring Member to satisfy those settlement obligations on behalf of a Sponsored Member if the Sponsored Member defaults and fails to perform its settlement obligations.[31]

FICC's calculation of the MLA Charge for a Sponsored Member that clears through a single account sponsored by a single Sponsoring Member is the same as described above in Section II.A.[32] However, for a Sponsored Member that clears through multiple accounts sponsored by multiple Sponsoring Members, in addition to calculating an MLA Charge for each account as described above, FICC also calculates an MLA Charge for the combined net unsettled positions of the Sponsored Member across all of its Sponsoring Members (referred to herein as the ''consolidated portfolio'').[33]

Currently, if the MLA Charge of the consolidated portfolio is greater than the sum of all MLA Charges for each account of the Sponsored Member, FICC charges the difference (referred to herein and currently defined in the Rules as the ''MLA Excess Amount'') in addition to the applicable MLA Charge.[34] If the MLA Charge of the consolidated portfolio is not greater than the sum of all MLA Charges for each account of the Sponsored Member, FICC does not charge the MLA Excess Amount.[35] Instead, FICC charges the applicable MLA Charge for each of the Sponsored Member's accounts.[36]

The MLA Excess Amount is designed to capture the additional market impact cost that could be incurred when a Sponsored Member defaults, and each of its Sponsoring Members, in its capacity as the Sponsored Member's guarantor, liquidates net unsettled positions associated with that defaulted Sponsored Member.[37] If large net unsettled positions in the same asset group are being liquidated by multiple Sponsoring Members, the market impact cost to liquidate those positions could increase as Sponsoring Members compete for market liquidity in the same asset group at the same time.[38] The MLA Excess Amount addresses this additional market impact cost by capturing any difference between the calculations of the MLA Charge for each of the Sponsored Member's accounts on both a stand-alone basis and for the consolidated portfolio.[39] The MLA Excess Amount for a Sponsored Member is allocated pro rata across each of its Sponsoring Members using a market volatility risk-weighted allocation methodology.[40]

III. Description of the Proposed Rule Change

A. Amend MLA Charge Calculation and Eliminate MLA Excess Amount

FICC proposes to amend the MLA Charge calculation for Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members to better align the amount of the MLA Charge with the market impact cost arising from position concentration of the Sponsored Member's respective Sponsored Member

[25] Securities Exchange Act Release No. 51896 (June 21, 2005), 70 FR 36981 (June 27, 2005) (SR–FICC–2004–22). *See* GSD Rule 3A, *supra* note 3.

[26] *See* GSD Rule 3A, Section 8, *supra* note 3.

[27] 17 CFR 230.144A.

[28] 15 U.S.C. 77a *et seq.*

[29] *See* GSD Rule 3A, Section 8, *supra* note 3.

[30] *See* GSD Rule 1 (definition of ''Sponsoring Member Guaranty'') and GSD Rule 3A, Section 2(c), *supra* note 3.

[31] *Id.*

[32] Notice of Filing, *supra* note 4, at 58006.

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] Notice of Filing, *supra* note 4, at 58006–07.

accounts. Specifically, the revised calculation would apportion a higher MLA Charge to those Sponsored Member accounts with higher relative market impact costs (and lower relative VaR Charges) than the current calculation.

FICC's proposal to amend the MLA Charge calculation for Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members is designed to mitigate the risk of incurring additional market impact costs when a Sponsored Member defaults and each of its Sponsoring Members (each, as the Sponsored Member's guarantor) liquidate the defaulted Sponsored Member's large net unsettled positions in the same asset group.[41] In light of this change to the MLA Charge calculation, FICC also proposes to simplify its margin methodology by eliminating the MLA Excess Amount from the GSD Rules because the amended MLA Charge calculation would address the additional market impact cost that the MLA Excess Amount was originally designed to address.[42] Specifically, for such Sponsored Members, FICC proposes to calculate an MLA Charge both (1) for each asset group/subgroup in the account on a stand-alone basis, as described above in Section II.C, and (2) for each asset group/subgroup in the account as part of a consolidated portfolio, as described below, with the greater amount applied as the MLA Charge for the relevant asset group/subgroup.

When calculating the MLA Charge for each asset group/subgroup in the account as part of a consolidated portfolio, FICC would first calculate the market impact cost for each asset group/subgroup based on the aggregate net unsettled positions of that asset group/subgroup in the consolidated portfolio. FICC would allocate the market impact cost for each asset group/subgroup to each asset group/subgroup in each account of the Sponsored Member on a pro rata basis based on the market impact cost of that asset group/subgroup in the account.

Next, FICC would compare the allocated market impact cost for an asset group/subgroup to a portion of the VaR Charge that is allocated to that asset group/subgroup in the account. If the ratio of the allocated market impact cost to a portion of the VaR Charge is greater than a prescribed threshold, FICC would apply an MLA Charge for that asset group/subgroup. If the ratio of the two amounts is equal to or less than this threshold, FICC would not apply an MLA Charge for that asset group/subgroup.[43]

When applicable, FICC would calculate the MLA Charge for each asset group/subgroup in the account as part of the consolidated portfolio as a proportion of the product of (1) the amount by which the ratio of the allocated market impact cost for the asset group/subgroup to the portion of the VaR Charge allocated to that asset group/subgroup exceeds the prescribed threshold,[44] and (2) a portion of the VaR Charge allocated to that asset group/subgroup.

FICC would then compare the MLA Charge for each asset group/subgroup in the account on a stand-alone basis against the MLA Charge for each asset group/subgroup in the account as part of a consolidated portfolio. FICC would apply the greater of these two amounts as the MLA Charge for the asset group. FICC would add the applicable MLA Charges for each asset group/subgroup together to calculate the total MLA Charge for that Sponsored Member account.

FICC believes that the proposed revisions to the MLA Charge calculation for Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members would better allocate MLA Charges to those Sponsored Member accounts than the current calculation, so that the MLA Charge would increase for accounts with higher relative market impact costs.[45] FICC also believes that the proposed revisions to the MLA Charge calculation would address the market impact costs that the MLA Excess Amount was originally designed to address, thereby enabling FICC to eliminate the MLA Excess Amount from the GSD Rules.[46]

B. Revise Description of Asset Groups and/or Subgroups

As described above in Section II.A, FICC categorizes securities into asset groups/subgroups that share similar risk profiles for the purpose of calculating the MLA Charge. The current GSD Rules contain a list of the asset groups/subgroups.[47] The current MBSD Rules contain a statement that there is one mortgage-backed securities asset group.[48] FICC states that it may need to set and adjust the asset groupings from time to time in response to changes in market conditions that cause the risk profiles of portfolio positions to shift.[49] However, since the groups/subgroups are currently codified in the GSD Rules and MBSD Rules, FICC notes that any changes to the groupings would require the filing of a proposed rule change with the Commission, which FICC believes does not necessarily provide FICC with the flexibility to make timely changes in response to market conditions.[50] Therefore, FICC proposes to retain the asset groups in the GSD Rules, but remove the asset subgroups (*i.e.,* the specific maturities) from the GSD Rules.[51] FICC proposes to revise the GSD Rules and the MBSD Rules to provide that FICC would publish the asset groups and subgroups on FICC's website, and that FICC will provide at least 5 business days' advance notice of any changes to the schedule via Important Notice.

Additionally, to better reflect the different risk profiles of the mortgage pools/mortgage-backed securities asset groups, FICC proposes to add language in the GSD Rules and MBSD Rules to indicate that mortgage pools/mortgage-backed securities asset groups may be further categorized into subgroups by mortgage pool types. FICC also proposes to revise the MBSD Rules to provide that for the purpose of calculating the MLA Charge at MBSD, a member's net unsettled positions in TBA transactions, Specified Pool Trades, and Stipulated Trades shall be included in one mortgage-backed securities asset group, which may be further categorized into subgroups by mortgage pool types.

C. Clarifying and Technical Changes

FICC proposes to modify certain language in the GSD Rules and MBSD Rules to clarify certain aspects of the MLA Charge, without making substantive changes to the methodology. Specifically, FICC proposes to clarify that for the purpose of determining the MLA Charge amount, FICC first calculates the MLA Charge for each asset group/subgroup, and then FICC

[41] *See* Notice of Filing, *supra* note 4, at 58007.

[42] *See id.*

[43] As described in further detail in Model Development Documentation submitted in the Proposed Rule Change, FICC determines the threshold by an optimization process based on the ratio of an estimate of the market impact cost to the 1-day VaR Charge. *See supra* note 8; *see* Notice of Filing, *supra* note 4, at 58007.

[44] The proposed methodology would calculate the MLA Charge for the consolidated portfolio by applying the threshold to *asset groups/subgroups,* as opposed to the current methodology, which calculates the MLA Charge for the consolidated portfolio by applying the threshold to the *entire portfolio. See supra* note 8.

[45] *See* Notice of Filing, *supra* note 4, at 58007.

[46] *See id.*

[47] *See* GSD Rule 1 (definition of ''Margin Liquidity Adjustment Charge''), *supra* note 3.

[48] *See* MBSD Rule 1 (definition of ''Margin Liquidity Adjustment Charge''), *supra* note 3.

[49] *See* Notice of Filing, *supra* note 4, at 58008.

[50] *See id.*

[51] The revised GSD Rule would contain provisions indicating that the asset groupings may be further categorized into subgroups. *See id.*

adds the MLA Charges together to result in one MLA Charge for each member portfolio. FICC also proposes to clarify that FICC calculates the market impact cost for the combined net unsettled positions in each asset group/subgroup; not for each net unsettled position. Similarly, FICC proposes to clarify that the associated VaR Charge allocation is also performed for each asset group/subgroup; not for each net unsettled position.

Finally, FICC proposes to make several technical changes to the GSD Rules that reflect the correct usage of terms. Specifically, in GSD Rule 1, FICC proposes to replace the term ''mortgage pools transactions'' with ''mortgage pools,'' and the term ''MLA charge'' with ''MLA Charge.''

IV. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act [52] 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. After carefully considering the Proposed Rule Change, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FICC. In particular, the Commission finds that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) [53] of the Act and Rules 17Ad-22(e)(4)(i), (e)(6)(i), and (e)(19) thereunder.[54]

A. Consistency With Section 17A(b)(3)(F) of the Act

1. Prompt and Accurate Clearance and Settlement

Section 17A(b)(3)(F) of the Act [55] requires that the rules of a clearing agency, such as FICC, be designed to, among other things, promote the prompt and accurate clearance and settlement of securities transactions and assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[56] The Commission believes that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act for the reasons stated below.

As described above in Section III.A, FICC proposes to amend the MLA Charge calculation at GSD for Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members. Specifically, the amended calculation would apportion a higher MLA Charge to those Sponsored Member accounts with higher relative market impact costs than the current calculation. As a result, the proposal would better align the MLA Charge with the risk arising from position concentration in such Sponsored Member portfolios. The Commission believes that a closer alignment between the MLA Charge and the risks presented by the concentration of securities in Sponsored Member portfolios would help facilitate FICC's ability to set margins that more accurately reflect the risks posed by such portfolios. Setting margins that accurately reflect the risks posed by its members' portfolios could reduce the likelihood that FICC would not have collected sufficient margin to address losses arising out of a member default. Reducing the likelihood that FICC holds insufficient margin to address default losses would, in turn, further assure that FICC's operation of its critical clearance and settlement services would not be disrupted because of insufficient financial resources.

As part of the Proposed Rule Change, FICC filed Exhibit 3a—Summary of Impact Study (''Impact Study''), which provided the actual MLA Charges at the member-level, account-level, and CCP-level, from October 19, 2020 through October 31, 2022, as compared to the MLA Charges that FICC would have assessed if the proposed enhancement had been in place during that time period.[57] The Commission reviewed and analyzed the Impact Study, which showed, among other things, that had the proposed enhancement been in place for Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members, it would have resulted in an average daily increase of $9.47 million in the aggregate MLA Charge for the impacted Sponsored Members. Therefore, the Impact Study demonstrates that the proposed MLA Charge calculation would enable FICC to set higher margin coverage levels than those using the current calculation, providing further assurance that FICC's operation of its critical clearance and settlement services would not be disrupted because of insufficient financial resources.

Additionally, as described above in Section III.A, the proposed enhancement to the MLA Charge calculation would enable FICC to simplify its margin methodology by eliminating the MLA Excess Amount from the GSD Rules because the enhanced MLA Charge calculation would address the additional market impact cost that the MLA Excess Amount was originally designed to address. Thus, the proposed enhancement to the MLA Charge calculation and removal of the MLA Excess Amount from the GSD Rules would render FICC's margin methodology more accurate, robust, and streamlined, further assuring its effectiveness.

As described above in Section III.B, FICC proposes to (1) remove the enumerated asset subgroups from the GSD Rules, (2) change both the GSD Rules and MBSD Rules to indicate that FICC may further categorize asset groups into subgroups, and (3) change both the GSD Rules and MBSD Rules to indicate that a member's net unsettled positions in TBA transactions, Specified Pool Trades, and Stipulated Trades shall be included in one mortgage-backed securities asset group, which may be further categorized into subgroups by mortgage pool types. FICC states that the purpose of these changes is to facilitate FICC's ability to timely set and adjust the asset groupings from time to time in response to changes in market conditions that cause a shift in the risk profiles of portfolio positions. FICC would publish the asset groups and subgroups on FICC's website, and that FICC will provide at least 5 business days' advance notice of any changes to the schedule via Important Notice.

FICC's ability to promptly respond to changing risk profiles of the securities in its members' portfolios would better enable FICC to set margins that more accurately reflect the risks posed by such portfolios. Setting margins that accurately reflect the risks posed by its members' portfolios could reduce the likelihood that FICC would not have collected sufficient margin to address losses arising out of a member default. Reducing the likelihood that FICC holds insufficient margin to address default losses would, in turn, further assure that FICC's operation of its critical clearance and settlement services would not be disrupted because of insufficient financial resources.

As described above in Section III.C, FICC proposes to make several technical changes to the GSD Rules that reflect the correct usage of terms. Enhancing the clarity of the GSD Rules would enable members to more efficiently and effectively understand and conduct their business in accordance with the GSD Rules. When members conduct

[52] 15 U.S.C. 78s(b)(2)(C).

[53] 15 U.S.C. 78q–1(b)(3)(F).

[54] 17 CFR 240.17Ad–22(e)(4)(i), (e)(6)(i), and (e)(19).

[55] 15 U.S.C. 78q–1(b)(3)(F).

[56] *Id.*

[57] FICC has requested confidential treatment of Exhibit 3a, pursuant to 17 CFR 240.24b-2.

their business in accordance with the GSD Rules, FICC is able to focus more of its resources on providing its clearance and settlement services.

Accordingly, for the reasons above, the Commission finds that the Proposed Rule Change should help FICC to continue providing prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[58]

2. Safeguarding Securities and Funds

As described above in Section II, FICC would access the mutualized Clearing Fund should a defaulted member's own margin be insufficient to satisfy losses to FICC caused by the liquidation of that member's portfolio. As discussed above in Section IV.A.1, FICC's proposals to enhance the MLA Charge calculation and eliminate the MLA Excess Amount should help ensure that FICC collects sufficient margin from its members. Similarly, FICC's proposals to remove the asset subgroups from the GSD Rules and otherwise streamline the GSD Rules and MBSD Rules with respect to the asset groups/subgroups, should help facilitate FICC's ability to promptly respond to changing risk profiles of its members' portfolios, and thereby set margins that more accurately reflect the risks posed by such portfolios. Accordingly, the Proposed Rule Change should help minimize the likelihood that FICC would have to access the Clearing Fund, thereby limiting non-defaulting members' exposure to mutualized losses.

The Commission believes that by helping to limit the exposure of FICC's non-defaulting members to mutualized losses, the Proposed Rule Change would help FICC assure the safeguarding of securities and funds which are in its custody or control, consistent with Section 17A(b)(3)(F) of the Act.[59]

B. Consistency With Rule 17Ad–22(e)(4)(i) Under the Act

Rule 17Ad–22(e)(4)(i) under the Act requires that each covered clearing agency that provides central counterparty services, such as FICC, establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[60] The Commission believes that the proposal is consistent with Rule 17Ad–22(e)(4)(i) under the Act for the reasons stated below.

As discussed above in Section IV.A, FICC's proposed enhancement to the MLA Charge calculation and removal of the MLA Excess Amount from the GSD Rules would render FICC's margin methodology more accurate than the current methodology by apportioning a higher MLA Charge to those Sponsored Member accounts with higher relative market impact costs. As a result, the proposal would better align the MLA Charge with the risk arising from position concentration in such Sponsored Member portfolios. The Commission has reviewed and analyzed the filing materials, including the Impact Study,[61] and agrees that the proposed enhancement to the MLA Charge calculation and removal of the MLA Excess Amount from the GSD Rules would enable FICC to set margins that more accurately reflect the risks posed by such portfolios than the current methodology. As a result, implementing the Proposed Rule Change would better enable FICC to collect sufficient margin in connection with Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members.

Accordingly, the Commission finds the Proposed Rule Change is consistent with Rule 17Ad–22(e)(4)(i) under the Act because it is designed to assist FICC in managing its credit exposures to its members by maintaining sufficient financial resources to cover its credit exposure to the portfolios of Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members.[62]

C. Consistency With Rule 17Ad–22(e)(6)(i) Under the Act

Rule 17Ad–22(e)(6)(i) under the Act requires that each covered clearing agency that provides central counterparty services, such as FICC, establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[63] The Commission believes that the proposal is consistent with Rule 17Ad–22(e)(6)(i) under the Act for the reasons stated below.

As discussed above in Section IV.A, FICC's proposed enhancement to the MLA Charge calculation and removal of the MLA Excess Amount from the GSD Rules would render FICC's margin methodology more accurate than the current methodology by apportioning a higher MLA Charge to those Sponsored Member accounts with higher relative market impact costs. As a result, the proposal would better align the MLA Charge with the risk arising from position concentration in such Sponsored Member portfolios. The Commission has reviewed and analyzed the filing materials, including the Impact Study,[64] and agrees that the proposed enhancement to the MLA Charge calculation and removal of the MLA Excess Amount from the GSD Rules would enable FICC to set margins that more accurately reflect the risks posed by such portfolios than the current methodology. As a result, implementing the Proposed Rule Change would better enable FICC to set margin amounts at levels commensurate with the risks associated with the portfolios of Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members.

Accordingly, the Commission finds the Proposed Rule Change is consistent with Rule 17Ad–22(e)(6)(i) under the Act because it is designed to assist FICC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of its Sponsored Member portfolios.[65]

D. Consistency With Rule 17Ad–22(e)(19) Under the Act

Rule 17Ad–22(e)(19) under the Act requires that each covered clearing agency that provides central counterparty services, such as FICC, establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage the material risks to the covered clearing agency arising from arrangements in which firms that are indirect participants in the covered clearing agency rely on the services provided by direct participants to access the covered clearing agency's payment, clearing, or settlement facilities.[66] The Commission believes that the proposal is consistent with Rule 17Ad–22(e)(19)

[58] 15 U.S.C. 78q–1(b)(3)(F).

[59] *Id.*

[60] 17 CFR 240.17Ad–22(e)(4)(i).

[61] *See supra* note 57.

[62] 17 CFR 240.17Ad–22(e)(4)(i).

[63] 17 CFR 240.17Ad–22(e)(6)(i).

[64] *See supra* note 57.

[65] 17 CFR 240.17Ad–22(e)(6)(i).

[66] 17 CFR 240.17Ad–22(e)(19).

under the Act for the reasons stated below.

As discussed above in Section II.B, FICC's Sponsored Service allows eligible members to sponsor their clients into a limited form of FICC membership such that a Sponsoring Member is permitted to submit to FICC, for comparison, novation, and netting, certain eligible securities transactions of its Sponsored Members. Sponsored Members are indirect FICC participants that rely on the services provided by direct FICC participants (*i.e.,* Sponsoring Members) to access FICC's clearance and settlement facilities.[67] Therefore, Rule17Ad–22(e)(19) requires FICC to identify, monitor, and manage the material risks arising from the Sponsored Service.[68]

FICC's proposals to amend the MLA Charge calculation and eliminate the MLA Excess Amount are designed to address the risks arising from Sponsored Members that clear through multiple accounts sponsored by multiple Sponsoring Members. As described above in Section II.B, for such Sponsored Members, FICC currently calculates an MLA Charge for each Sponsored Member account on both a stand-alone and consolidated portfolio basis, ultimately applying whichever MLA Charge calculation is greater to the Sponsored Member's margin. FICC has identified an opportunity to amend the MLA Charge calculation for such Sponsored Members to better align the amount of the MLA Charge with the market impact cost arising from position concentration in the Sponsored Member's respective Sponsored Member accounts. Specifically, the revised calculation would apportion a higher MLA Charge to those Sponsored Member accounts with higher relative market impact costs than the current calculation. The proposed change would also enable FICC to simplify its margin methodology by eliminating the MLA Excess Amount from the GSD Rules because the enhancement would address the additional market impact cost that the MLA Excess Amount was originally designed to address. As discussed above in Section IV.A, the Commission believes that implementation of these proposals would help facilitate FICC's ability to set margins that more accurately and efficiently reflect the risks posed by the portfolios of Sponsored Members that clear through multiple Sponsoring Members.

Accordingly, the Commission believes that by improving FICC's margin methodology with respect to FICC's Sponsored Members, the Proposed Rule Change would help FICC better manage the material risks arising from the Sponsored Service, consistent with Rule 17Ad–22(e)(19).[69]

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

Send an email to *rule-comments@sec.gov.* Please include File Number SR–FICC–2023–012 on the subject line.

Paper Comments

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR–FICC–2023–012. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of FICC and FICC's website at *https://www.dtcc.com/legal.*

Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–FICC–2023–012 and should be submitted on or before October 24, 2023.

VI. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause, pursuant to Section 19(b)(2)(C)(iii) of the Act,[70] to approve the Proposed Rule Change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of Amendment No. 1 in the **Federal Register**. As noted above, in Amendment No. 1, FICC updated the Exhibit 3b[71] to the Proposed Rule Change to add a missing description of a term used in a calculation and to remove an unnecessary chart. Amendment No. 1 neither modifies the Proposed Rule Change as originally published in any substantive manner, nor does Amendment No. 1 affect any rights or obligations of FICC or its members. Instead, Amendment No. 1 makes technical changes to clarify Exhibit 3b. Additionally, since FICC filed Amendment No. 1 on August 22, 2023, the Commission has had sufficient time to review and consider Amendment No. 1 as part of its analysis of the Proposed Rule Change. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2)(C)(iii) of the Act,[72] to approve the Proposed Rule Change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of Amendment No. 1 in the **Federal Register**.

VII. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change, as modified by Amendment No. 1, is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[73] and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[74] that proposed rule change SR–FICC–2023–012, be, and hereby is, *approved*.[75]

[67] *See id.*

[68] *See id.*

[69] 17 CFR 240.17Ad–22(e)(19).

[70] 15 U.S.C. 78s(b)(2)(C)(iii).

[71] *See supra* note 8.

[72] *Id.*

[73] 15 U.S.C. 78q–1.

[74] 15 U.S.C. 78s(b)(2).

[75] In approving the Proposed Rule Change, the Commission considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[76]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21783 Filed 10–2–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98561; File No. SR–Phlx–2023–44]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Pricing Schedule at Options 7, Section 4 Regarding Marketing Fees

September 27, 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 13, 2023, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to a proposal to amend its Pricing Schedule at Options 7, Section 4.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed 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 Exchange's Pricing Schedule at Options 7, Section 4 to specify the application of its marketing fees. Today, the Exchange delineates pricing for multiply-listed options in Options 7, Section 4, including marketing fees (''Marketing Fees''). The Marketing Fees for multiply-listed options are assessed on Lead Market Makers,[3] Market Makers,[4] and Directed Market Makers[5] for trades resulting from either Directed or non-Directed Customer Orders[6] that are delivered electronically and executed on the Exchange, with certain specified exceptions, including the exclusion of transactions in broad-based index options symbols listed in Options 7, Section 5.A.

The Exchange now proposes to amend the rule to specify that no Marketing Fees will be assessed on transactions in options symbols subject to Options 7, Section 5 pricing[7] to make clear that the exclusion also applies to all singly listed options subject to pricing in Options 7, Section 5.C and Options 7, Section 5.D (in addition to broad-based index options symbols in Options 7, Section 5.A, as currently specified). The Exchange notes that this is not a change to current practice; rather, the proposed changes are intended to memorialize how the Exchange currently assesses Marketing Fees. Today, the Exchange already indicates in the header of Options 7, Section 4 that the pricing set forth in Section 4 (including Marketing Fees) applies only to multiply listed options excluding SPY and the broad-based index options in Options 7, Section 5.A. Section 4 specifically excludes the broad-based index options in Options 7, Section 5.A because some of the symbols (like NDX) are multiply listed. Furthermore, Options 7, Section 5 specifically indicates that the pricing set forth in this Section 5 applies to index options and singly listed options. By implication, options that are singly listed on Phlx, and that are subject to Options 7, Section 5.C and Section 5.D pricing are excluded from Options 7, Section 4 pricing like the Marketing Fees. However, the Exchange believes that further clarity will be helpful by explicitly stating this exclusion in the Marketing Fees portion of Section 4 to avoid potential confusion by market participants and investors.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed changes in Options 7, Section 4 to specify that no Marketing Fees will be assessed on transactions in options symbols subject to Options 7, Section 5 pricing are reasonable because the changes will make clear that the exclusion also applies to all singly listed options subject to pricing in Options 7, Section 5.C and Options 7, Section 5.D (in addition to broad-based index options symbols in Options 7, Section 5.A, as currently specified). As discussed above, the proposed changes will not amend current practice; rather, the proposed changes are intended to memorialize how the Exchange currently assesses Marketing Fees. While the Exchange already indicates which sections of its Pricing Schedule apply to which options in the manner discussed above, the Exchange believes that further clarity will be helpful by explicitly stating in the Marketing Fees pricing program itself that all symbols subject to Options 7, Section 5 pricing

[3] The term ''Lead Market Maker'' applies to transactions for the account of a Lead Market Maker (as defined in Options 2, Section 12(a)). A Lead Market Maker is an Exchange member who is registered as an options Lead Market Maker pursuant to Options 2, Section 12(a). An options Lead Market Maker includes a Remote Lead Market Maker which is defined as an options Lead Market Maker in one or more classes that does not have a physical presence on an Exchange floor and is approved by the Exchange pursuant to Options 2, Section 11.

[4] The term ''Market Maker'' is defined in Options 1, Section 1(b)(28) as a member of the Exchange who is registered as an options Market Maker pursuant to Options 2, Section 12(a). A Market Maker includes SQTs and RSQTs as well as Floor Market Makers.

[5] The term ''Directed Market Maker'' means a Market Maker that receives a Directed Order in accordance with Options 2, Section 10.

[6] The term ''Directed Order'' means any order to buy or sell which has been directed to a particular Lead Market Maker, RSQT, or SQT by an Order Flow Provider, as defined in Options 2, Section 10. To qualify as a Directed Order, an order must be delivered to the Exchange via the System.

[7] Options 7, Section 5 sets forth pricing for index and singly listed options (includes options overlying FX Options, equities, ETFs, ETNs, and indexes not listed on another exchange).

[76] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

will be excluded from the Marketing Fees in order to avoid potential confusion by market participants and investors. The Exchange also believes that it is reasonable to exclude singly listed options in Options 7, Section 5 from the Marketing Fees because the purpose of this program is to generate more Customer order flow to the Exchange. Because singly listed options are exclusively listed products on Phlx, the Exchange does not believe that applying Marketing Fees is necessary for these products.

Lastly, the Exchange believes that its proposal to memorialize that all options symbols subject to Options 7, Section 5 pricing are excluded from the Marketing Fees program set forth in Options 7, Section 4 is equitable and not unfairly discriminatory because the program will uniformly exclude all market participant orders in these symbols. As noted above, the Exchange's proposal does not alter its existing Marketing Fees program, but instead memorializes current practice.

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 does not believe that its proposal would impose an undue burden on intra-market competition. The proposed changes will memorialize current practice that no Marketing Fees will be assessed on transactions in options symbols subject to Options 7, Section 5 pricing, which will continue to apply uniformly to all market participant orders in such symbols.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–Phlx–2023–44 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–Phlx–2023–44. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–Phlx–2023–44 and should be submitted on or before October 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Sherry R. Haywood,

Assistant Secretary.

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[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98565; File No. SR-CboeBZX–2023–070]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the ARK 21Shares Ethereum ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

September 27, 2023.

On September 6, 2023, Cboe BZX Exchange, Inc. (''BZX'' or ''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 to list and trade shares of the ARK 21Shares Ethereum ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on September 27, 2023.[3] The Commission has received no comments on the proposal.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 98467 (Sept. 21, 2023), 88 FR 66515.

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 November 11, 2023. The Commission is extending this 45-day time period.

The Commission finds it 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 and the issues raised therein. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates December 26, 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-CboeBZX–2023–070).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21790 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98564; File No. SR–NYSEARCA–2023–58)]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of a Proposed Rule Change Regarding the Hashdex Bitcoin Futures ETF

September 27, 2023.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on September 22, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the Hashdex Bitcoin Futures ETF under NYSE Arca Rule 8.500–E (''Trust Units''). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares of the Hashdex Bitcoin Futures ETF (the ''Fund'') under NYSE Arca Rule 8.500–E. The Commission previously approved the listing and trading of the Shares pursuant to NYSE Arca Rule 8.200–E, Commentary .02 as shares of the Teucrium Bitcoin Futures Fund.[4] The Fund's name was subsequently changed to the Hashdex Bitcoin Futures ETF pursuant to an April 18, 2022 amendment to the Fund's registration statement.[5] In addition to the proposed changes to the Fund's investment objective and strategy, as further discussed below, the Exchange proposes to update the name of the Fund to the Hashdex Bitcoin ETF to reflect the same. This new name for the Fund is reflected in the Form S–1 filed by the Tidal Commodities Trust I (the ''Trust'') on July 21, 2023.[6]

The Fund is a series of the Trust, a Delaware statutory trust.[7] The Fund is managed and controlled by Toroso Investments LLC (the ''Sponsor'').[8] The

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 34–94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (SR–NYSEArca–2021–53) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts)) (the ''Approval Order''). The representations herein supersede and replace the representations in the Exchange's prior rule filing relating to the Teucrium Bitcoin Futures Fund and Partial Amendment No. 2 thereto. *See* Securities Exchange Act Release No. 92573 (August 5, 2021), 86 FR 44062 (August 11, 2021) (SR–NYSEArca–2021–53) (Notice of Filing of a Proposed Rule Change To List and Trade Shares of Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200–E) and Partial Amendment No. 2, available at: *https://www.sec.gov/comments/sr-nysearca-2021-53/srnysearca202153-20118884-271701.pdf.*

[5] On April 18, 2022, Teucrium Commodity Trust filed with the Commission Pre-Effective Amendment No. 2 to the registration statement on Form S–1 under the Securities Act of 1933 (the ''Securities Act'') (File No. 333–256339) changing the name of the Fund from Teucrium Bitcoin Futures Fund to Hashdex Bitcoin Futures ETF.

[6] On July 21, 2023, the Trust filed with the Commission a registration statement on Form S–1 under the Securities Act (15 U.S.C. 77a) (File No. 333–____) (the ''July 21, 2023 Form S–1'') reflecting the Trust's assumption of management and control of Fund from Teucrium Commodity Trust. The Shares of the Fund were originally issued by the Teucrium Commodity Trust pursuant to a registration statement on Form S–1 filed with the Commission on May 20, 2021 (File No. 333–256339). The Exchange will submit a separate proposed rule change relating to the transfer of management and control of the Fund from Teucrium Commodity Trust to the Trust.

[7] On August 25, 2023, the Trust confidentially filed a draft registration statement under the Securities Act (the ''Registration Statement''). The Jumpstart Our Business Startups Act (the ''JOBS Act''), enacted on April 5, 2012, added Section 6(e) to the Securities Act. Section 6(e) of the Securities Act provides that an ''emerging growth company'' may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than $1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently submitted its Registration Statement to the Commission on a confidential basis. The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement.

[8] The July 21, 2023 Form S–1 also reflects that Toroso Investments LLC has assumed role of the Sponsor of the Trust from Teucrium Trading, LLC. The Sponsor is not registered as a broker-dealer or affiliated with a broker-dealer. In the event that (a) the Sponsor becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new sponsor or sub-adviser is registered as a broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or personnel of the broker-dealer affiliate, as applicable, regarding access to information concerning the composition of and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.

Sponsor is registered as a commodity pool operator (''CPO'') and a commodity trading adviser (''CTA'') with the Commodity Futures Trading Commission (''CFTC'') and is a member of the National Futures Association (''NFA'').

The Fund's Investment Objective and Strategy

According to the Registration Statement, the Chicago Mercantile Exchange, Inc. (''CME'') offers two Bitcoin futures contracts, one contract representing five (5) Bitcoins (''BTC Contract'') and another contract representing one-tenth of one (0.10) Bitcoin (''MBT Contract'').[9] Each BTC Contract and MBT Contract settles daily to the BTC Contract volume-weighted average price (''VWAP'') of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick. BTC Contracts and MBT Contracts each expire on the last Friday of the contract month, and the final settlement value for each contract is based on the CME CF Bitcoin Reference Rate (''CME CF BRR'').[10]

BTC Contracts and MBT Contracts each trade six consecutive monthly contracts plus two additional December contract months (if the 6 consecutive months include December, only one additional December contract month is listed). Because BTC Contracts and MBT Contracts are exchange-listed, they allow investors to gain exposure to Bitcoin without having to hold the underlying cryptocurrency. Like a futures contract on a commodity or stock index, BTC Contracts and MBT Contracts allow investors to hedge investment positions or speculate on the future price of Bitcoin.

According to the Registration Statement, the investment objective of the Fund is to have the daily changes in the net asset value (''NAV'') of the Fund's shares (''Shares'') reflect the daily changes in the price of a specified benchmark (the ''Benchmark''). The Benchmark will be calculated using the Nasdaq Bitcoin Reference Price—Settlement (the ''NQBTCS''),[11] which ultimately tracks the price of Bitcoin.[12] According to the Sponsor, the NQBTCS is designed to allow institutional investors to track the price of Bitcoin by applying a rigorous methodology to trade data captured from cryptocurrency exchanges that meet eligibility criteria of the Nasdaq Crypto Index (''NCI''). The NQBTCS is calculated once every trading day through the application of a publicly available rules-based pricing methodology to a diverse collection of pricing sources to provide an institutional-grade reference price for Bitcoin.[13] The pricing methodology is designed to account for variances in price across a wide range of sources, each of which has been vetted according to criteria identified in the methodology. Specifically, the settlement value is the Time Weighted Average Price (''TWAP'') calculated across VWAPs for each minute in the settlement price window, which is between 2:50:00 and 3:00:00 p.m. New York time. Where there are no transactions observed in any given minute of the settlement price window, that minute is excluded from the calculation of the TWAP.

According to the Sponsor, the NQBTCS methodology also utilizes penalty factors to mitigate the impact of anomalous trading activity such as manipulation, illiquidity, large block trading, or operational issues that could compromise price representation. Three types of penalties are applied: abnormal price penalties, abnormal volatility penalties, and abnormal volume penalties. These penalties are defined as adjustment factors on the weight of information from each exchange that contributes pricing information based on the deviation of an exchange's price, volatility, or volume from the median across all exchanges. For example, if a core exchange's price is 2.5 standard deviations away from the median price, its price penalty factor will be a 1/2.5 multiplier.

Finally, as a means of achieving the highest degrees of confidence in the reported volume, data is sourced only from ''core exchanges'' that are screened, selected, and approved by the Nasdaq Crypto Index Oversight Committee (the ''NCIOC''). Core exchanges must: (1) have strong forking controls; (2) have effective anti-money laundering (AML) controls; (3) have reliable and transparent application programming interface (API) that provides real-time and historical trading data; (4) charge fees for trading and structure trading incentives that do not interfere with the forces of supply and demand; (5) be licensed by a public independent governing body; (6) include surveillance for manipulative trading practices and erroneous transactions; (7) evidence a robust IT infrastructure; (8) demonstrate active capacity management; (9) evidence cooperation with regulators and law enforcement; and (10) have a minimum market representation for trading volume. Additionally, the NCIOC conducts further diligence to assess an exchange's eligibility and will consider additional criteria such as the exchange's organizational and ownership structure, security history, and reputation; the list of existing core exchanges will be recertified by the NCIOC at minimum on an annual basis.

The Sponsor believes that the NQBTCS is suitable for use in calculating the Benchmark because (i) it would provide reliable pricing for purposes of tracking the actual performance of spot Bitcoin, (ii) it is administered by an independent index administrator, and (iii) its methodology is specifically designed to mitigate potential manipulation coming from unregulated markets. Specifically, the Sponsor believes that (i) by tracking the actual price of spot Bitcoin, which would better represent the Fund's strategy, NQBTCS is a Benchmark that will be more transparent and adequate for the Fund's investors; (ii) using a Benchmark that has its own independent index administrator provides investors the best practices in governance and accountability and benchmark quality; and (iii) the pricing methodology underlying the NQBTCS is designed to be resistant to potential price manipulation by applying a robust methodology to trade data captured from NCI core exchanges, which have to meet strict criteria created by the NCIOC, thereby drawing on a diverse collection of trustworthy pricing sources to provide an institutional-grade reference price for Bitcoin that accounts for variances in price across a wide range of sources and that adjusts to mitigate the impact of anomalous trading activity that could compromise the integrity of the NQBTCS price.

According to the Registration Statement, the Fund seeks to maintain its holdings in Bitcoin Futures Contracts with a roughly constant expiration profile. Therefore, the Fund's positions will be changed or ''rolled'' on a regular basis in order to track the changing nature of the Benchmark by closing out first to expire contracts prior to

[9] BTC Contracts began trading on the CME Globex (''Globex'') trading platform on December 15, 2017, and are cash-settled in U.S. dollars. MBT Contracts began trading on the Globex trading platform on May 3, 2021, under the ticker symbol ''MBT'' and are also cash-settled in U.S. dollars.

[10] The CME CF BRR aggregates the trade flow of major Bitcoin spot platforms during a specific calculation window into a once-a-day reference rate of the U.S. dollar price of Bitcoin.

[11] *See https://indexes.nasdaqomx.com/Index/Overview/NQBTCS.*

[12] The Approval Order stated that the Benchmark would be calculated using the closing settlement prices of BTC Contracts listed on the CME. *See* Approval Order, 87 FR at 21676.

[13] *See https://indexes.nasdaqomx.com/docs/methodology_NCI.pdf.*

settlement that are no longer part of the Benchmark, and then entering into second to expire contracts. Accordingly, the Fund will never carry futures positions all the way to cash settlement—the Fund will price only off of the daily settlement prices of the Bitcoin Futures Contracts.[14] To achieve this, the Fund will roll its futures holdings prior to cash settlement of the expiring contract.

In seeking to achieve the Fund's investment objective, the Sponsor will employ a ''neutral'' investment strategy that is intended to track the changes in the Benchmark regardless of whether the Benchmark goes up or goes down. The Fund will endeavor to trade in Bitcoin Futures Contracts and spot Bitcoin so that the Fund's average daily tracking error against the Benchmark will be less than 10 percent over any period of 30 trading days. The Fund's ''neutral'' investment strategy is designed to permit investors generally to purchase and sell the Fund's Shares for the purpose of investing in the Bitcoin Futures Contracts and spot Bitcoin (as discussed below). Such investors may include participants in the Bitcoin market seeking to hedge the risk of losses in their Bitcoin-related transactions, as well as investors seeking price exposure to the Bitcoin market.

According to the Registration Statement, one factor determining the total return from investing in futures contracts is the price relationship between soon to expire contracts and later to expire contracts. If the futures market is in a state of backwardation (*i.e.,* when the price of BTC Contracts and MBT Contracts in the future is expected to be less than the current price), the Fund will buy later to expire contracts for a lower price than the sooner to expire contracts that it sells. Hypothetically, and assuming no changes to either prevailing BTC Contracts and MBT Contracts' prices or the price relationship between soon to expire contracts and later to expire contracts, the value of a contract will rise as it approaches expiration. Over time, if backwardation remained constant, the performance of a portfolio would continue to be affected. If the futures market is in contango, the Fund will buy later to expire contracts for a higher price than the sooner to expire contracts that it sells. Hypothetically, and assuming no other changes to either prevailing BTC Contracts and MBT Contracts' prices or the price relationship between the spot price, soon to expire contracts and later to expire contracts, the value of a contract will fall as it approaches expiration. Over time, if contango remained constant, the performance of a portfolio would continue to be affected. Frequently, whether contango or backwardation exists is a function, among other factors, of the prevailing market conditions of the underlying market and government policy.

The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2Xs, 3Xs, –2Xs, and –3Xs) of the Fund's Benchmark.

According to the Registration Statement, the Fund will seek to achieve its investment objective by investing in Bitcoin Futures Contracts as well as in physical Bitcoin to the extent allowed by the Fund's investment restrictions on spot Bitcoin, using a pricing methodology, for purposes of calculating the Fund's NAV, that will derive spot Bitcoin prices from Bitcoin Futures Contracts and not from unregulated exchanges, as further explained below (''Spot Bitcoin'').[15] In doing so, the Sponsor expects to provide a better tracking of Bitcoin exposure to investors, while using Bitcoin Futures Contracts in its strategy and relying on the CME as its ''market of relevant size.'' In particular, to avoid any exposure to potential manipulation from unregulated exchanges, the Fund's NAV will be calculated using a spot Bitcoin price derived from CME futures prices, as further explained below, and the Fund expects to purchase and sell physical Bitcoin via CME's Exchange for Physical Transactions, which are subject to CME's market surveillance.

The Bitcoin and Bitcoin Futures Markets Have Progressed and Matured Significantly

According to the Registration Statement, Bitcoin is a digital asset that serves as the unit of account on an open-source, decentralized, peer-to-peer computer network. It may be used to pay for goods and services, stored for future use, or converted to government-backed currency. As of the date of this prospectus, the adoption of bitcoin for these purposes has been limited. The value of Bitcoin is not backed by any government, corporation, or other identified body.

The value of Bitcoin depends on its supply (which is limited), and demand for bitcoin in the markets for exchange that have been organized to facilitate the trading of Bitcoin. By design, the supply of Bitcoin is intentionally limited to 21 million Bitcoins. According to the Registration Statement, there are approximately 19 million Bitcoins in circulation.

Bitcoin is maintained on the decentralized, open source, peer-to-peer computer network, the ''Bitcoin Network.'' No single entity owns or operates the Bitcoin Network. The Bitcoin Network is accessed through software and governs bitcoin's creation and movement. The source code for the Bitcoin Network, often referred to as the Bitcoin Protocol, is open-source, and anyone can contribute to its development.

The infrastructure of the Bitcoin Network is collectively maintained by various participants in the Bitcoin Network, which include miners, developers, and users. Miners validate transactions and provide security to the network, and are currently compensated for that service in Bitcoin. Developers maintain and contribute updates to the Bitcoin Network's source code, often referred to as the Bitcoin Protocol. Users access the Bitcoin Network using open-source software. Anyone can be a user, developer, or miner.

Bitcoin is ''stored'' on a digital transaction ledger commonly known as a ''blockchain.'' A blockchain is a distributed database that is continuously updated and reconciled among certain users and is protected by cryptography. The Bitcoin blockchain contains a complete record and history for each bitcoin transaction. New Bitcoins are created through a process called ''mining.'' Miners use specialized computer software and hardware to solve a highly complex mathematical problem presented by the Bitcoin Protocol. The first miner to successfully solve the problem is permitted to add a block of transactions to the Bitcoin blockchain. The new block is then confirmed through acceptance by a majority of users who maintain versions of the blockchain on their individual computers. Miners that successfully add a block to the Bitcoin blockchain are automatically rewarded with a fixed amount of Bitcoin for their effort plus any transaction fees paid by transferors whose transactions are recorded in the block. This reward system is the means by which new Bitcoin enter circulation and is the mechanism by which versions of the blockchain held by users

[14] As discussed in more detail below, the CME determines the daily settlements for Bitcoin futures based on trading activity on CME Globex between 14:59:00 and 15:00:00 Central Time (CT), which is the ''settlement period.''

[15] The Approval Order stated that the Fund would only invest in BTC Contracts and MBT Contracts and in cash and cash equivalents.

on a decentralized network are kept in consensus.

The Bitcoin Protocol is an open source project with no official company or group in control, and anyone can review the underlying code. There are, however, a number of individual developers that regularly contribute to a specific distribution of Bitcoin software known as the ''Bitcoin Core.'' Developers of the Bitcoin Core loosely oversee the development of the source code. There are many other compatible versions of the Bitcoin software, but Bitcoin Core is the most widely adopted and currently provides the de facto standard for the Bitcoin Protocol. The core developers are able to access, and can alter, the Bitcoin Network source code and, as a result, they are responsible for quasi-official releases of updates and other changes to the Bitcoin Network's source code. However, because Bitcoin has no central authority, the release of updates to the Bitcoin Network's source code by the core developers does not guarantee that the updates will be automatically adopted by the other purchasers. Users and miners must accept any changes made to the source code by downloading the proposed modification and that modification is effective only with respect to those Bitcoin users and miners who choose to download it. As a practical matter, a modification to the source code becomes part of the Bitcoin Network only if it is accepted by purchasers that collectively have a majority of the processing power on the Bitcoin Network. If a modification is accepted by only a percentage of users and miners, a division will occur such that one network will run the pre-modification source code and the other network will run the modified source code. Such a division is known as a ''fork.''

The first rule filing proposing to list an exchange-traded product to provide exposure to Bitcoin in the U.S. was submitted by the Cboe BZX Exchange, Inc. on June 30, 2016.[16] At that time, blockchain technology, and digital assets that utilized it, were relatively new to the broader public. The market cap of all Bitcoin in existence at that time was approximately $10 billion. No registered offering of digital asset securities or shares in an investment vehicle with exposure to Bitcoin or any other cryptocurrency had yet been conducted, and the regulated infrastructure for conducting a digital asset securities offering had not begun to develop.[17] Similarly, regulated U.S. Bitcoin futures contracts did not exist. The Commodity Futures Trading Commission (the ''CFTC'') had determined that Bitcoin is a commodity,[18] but had not engaged in significant enforcement actions in the space. The New York Department of Financial Services (''NYDFS'') adopted its final BitLicense regulatory framework in 2015, but had only approved four entities to engage in activities relating to virtual currencies (whether through granting a BitLicense or a limited-purpose trust charter) as of June 30, 2016.[19] While the first over-the-counter Bitcoin fund launched in 2013, public trading was limited and the fund had only $60 million in assets.[20] There were very few, if any, traditional financial institutions engaged in the space, whether through investment or providing services to digital asset companies. In January 2018, the Staff of the Commission noted in a letter to the Investment Company Institute and SIFMA that it was not aware, at that time, of a single custodian providing fund custodial services for digital assets.[21]

As of the first quarter of 2021, the digital assets financial ecosystem, including Bitcoin, has progressed and matured significantly. The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities [22] and shares in investment vehicles holding Bitcoin futures.[23] Additionally, licensed and regulated service providers have emerged to provide fund custodial services for digital assets, among other services. For example, in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3–3 under the Exchange Act.[24] In September 2020, the Staff of the Commission released a no-action letter permitting certain broker-dealers to operate a non-custodial Alternative Trading System (''ATS'') for digital asset securities, subject to specified conditions.[25] In October 2019, the Staff of the Commission granted temporary relief from the clearing agency registration requirement to an entity seeking to establish a securities clearance and settlement system based on distributed ledger technology; [26] and multiple transfer agents who provide

[16] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the ''Winklevoss II Order''). This proposal was subsequently disapproved by the Commission. *See id.*

[17] Digital assets that are securities under U.S. law are referred to throughout this proposal as ''digital asset securities.'' All other digital assets, including Bitcoin, are referred to interchangeably as ''cryptocurrencies'' or ''virtual currencies.'' The term ''digital assets'' refers to all digital assets, including both digital asset securities and cryptocurrencies, together.

[18] *See* ''In the Matter of Coinflip, Inc.'' (''Coinflip'') (CFTC Docket 15–29 (September 17, 2015)) (order instituting proceedings pursuant to Sections 6(c) and 6(d) of the CEA, making findings and imposing remedial sanctions), in which the CFTC stated: ''Section 1a(9) of the CEA defines 'commodity' to include, among other things, 'all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.' 7 U.S.C. 1a(9). The definition of a 'commodity' is broad. *See, e.g., Board of Trade of City of Chicago* v. *SEC,* 677 F.2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.''

[19] A list of virtual currency businesses that are entities regulated by the NYDFS is available on the NYDFS website. *See https://www.dfs.ny.gov/virtual_currency_businesses#:~:text=A%20business%20must%20obtain%20a,business%20in%20New%20York%20State.*

[20] *See* Bitcoin Investment Trust Form S–1, dated May 27, 2016, *available at: https://www.sec.gov/Archives/edgar/data/1588489/000095012316017801/filename1.htm* (data as of March 31, 2016 according to publicly available filings).

[21] *See* Letter from Dalia Blass, Director, Division of Investment Management, U.S. Securities and Exchange Commission to Paul Schott Stevens, President & CEO, Investment Company Institute and Timothy W. Cameron, Asset Management Group—Head, Securities Industry and Financial Markets Association (January 18, 2018), *available at: https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm.*

[22] *See* Prospectus Supplement filed pursuant to Rule 424(b)(1) for INX Tokens (Registration No. 333–233363), *available at: https://www.sec.gov/Archives/edgar/data/1725882/000121390020023202/ea125858-424b1_inxlimited.htm.*

[23] *See* Prospectus filed by Stone Ridge Trust VI on behalf of NYDIG Bitcoin Strategy Fund Registration, *available at: https://www.sec.gov/Archives/edgar/data/1764894/000119312519309942/d693146d497.htm.*

[24] *See* Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7–25–20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

[25] *See* Letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), *available at: https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf.*

[26] *See* Letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), *available at: https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf.*

services for digital asset securities have registered with the Commission.[27]

Beyond the Commission's purview, the regulatory landscape has also changed significantly since 2016, and cryptocurrency markets have grown and evolved as well. The market for Bitcoin grew approximately 100 times larger through 2021, reaching a market cap of $1.3 trillion at its all-time high. Although Bitcoin's market cap is down to $500 billion (as of September 7, 2023), its market cap is greater than companies [28] such as Visa, Inc., Exxon Mobil Corporation, Walmart, Inc., and JP Morgan Chase & Co. The number of verified users at Coinbase, the largest U.S.-based Bitcoin exchange, has grown to over 110 million at the end of 2022, compared to 43 million at the end of 2020.[29] CFTC-regulated Bitcoin futures (''Bitcoin Futures'') represented approximately $42 billion in notional trading on the CME in August 2023, compared to $3.9 billion, $28 billion, $60 billion, and $20 billion in total trading in December 2019, December 2020, December 2021, and December 2022 respectively. Bitcoin Futures represented $2.2 billion in open interest in August 2023, compared to $115 million, $1.29 billion, $3.27 billion, and $1.31 billion in December 2019, December 2020, December 2021, and December 2022 respectively.[30] The CFTC has exercised its regulatory jurisdiction in bringing a number of enforcement actions related to Bitcoin and against trading platforms that offer cryptocurrency trading.[31] The U.S. Office of the Comptroller of the Currency (the ''OCC'') has made clear that federally-chartered banks are able to provide custody services for cryptocurrencies and other digital assets.[32] NYDFS has granted no fewer than thirty BitLicenses, including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services. The U.S. Treasury Financial Crimes Enforcement Network (''FinCEN'') has released extensive guidance regarding the applicability of the Bank Secrecy Act (''BSA'') and implementing regulations to virtual currency businesses,[33] and has proposed rules imposing requirements on entities subject to the BSA that are specific to the technological context of virtual currencies.[34] In addition, the Treasury's Office of Foreign Assets Control (''OFAC'') has brought enforcement actions over apparent violations of the sanctions laws in connection with the provision of wallet management services for digital assets.[35]

In addition to the regulatory developments noted above, more traditional financial market participants appear to be embracing cryptocurrency: large insurance companies,[36] investment banks,[37] asset managers,[38] credit card companies,[39] university endowments,[40] pension funds,[41] and even historically Bitcoin skeptical fund managers [42] are allocating to Bitcoin. The largest over-the-counter Bitcoin fund previously filed a Form 10 registration statement, which the Staff of the Commission reviewed and which took effect automatically, and is now a reporting company.[43] Established companies like Tesla, Inc.,[44] MicroStrategy Incorporated,[45] and Square, Inc.,[46] among others, have recently announced substantial investments in Bitcoin in amounts as large as $1.5 billion (Tesla) and $425 million (MicroStrategy).

The Sponsor maintains that despite these developments, access for U.S. retail investors to gain exposure to Bitcoin via a transparent and regulated

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[27] *See, e.g.,* Form TA–1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, *available at: https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xslFTA1X01/primary_doc.xml.*

[28] *See https://coinmarketcap.com/largest-companies/.*

[29] *See* Coinbase 2022 10–K, available at: *https://s27.q4cdn.com/397450999/files/doc_financials/2022/q4/86fe25e0-342b-40fa-aacc-ea04faf322cb.pdf.*

[30] All statistics and charts included in this proposal with respect to the CME are sourced from *https://www.cmegroup.com/trading/bitcoin-futures.html.* In addition, as further discussed below, the Sponsor believes the CME represents a regulated market of significant size for purposes of addressing the Commission's concerns about potential manipulation of the Bitcoin market.

[31] The CFTC's annual report for Fiscal Year 2020 (which ended on September 30, 2020) noted that the CFTC ''continued to aggressively prosecute misconduct involving digital assets that fit within the CEA's definition of commodity'' and ''brought a record setting seven cases involving digital assets.'' *See* CFTC FY2020 Division of Enforcement Annual Report, *available at: https://www.cftc.gov/media/5321/DOE_FY2020_AnnualReport_120120/download.* Additionally, the CFTC filed on October 1, 2020, a civil enforcement action against the owner/operators of the BitMEX trading platform, which was one of the largest Bitcoin derivative exchanges. *See* CFTC Release No. 8270–20 (October1, 2020), *available at: https://www.cftc.gov/PressRoom/PressReleases/8270-20.*

[32] *See* OCC News Release 2021–2 (January 4, 2021), *available at: https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2.html.*

[33] *See* FinCEN Guidance FIN–2019–G001 (May 9, 2019) (Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies), *available at: https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf.*

[34] *See* U.S. Department of the Treasury Press Release: ''The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions'' (December 18, 2020), available at: *https://home.treasury.gov/news/press-releases/sm1216.*

[35] *See* U.S. Department of the Treasury Enforcement Release: ''OFAC Enters Into $98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions'' (December 30,2020), *available at: https://home.treasury.gov/system/files/126/20201230_bitgo.pdf.*

[36] On December 10, 2020, Massachusetts Mutual Life Insurance Company (MassMutual) announced that it had purchased $100 million in Bitcoin for its general investment account. *See* MassMutual Press Release ''Institutional Bitcoin provider NYDIG announces minority stake purchase by MassMutual'' (December 10, 2020), *available at: https://www.massmutual.com/about-us/news-and-press-releases/press-releases/2020/12/institutional-bitcoin-provider-nydig-announces-minority-stake-purchase-by-massmutual.*

[37] *See, e.g.,* ''Morgan Stanley to Offer Rich Clients Access to Bitcoin Funds'' (March 17, 2021) *available at: https://www.bloomberg.com/news/articles/2021-03-17/morgan-stanley-to-offer-rich-clients-access-to-bitcoin-funds.*

[38] *See, e.g.,* ''BlackRock's Rick Rieder says the world's largest asset manager has 'started to dabble' in Bitcoin'' (February 17, 2021), *available at: https://www.cnbc.com/2021/02/17/blackrock-has-started-to-dabble-in-bitcoin-says-rick-rieder.html* and ''Guggenheim's Scott Minerd Says Bitcoin Should Be Worth $400,000'' (December 16, 2020), *available at: https://www.bloomberg.com/news/articles/2020-12-16/guggenheim-s-scott-minerd-says-bitcoin-should-be-worth-400-000.*

[39] *See, e.g.,* ''Visa Moves to Allow Payment Settlements Using Cryptocurrency'' (March 29, 2021), *available at: https://www.reuters.com/business/autos-transportation/exclusive-visa-moves-allow-payment-settlements-using-cryptocurrency-2021-03-29/.*

[40] *See, e.g.,* ''Harvard and Yale Endowments Among Those Reportedly Buying Crypto'' (January 25, 2021), *available at: https://www.bloomberg.com/news/articles/2021-01-26/harvard-and-yale-endowments-among-those-reportedly-buying-crypto.*

[41] *See, e.g.,* ''Virginia Police Department Reveals Why its Pension Fund is Betting on Bitcoin'' (February 14, 2019), *available at: https://finance.yahoo.com/news/virginia-police-department-reveals-why-194558505.html.*

[42] *See, e.g.,* ''Bridgewater: Our Thoughts on Bitcoin'' (January 28, 2021) available at: *https://www.bridgewater.com/research-and-insights/our-thoughts-on-bitcoin* and ''Paul Tudor Jones says he likes bitcoin even more now, rally still in the 'first inning' '' (October 22, 2020), available at: *https://www.cnbc.com/2020/10/22/-paul-tudor-jones-says-he-likes-bitcoin-even-more-now-rally-still-in-the-first-inning.html.*

[43] *See* Letter from Division of Corporation Finance, Office of Real Estate & Construction to Barry E. Silbert, Chief Executive Officer, Grayscale Bitcoin Trust (January 31, 2020), *available at: https://www.sec.gov/Archives/edgar/data/1588489/000000000020000953/filename1.pdf.*

[44] *See* Form 10–K submitted by Tesla, Inc. for the fiscal year ended December 31, 2020 at 23: *https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm.*

[45] *See* Form 10–Q submitted by MicroStrategy Incorporated for the quarterly period ended September 30, 2020 at 8: *https://www.sec.gov/ix?doc=/Archives/edgar/data/1050446/000156459020047995/mstr-10q_20200930.htm.*

[46] *See* Form 10–Q submitted by Square, Inc. for the quarterly period ended September 30, 2020 at 51: *https://www.sec.gov/ix?doc=/Archives/edgar/data/1512673/000151267320000012/sq-20200930.htm.*

exchange-traded vehicle remains limited. As investors and advisors increasingly utilize Exchange-Traded Products (''ETPs'') to manage diversified portfolios (including equities, fixed income securities, commodities, and currencies) quickly, easily, relatively inexpensively, tax-efficiently, and without having to hold directly any of the underlying assets; options for Bitcoin exposure for U.S. investors remain limited to: (i) investing in over-the-counter Bitcoin funds (''OTC Bitcoin Funds'') that are subject to high premium/discount volatility (and high management fees) to the advantage of more sophisticated investors that are able to purchase shares at NAV directly with the issuing trust; (ii) investing in Bitcoin Futures ETFs that are subject to higher complexity and costs due to need for rolling the futures contracts; (iii) facing the technical risk, complexity, and generally high fees associated with buying and storing Bitcoin directly; or (iv) purchasing shares of operating companies that they believe will provide proxy exposure to Bitcoin with limited disclosure about the associated risks. Meanwhile, investors in many other countries, including Canada, are able to use more traditional exchange listed and traded products to gain exposure to Bitcoin.[47]

For example, the Purpose Bitcoin ETF, a retail physical Bitcoin ETP launched in Canada, reportedly reached $421.8 million in assets under management (''AUM'') in two days, and has achieved $993 million in assets as of April 14, 2021, demonstrating the demand for a North American market listed Bitcoin ETP. The Sponsor believes that the demand for the Purpose Bitcoin ETF is driven primarily by investors' desire to have a regulated and accessible means of exposure to. The Purpose Bitcoin ETF also offers a class of units that is U.S. dollar Bitcoin denominated, which could appeal to U.S. investors. Without an approved Bitcoin ETP in the U.S. as a viable alternative, the Sponsor believes U.S. investors will seek to purchase these shares in order to get access to Bitcoin exposure, leaving them without the protections of U.S. securities laws. Given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange listed ETP. With the addition of more Bitcoin ETPs in non-U.S. jurisdictions expected to grow, the Sponsor anticipates that such risks will only continue to grow.

In addition, several funds registered under the Investment Company Act of 1940 (the ''1940 Act'') have effective registration statements that contemplate Bitcoin exposure through a variety of means, including through investments in Bitcoin futures contracts [48] and through OTC Bitcoin Funds.[49] As of the date of this filing, it is anticipated that other 1940 Act funds will soon begin to pursue Bitcoin through other means, including through options on Bitcoin futures contracts and investments in privately offered pooled investment vehicles that invest in Bitcoin.[50] In previous statements, the Staff of the Commission has acknowledged how such funds can satisfy their concerns regarding custody, valuation, and manipulation.[51] The funds that have already invested in Bitcoin instruments have no reported issues regarding custody, valuation, or manipulation of the instruments held by these funds. While these funds do offer investors some means of exposure to Bitcoin, the Sponsor believes the current offerings fall short of giving investors an accessible, regulated product that provides concentrated exposure to Bitcoin and Bitcoin prices.

OTC Bitcoin Funds and Investor Protection

The Sponsor notes that U.S. investor exposure to Bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars. With that growth, so too has grown the potential risk to U.S. investors. As described below, premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are exposing U.S. investors to risks that could potentially be eliminated through access to a Bitcoin futures-based ETP. Investor protection concerns remain and are growing related to OTC Bitcoin Funds. The Sponsor understands the Commission's previous focus in prior disapproval orders on potential manipulation of a Bitcoin ETP holding actual Bitcoin, but believes that such concerns have been sufficiently mitigated by the use of futures contracts, futures-based pricing for Spot Bitcoin, and EFP transactions for Spot Bitcoin in the proposed ETP. Accordingly, the Sponsor believes that the Fund represents an opportunity for U.S. investors to gain price exposure to Bitcoin futures contracts and Spot Bitcoin in a regulated and transparent exchange-traded vehicle that limits risks by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for Bitcoin exposure; and (iv) avoiding regulatory concerns regarding valuation posed by ETFs and ETPs that invest directly in Bitcoin rather than in Bitcoin futures contracts or Bitcoin via EFP.

OTC Bitcoin Funds and Premium/Discount Volatility

According to the Sponsor, OTC Bitcoin Funds are generally designed to provide exposure to Bitcoin in a manner similar to the Shares. However, unlike the Shares, OTC Bitcoin Funds are unable to freely offer creation and redemption in a way that incentivizes market participants to keep their shares trading in line with their NAV [52] and, as a result, shares of OTC Bitcoin Funds frequently trade at a price that is out of line with the value of their assets held. Historically, OTC Bitcoin Funds have traded at a significant premium to NAV.[53]

Trading at a premium or a discount is not unique to OTC Bitcoin Funds and is not in itself problematic, but the size of such premiums/discounts and volatility

[47] Securities regulators in a number of other countries have either approved or otherwise allowed the listing and trading of Bitcoin ETPs. Specifically, these funds (with their respective approximate AUMs as of April 14, 2021) include the Purpose Bitcoin ETF ($993,000,000), VanEck Vectors Bitcoin ETN ($209,000,000), WisdomTree Bitcoin ETP ($407,000,000), Bitcoin Tracker One ($1,380,000,000), BTCetc Bitcoin ETP ($1,410,000,000), 21Shares Bitcoin ETP ($362,000,000), 21Shares Bitcoin Suisse ETP ($30,000,000), CoinShares Physical Bitcoin ETP ($396,000,000).

[48] *See, e.g.,* Stone Ridge Trust VI (File No. 333–234055); BlackRock Global Allocation Fund, Inc. (File No. 33–22462); and BlackRock Funds V (File No. 333–224371).

[49] *See, e.g.,* Amplify Transformational Data Sharing ETF (File No. 333–207937); and ARK Innovation ETF (File No. 333–191019).

[50] *See* Stone Ridge Trust, Post-Effective Amendment No. 74 to Registration Statement on Form N–1A (File No. 333–184477), available at: *https://www.sec.gov/Archives/edgar/data/1559992/000119312521072856/d129263d485apos.htm.*

[51] *See* Dalia Blass, ''Keynote Address—2019 ICI Securities Law Developments Conference'' (December 3, 2019), *available at: https://www.sec.gov/news/speech/blass-keynote-address-2019-ici-securities-law-developments-conference.*

[52] Because OTC Bitcoin Funds are not listed on an exchange, they are also not subject to the same transparency and regulatory oversight by a listing exchange as the Shares would be. In the case of the Fund, the common membership of the Exchange and the CME in the Intermarket Surveillance Group (''ISG'') results in increased investor protections as compared to OTC Bitcoin Funds.

[53] The inability to trade in line with NAV may at some point result in OTC Bitcoin Funds trading at a discount to their NAV, which has occurred more recently with respect to one prominent OTC Bitcoin Fund. While that has not historically been the case, and it is not clear whether such discounts will continue, such a prolonged, significant discount scenario would give rise to nearly identical potential issues related to trading at a premium.

thereof highlight the key differences in operations and market structure of OTC Bitcoin Funds as compared to ETPs.

Combined with the significant increase in AUM for OTC Bitcoin Funds over the past year, the size and volatility of premiums and discounts for OTC Bitcoin Funds have given rise to significant and quantifiable investor protection issues, as further described below. In fact, the largest OTC Bitcoin Fund has grown to $16.0 billion in AUM as of September 6, 2023.[54] In the past it has traded at a premium of between roughly five and forty percent, though it has seen premiums at times above one hundred percent.[55] Recently, however, it has traded at a discount, reaching almost 50% discount a few times and trading at an average 40% discount to NAV from October 2022 to June 2023. As of September 6, 2023, the discount to NAV has narrowed and was approximately 19.5%, representing around $3.1 billion less in market value than the Bitcoin actually held by the fund. If premium/discount numbers move back to the middle of its historical range to a 20% premium (which historically could occur), it would represent a swing of approximately $6.4 billion in value unrelated to the value of Bitcoin held by the fund and if the premium returns to the upper end of its typical range, that number increases to $18.9 billion. The Sponsor notes that, as these numbers are only associated with a single OTC Bitcoin Fund, the potential dollars at risk for the whole industry is even higher.

The Sponsor believes that the risks associated with volatile premiums/discounts for OTC Bitcoin Funds raise significant investor protection issues in several ways. First, investors may be buying shares of a fund for a price that is not reflective of the per share value of the fund's underlying assets. Even operating within the normal premium range, it is possible for an investor to buy shares of an OTC Bitcoin Fund only to have those shares quickly lose 10% or more in dollar value without any movement of the price of Bitcoin. That is to say—the price of Bitcoin could have stayed exactly the same from market close on one day to market open the next, yet the value of the shares held by the investor decreased only because of the fluctuation of the premium/discount. As more investment vehicles, including mutual funds and ETFs, seek to gain exposure to Bitcoin, the easiest option for a buy and hold strategy is often an OTC Bitcoin Fund, meaning that even investors that do not directly buy OTC Bitcoin Funds can be disadvantaged by extreme premiums (or discounts) and premium volatility.

The second issue is related to the first and explains how the premium in OTC Bitcoin Funds essentially creates a transfer of value from retail investors to more sophisticated investors. Generally speaking, only accredited investors are able to purchase shares from the issuing fund, which means that they are able to purchase shares directly with the fund at NAV (in exchange for either cash or Bitcoin) without having to pay the premium or sell into the discount. While there are often minimum holding periods for shares required by law, an investor that is allowed to purchase directly from the fund is able to hedge their Bitcoin exposure as needed to satisfy the holding requirements and collect on the premium or discount opportunity.

As noted above, the existence of a premium or discount and the premium/discount collection opportunity is not unique to OTC Bitcoin Funds and does not in itself warrant the approval of an exchange traded product.[56] What is unique is that such significant and persistent premiums and discounts can exist in a product with over $16 billion in assets under management,[57] that billions of retail investor dollars are constantly under threat of premium/discount volatility,[58] and that premium/discount volatility is generally captured by more sophisticated investors on a riskless basis. While the Sponsor appreciates the Commission's focus on potential manipulation of a Bitcoin ETP in prior disapproval orders and believes those concerns are adequately addressed in this filing, the Sponsor believes that the Commission should also consider the direct, quantifiable investor protection issue in determining whether to approve this proposal, particularly when the Trust, as a Bitcoin ETP, is designed to reduce the likelihood of significant and prolonged premiums and discounts with its open-ended nature as well as the ability of market participants (*i.e.,* market makers and authorized participants) to create and redeem on a daily basis.

The Bitcoin Futures Market Has Developed Alongside the Bitcoin Spot Market Into a Strong and Viable Marketplace That Stands on Its Own

As noted above, CME began offering trading in BTC Contracts in 2017, and in MBT Contracts in 2021. Each of the contract's final cash settlement is based on the CME CF Bitcoin Reference Rate (the ''CME CF BRR'').[59] The contracts trade and settle like other cash-settled commodity futures contracts. According to the Sponsor, trading in CME Bitcoin futures contracts has increased significantly, in particular with respect to BTC Contracts. Nearly every measurable metric related to BTC Contracts has trended consistently up since launch and/or accelerated upward in the past year, as the market recovered some of the ground lost since falling from the all-time high activity levels of end 2021. This general upward trend in trading volume and open interest is captured in the following chart.

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[54] As compared to an AUM of approximately $2.6 billion on February 26, 2020. While the price of one Bitcoin has increased approximately 193% in the intervening period, the market price of a share of the fund has increased by approximately 80%, indicating that the price of a share of the fund is attributable to more than just price appreciation in Bitcoin.

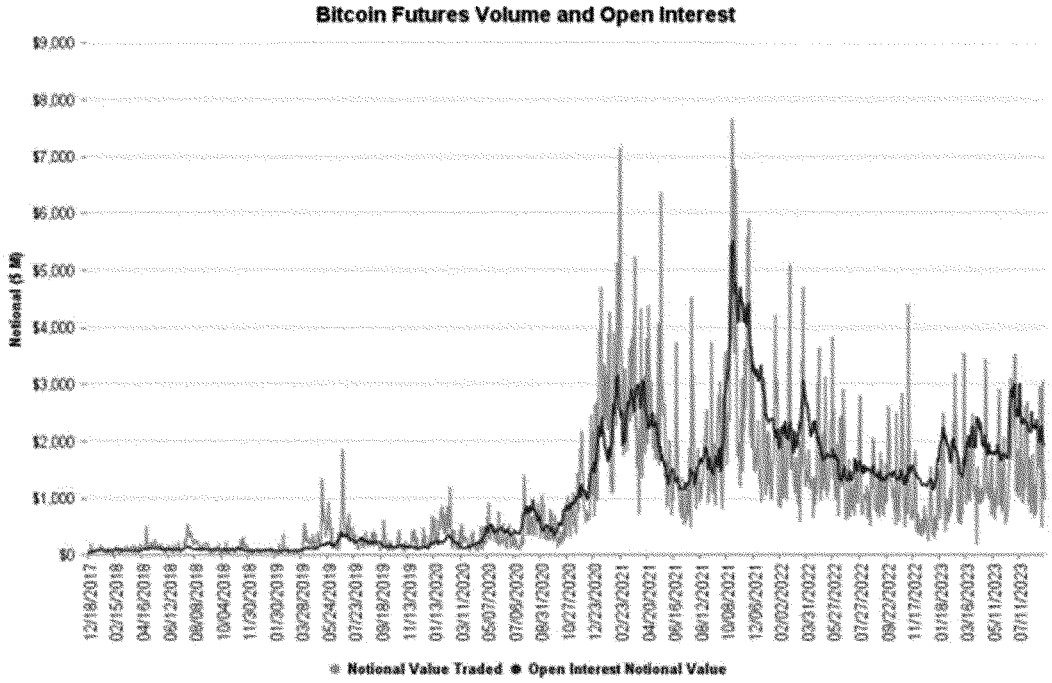
[55] *See* ''Traders Piling Into Overvalued Crypto Funds Risk a Painful Exit'' (February 4, 2021), available at: *https://www.bloomberg.com/news/articles/2021-02-04/bitcoin-one-big-risk-when-investing-in-crypto-funds.*

[56] For example, similar premiums/discounts and premium/discount volatility exist for other non-Bitcoin cryptocurrency related over-the-counter funds, but the size and investor interest in those funds does not give rise to the same investor protection concerns that exist for OTC Bitcoin Funds.

[57] At $16 billion in AUM, the largest OTC Bitcoin Fund would be among the top 90 largest out of roughly 2,400 U.S. listed ETPs. Source: *https://etfdb.com/compare/market-cap/.*

[58] Over the 12 months, there were 4 occurrences where the discount changed overnight by 500 percentage points or more in a single day, either narrowing or widening the discount. In two incidents, the premium dropped from 28.28% to 12.29% from the close on 3/19/20 to the close on 3/20/20 and from 38.40% to 21.05% from the close on 5/13/19 to the close on 5/14/19. Similarly, over the period of 12/21/20 to 1/21/20, the premium went from 40.18% to 2.79%. While the price of Bitcoin appreciated significantly during this period and NAV per share increased by 41.25%, the price per share increased by only 3.58%.

[59] According to the CME, the CME CF BRR aggregates the trade flow of major Bitcoin spot exchanges during a specific calculation window into a once-a-day reference rate of the U.S. dollar price of Bitcoin. Calculation rules are geared toward maximum transparency and real-time replicability in underlying spot markets, including Bitstamp, Coinbase, Gemini, itBit, and Kraken. For additional information, refer to *https://www.cmegroup.com/trading/cryptocurrency-indices/cf-bitcoin-reference-rate.html?redirect=/trading/cf-bitcoin-reference-rate.html.*



Note: The 2023 daily average notional value is for the period through September 1, 2023.

Source: CME, https://www.cmegroup.com/reports/bitcoin-futures-liquidity-report.pdf

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Similarly, the number of large open interest holders [60] has continued to increase even as the price of Bitcoin has risen, as have the number of unique accounts trading Bitcoin Futures.

As it pertains specifically to the Bitcoin Futures Contracts in which the Fund will invest, the statistics are equally as profound. The following table sets forth the approximate daily notional average volume for the Bitcoin Futures Contracts, followed by the daily average volume for all of the Bitcoin Futures Contracts, the first to expire and the second to expire. With a Daily Notional Average Volume of $1.4 billion in 2023, that is almost 6 times the 2019 level and almost 3 times the 2020 ones. Despite the bear market, the trading volume in 2023 has been resilient and slightly increasing compared to 2022.

	Daily notional average volume for bitcoin futures contracts (in million $)	Average daily volume for bitcoin futures contracts	First-to-expire bitcoin futures contract	Second-to-expire bitcoin futures contract
2019	242	6,365	5,400	700
2020	523	8,782	7,100	1,300
2021	2,379	10,035	7,300	2,100
2022	1,426	10,735	8,200	2,100
2023	1,413	10,775	8,400	1,900

Note: The 2023 data is for the period ending on August 31, 2023. Source: CME; Bloomberg.

The Sponsor notes that individual users, institutional investors and investment funds that want to provide exposure to Bitcoin by investing directly in Bitcoin, and therefore must transact in Bitcoin, must use the Bitcoin Network to download specialized software referred to as a ''Bitcoin wallet.'' This wallet may be used to send and receive Bitcoin through users' unique ''Bitcoin addresses.'' The amount of Bitcoin associated with each Bitcoin address, as well as each Bitcoin transaction to or from such address, is captured on the Blockchain. Bitcoin transactions are secured by cryptography known as public-private key cryptography, represented by the Bitcoin addresses and digital signature in a transaction's data file. Each Bitcoin Network address, or wallet, is associated with a unique ''public key'' and ''private key'' pair, both of which are lengthy alphanumeric codes, derived together

[60] A large open interest holder in BTC Contracts is an entity that holds at least 25 contracts, which is the equivalent of 125 Bitcoin. At a price of approximately $26,025 per Bitcoin on 9/7/23, more than 110 firms had outstanding positions of greater than $3.25 million in BTC Contracts. Source: *https://www.theblock.co/data/crypto-markets/cme-cots/large-open-interest-holders-of-cme-bitcoin-futures.*

and possessing a unique relationship. The private key is a secret and must be kept in accordance with appropriate controls and procedures to ensure it is used only for legitimate and intended transactions. If an unauthorized third person learns of a user's private key, that third person could forge the user's digital signature and send the user's Bitcoin to any arbitrary Bitcoin address, thereby stealing the user's Bitcoin. Similarly, if a user loses his private key and cannot restore such access (*e.g.,* through a backup), the user may permanently lose access to the Bitcoin contained in the associated address.

According to the Registration Statement, institutional purchasers of Bitcoin, including other Bitcoin funds that provide exposure to Bitcoin by investing directly in Bitcoin, generally maintain their Bitcoin account with a Bitcoin custodian. Bitcoin custodians are financial institutions that have implemented a series of specialized security precautions, including holding Bitcoin in ''cold storage,'' to try to ensure the safety of an account holder's Bitcoin. These Bitcoin custodians must carefully consider the design of the physical, operational, and cryptographic systems for secure storage of private keys in an effort to lower the risk of loss or theft, and many use a multi-factor security system under which actions by multiple individuals working together are required to access the private keys necessary to transfer such digital assets and ensure exclusive ownership. Considering that the Fund will be able to hold spot bitcoin acquired via EFP transactions made on the CME, the Sponsor will engage a third-party custodian to act as the bitcoin custodian for the Fund to maintain custody of the Fund's bitcoin assets.

The Structure and Operation of the Trust Satisfies Commission Requirements for Bitcoin-Based Exchange Traded Products

The Sponsor believes that the Fund's holding a combination of Bitcoin Futures Contracts, Spot Bitcoin, and cash could significantly mitigate the risk of market manipulation while still providing the market with a regulated product that tracks the actual price of Bitcoin, creating a secure way for U.S. investors to gain exposure to spot Bitcoin without having to rely on unregulated products, offshore regulated products, or indirect strategies such as investing in publicly traded companies that hold Bitcoin.

In determining whether to approve listing and trading of new Exchange-Traded Products (''ETPs''), the Commission conducts a thorough analysis to ensure the proposal is consistent with Section 6(b)(5) of the Act. Section 6(b)(5) of the Act mandates that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. With respect to ETPs, the Commission often considers how the listing exchange would access necessary information to detect and deter market manipulation, illegal trading, and other abuses, which listing exchanges may accomplish by entering into a comprehensive surveillance-sharing agreement with other entities, such as the markets trading the ETP's underlying assets. Historically, for commodity-trust ETPs, there has always been at least one regulated market of significant size for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper. Then, the listing exchange would enter into surveillance-sharing agreements with, or hold ISG membership in common with, that regulated market.[61]

In the context of Bitcoin, the CME Bitcoin Futures Market (the ''CME Market'') is currently the only regulated market in the U.S.

The Commission has previously interpreted the terms ''significant market'' and ''market of significant size'' to include a market (or group of markets) where:

(1) There is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, such that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct; and

(2) It is unlikely that trading in the ETP would be the predominant influence on prices in that market.[62]

With respect to the first prong of the Commission's interpretation, the Commission has previously explained that the lead/lag relationship between the Bitcoin futures market and the spot market is central to understanding this first prong. With respect to the second prong, the Commission's prior analysis has focused on the potential size and liquidity of the ETP compared to the size and liquidity of the market.

The Commission recognized in the Approval Order that ''the CME [Market] is a 'significant market' related to CME bitcoin futures contracts, and thus that the Exchange has entered into the requisite surveillance-sharing agreement with respect to its Bitcoin Futures Contracts holdings.[63] However, there is still a lack of consensus on whether the CME Market is of ''significant size'' in relation to the spot Bitcoin market based on the test historically applied by the Commission.

Interrelationship Between the CME and the Fund

The Commission has previously stated that ''the interpretation of the term market of significant size depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.'' [64] The Sponsor intends to adopt an innovative approach to mitigate the risks of fraud and manipulation that are unique to the Fund. The core principle of this approach would be to structure the operation of the Fund such that the regulated market of significant size in relation to the Fund is the CME Market because it is the same market on which the Fund trades its non-cash assets. Therefore, the Sponsor's strategy aims to establish a comprehensive interrelationship between the CME Market and the Fund to unequivocally classify the CME Market as the market of significant size in relation to the ETP. The Sponsor notes that, although the Fund may, as proposed, hold physical Bitcoin, it does not rely on any information or services from unregulated Bitcoin spot exchanges (such as Binance and others). Therefore, no spot Bitcoin exchange could be

[61] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 at 37592–94 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (the ''Winklevoss Order''); ''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 87267 (Oct. 9, 2019), 84 FR 55382 at 55383, 55410 (Oct. 16, 2019) (SR–NYSEArca–2019–01) (the ''Bitwise Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 at 12609 (March 3, 2020) (SR–NYSEArca–2019–39) (the ''Wilshire Phoenix Order'').

[62] *See, e.g.,* Winklevoss Order, 83 FR at 37594. The Commission further noted that ''[t]here could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants.'' *Id.*

[63] *See* Approval Order, 87 FR at 21678 and further discussion at 21678–81.

[64] *See* Securities Exchange Act Release No. 95180 (June 29, 2022), 87 FR 40299 at 40312 (July 6, 2022) (SR–NYSEArca–2021–90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)).

considered a ''market of relevant size'' in relation to the Fund.

The Sponsor has designed the Fund to have five novel features that underscore its significant interrelationship with the CME:

1. *Investment strategy:* The Fund will hold a mix of Spot Bitcoin, Bitcoin Futures Contracts, and cash and cash equivalents, subject to certain investment restrictions (as further discussed below).

2. *Futures-based pricing for Spot Bitcoin:* The price determination for Spot Bitcoin holdings in the NAV calculation will be derived from the CME Market's Bitcoin futures curve. As a result, the price of Spot Bitcoin holdings will depend solely on Bitcoin futures settlement prices on the CME Market and will not depend directly on price information from unregulated spot Bitcoin markets (as further discussed below).

3. *Investment restrictions on Spot Bitcoin:* The Fund will be subject to dynamic investment restrictions that are designed to mitigate the risk that Shares of the Fund could be manipulated by manipulating the Bitcoin spot market and ensuring that the CME Market is the only ''market of significant size'' with respect to the Fund.

4. *Physical Bitcoin purchases on the CME Market:* The Fund will use the CME Market's Exchange for Physical (''EFP'') [65] transactions to acquire and dispose of Spot Bitcoin, instead of transactions on unregulated spot exchanges. Accordingly, the only non-cash assets held by the Fund (Bitcoin Futures Contracts and Bitcoin via EFP) would be traded on the CME Market, such that the exchanges' ability to share information pursuant to their common ISG membership could assist in detecting and deterring fraudulent or manipulative misconduct related to those assets.

5. *Creations and redemptions:* The Fund will use cash creations and redemptions [66] to deter intraday Share price manipulation that could originate from in kind creation or redemption from physical spot Bitcoin sourced in unregulated spot markets. Investment in Spot Bitcoin thus would not be directly related to creation/redemptions, but instead on target portfolio exposure, as allowed by the investment restrictions on spot Bitcoin. Trading for Spot Bitcoin could thus be accomplished in smaller sizes and at unpredictable times, reducing the risk of manipulation in the creation or redemption processes.

The Sponsor believes that these features of the Fund are designed to provide a robust framework for mitigating the risks of market manipulation, thereby protecting investors and maintaining the integrity of the market, and further believes that, given these features of the Fund, the CME Market would be considered the regulated market of significant size in relation to the Fund.

Additionally, as further discussed below, the Sponsor believes that the Fund investment strategy is designed such that it would be highly unlikely that a person attempting to manipulate the Fund could be successful by trading on unregulated spot and derivatives markets. Thus, no market other than CME could be considered as of significant size in relation to the Fund.

The Sponsor further believes that the novel approach proposed is in line with the first prong of the Commission's interpretation of the definition of ''regulated market of significant size'' as to the CME Market and that there is a reasonable likelihood that a person attempting to manipulate the Fund would also have to trade on the CME Market to successfully manipulate the ETP (and, accordingly, the exchange's common ISG membership would aid the Exchange in detecting and deterring potential misconduct).

According to the Sponsor, the Sponsor's approach is designed in such a way that any attempt to manipulate the Fund would require trading on the CME Market, for the following reasons:

1. *Futures-based pricing for Spot Bitcoin:* Because the price determination for Spot Bitcoin holdings in the Fund would be derived from the CME Market futures curve, any attempt to manipulate the price of the Fund would require influencing the futures curve on the CME Market because the spot price (which could be a target for manipulation) does not directly influence the price of the Fund. There is thus a direct and unequivocal lead-lag relationship in which CME Market prices lead both the spot price used by the Fund to determine its NAV and the Fund's market price.

2. *Investment restrictions on Spot Bitcoin:* The dynamic investment restrictions in place for the Fund (as discussed in the section below entitled ''Investment Restrictions on Spot Bitcoin'') ensure that any significant trading activity aimed at manipulating the Fund would likely spill over into the CME Market because the investment restrictions are designed to prevent the Fund from becoming so large in relation to the unregulated spot market that the cost-benefit tradeoff is favorable for the potential manipulator to execute without influencing the futures market.

3. *Spot Bitcoin operations via EFP on the CME Market:* Because the Fund's Spot Bitcoin operations would take place via CME Market EFP transactions, any attempt to manipulate the Fund's transactions in Spot Bitcoin holdings would need to occur on the CME Market. Accordingly, any potential manipulation of the Fund is closely tied to the CME Market.

4. *Creations and redemptions:* The Fund's use of cash creations and redemptions also reduces the potential for manipulation through the creation and redemption processes. Any significant creation or redemption activity aimed at manipulating the Fund would likely influence the futures market, given that the investment in spot is based on target portfolio exposure and not directly related to creations or redemptions.

Given these factors, the Sponsor believes that the Exchange and CME Market's common membership in the ISG would be an effective tool in assisting the Exchange in detecting and deterring potential misconduct. The agreement would provide the Exchange with access to necessary trading data from the CME Market, which is intrinsically linked to the Fund, allowing for comprehensive oversight and the ability to quickly identify and investigate any suspicious trading activity.

The Approval Order stated that the CME ''comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts'' and that the ''CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the [Fund] by manipulating the price of CME Bitcoin Futures Contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market.'' [67] The Commission further noted in the Approval Order that, as a result, ''when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the [Fund].'' [68] The Sponsor further believes that, consistent with the Approval Order, CME surveillance can be relied upon to capture any possible manipulation of the CME Bitcoin futures markets, even when the attempt is made indirectly by trading outside the CME in unregulated markets.

The Sponsor also believes that it is unlikely that trading in the Fund would be the predominant influence on prices on the CME Market. The addition of Spot Bitcoin to the Fund's holdings, using EFP transactions on the CME Market, does not significantly alter the influence of the Fund's trading on the CME Market, for the following reasons:

1. *The Fund's limited influence over the market:* As the Commission noted in the

[65] *See https://www.cmegroup.com/trading/equity-index/exchange-for-physical-efp-transactions.html.*

[66] In a cash creation/redemption format, the Authorized Participant delivers cash to the fund instead of Spot Bitcoin.

[67] *See* Approval Order, 87 FR at 21679.

[68] *Id.*

Approval Order,[69] the Commission observed no disruption to the CME or evidence that the Fund exerted a dominant influence on CME Bitcoin futures prices. That being the case, the Sponsor believes that it is very unlikely that the Fund's trading, even with the addition of Spot Bitcoin to its holdings, would become the predominant influence on the futures market.

2. *Spot Bitcoin would be purchased using market-neutral EFP transactions:* The Spot Bitcoin in the Fund's portfolio would be converted from futures positions using EFP transactions on the CME Market. The Fund's Spot Bitcoin holdings would thus be directly linked to the futures market and would not introduce a new, independent variable that could significantly influence the futures market. Indeed, because both sides of the trade track the same benchmark, an EFP is market-neutral and, as such, the pricing of an EFP is quoted in terms of the basis between the price of the futures contract and the level of the underlying index.

3. *Investment restrictions on Spot Bitcoin and futures-based pricing:* The dynamic investment restrictions and futures-based pricing for Spot Bitcoin would ensure that the Fund's Spot Bitcoin holdings remain at a level where they are unlikely to significantly impact the futures market and that the futures market continues to influence the price of the Fund's Spot Bitcoin holdings (and not the other way around).

The Sponsor therefore believes that the proposed addition of Spot Bitcoin to the Fund's holdings would not significantly alter the influence of the Fund's trading on the CME Market and that the proposed design of the Fund's investment strategy ensures that its potential impact on the CME Market is the same or smaller than the previous investment strategy (as represented in the Approval Order).

The Sponsor notes that, as of April 2021 and as noted in the Fund's original proposal to list and trade its Shares on the Exchange, the CME Market was already showing a significant increase in size, as per the table below:[70]

CHICAGO MERCANTILE EXCHANGE BITCOIN FUTURES

	February 26, 2020 (million)	April 7, 2021 (million)
Trading Volume ...	$433	$4,321
Open Interest	238	2,582

The Sponsor notes that growth of the CME Market at that time coincided with similar growth in the Bitcoin spot market. Moreover, the market for Bitcoin futures was and still is rapidly approaching the size of markets for other commodity interests, including interests in metals, agricultural, and petroleum products.

Accordingly, as the CME Market continues to develop and more closely resemble other commodity futures markets, the Sponsor believes that it is reasonable to expect that the relationship between the Bitcoin futures market and Bitcoin spot market will behave similarly to other future/spot market relationships, where the spot market may have no relationship to the futures market (although the current proposal does not depend on such similarity).

In addition, in the time since the Approval Order was issued, there has been significant growth in Bitcoin futures in terms of trading volumes, as reflected in the table below:

CHICAGO MERCANTILE EXCHANGE BITCOIN FUTURES

	April 6, 2022 (million)	June 30, 2023 (million)
Trading Volume ...	$1,692	$3,473
Open Interest	2,529	2,800

The Sponsor also notes that in the same period during which CME Market open interest remained at roughly at the same level, trading volume and open interest of unregulated Bitcoin futures markets had a significant drawdown: [71]

UNREGULATED FUTURES MARKET

	April 7, 2021 (million)	April 6, 2022 (million)	June 30, 2023 (million)
Trading Volume	$68,333	$37,333	$29,693
Open Interest	20,420	13,980	11,630

Furthermore, the Sponsor notes that in the same period the trading volume of spot Bitcoin also fell significantly:

SPOT BITCOIN

	April 7, 2021 (million)	April 6, 2022 (million)	June 1, 2023 (million)
Trading Volume	$698,000	$297,000	$116,000

The Sponsor believes that the data above suggests an increase in market appetite for regulated products (*e.g.,* CME Market Bitcoin futures) vis-a-vis a significant decrease in interest for unregulated products (*e.g.,* unregulated futures and spot Bitcoin).

The Sponsor further believes that an analysis of the data presented above indicates that the CME Market managed to maintain its open interest level despite the price volatility that Bitcoin experienced in 2022, demonstrating its resilience and that it is sufficiently developed such that it is unlikely that trading in the Fund would be the predominant influence on its prices.

The Sponsor further notes that the Commission stated in the Approval Order ''that the CME bitcoin futures market has sufficiently developed to support ETPs seeking exposure to bitcoin by holding CME Bitcoin Futures

[69] *See id.* at 21681.

[70] *See* Securities Exchange Act Release No. 92573 (August 5, 2021), 86 FR 44062 at 44073 (August 11, 2021) (SR–NYSEArca–2021–53) (Notice of Filing of a Proposed Rule Change To List and Trade Shares of Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200–E).

[71] Data in this table is sourced from: *https://www.theblock.co/data/crypto-markets/futures.* Trading volume data for Bitcoin futures in unregulated markets was only available on a monthly frequency. Therefore, the trading volume figures displayed in the table are approximations derived from the daily average trading volumes reported for their respective months.

Contracts.'' [72] The Sponsor believes that the CME Market is also sufficiently developed to support ETPs that seek exposure to Bitcoin by holding a mix of CME Market Bitcoin Futures Contracts and physical Bitcoin through the use of CME Market EFP transactions, because the CME Market is the only market on which the Fund's only proposed non-cash assets would trade. Thus, the CME Market remains the ''significant market'' in relation to the Fund, as proposed.

Moreover, as detailed above, the Sponsor's proposed investment strategy ensures that no unregulated spot exchange could be considered a ''market of relevant size'' in relation to the Fund, given that the Fund does not rely on any information or services coming from unregulated markets. All of the Fund's operations, including the purchase and sale of spot Bitcoin and its NAV determination, are conducted through the CME Market. Thus, all transactions are registered and monitored on a regulated exchange, providing an additional layer of security and transparency. Because any attempt to manipulate the Fund would require significant trading on the CME Market, and not on any unregulated spot Bitcoin exchange, there is significantly reduced potential for manipulation and fraud, further protecting investors and maintaining the integrity of the market.

Futures-Based Spot Price (''FBSP'')

The value of Spot Bitcoin held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (the ''Digital Asset Adviser'') in good faith based on a methodology that is entirely derived from the settlement prices of Bitcoin Futures Contracts on the CME Market and that considers all available facts and all available information on the valuation date.

The method involves a calculation that is sensitive to both the length of time (the ''tenor'') until each Bitcoin Futures Contract is due for settlement and the final settlement price for each contract. The calculation takes into account each contract's tenor and the tenor squared. This approach is designed to give more importance to contracts that are due for settlement in the near term, considering that the prices of these near-term contracts are more reliable indicators of the current spot price of Bitcoin and are also more heavily traded. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Bitcoin Futures Contract to the estimated current spot price of Bitcoin. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor do not use data from Bitcoin exchanges or directly from spot Bitcoin trading activity in determining the value of Spot Bitcoin held by the Fund.

As an example, the table below demonstrates how the weights of each hypothetical Bitcoin Futures Contract change over time as the first contract gets closer to maturity.

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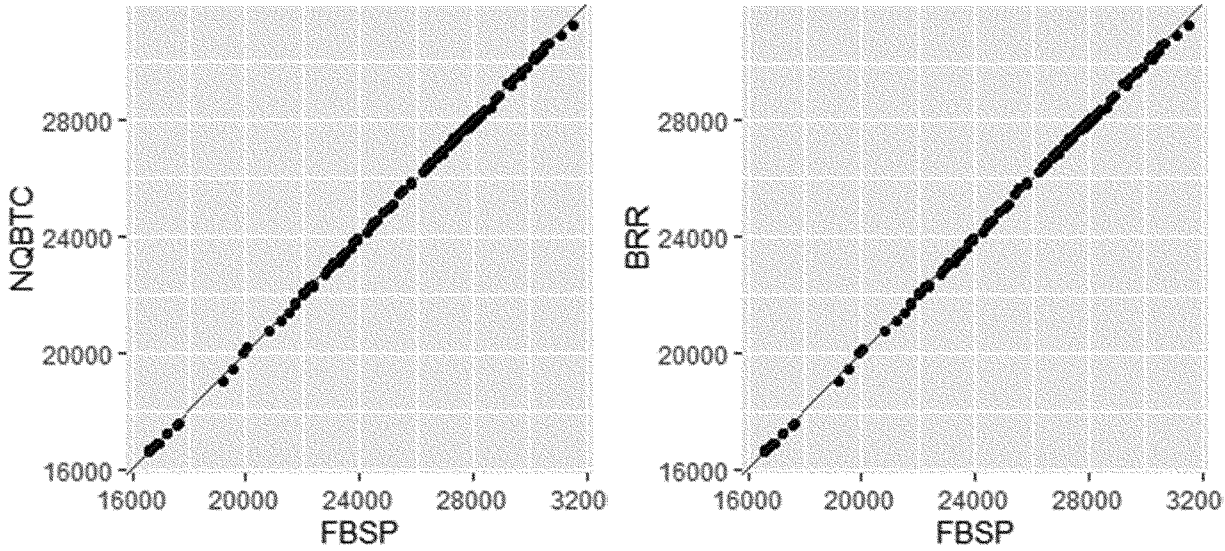
	First future tenor				
Future	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

The Sponsor believes that the accuracy of the proposed pricing methodology can be measured by comparing its pricing results to the real time version of Bitcoin price benchmarks such as CME CF BRR and NQBTCS. FBSP is derived from futures settlement prices, which are usually VWAPs from all contracts traded on Globex between 14:59:00 and 15:00:00 Central Time. Accordingly, for purposes of developing a useful proxy, the Sponsor's analysis uses the arithmetic average of the Benchmark closing prices at 14:59:00 and 15:00:00 CT, which is not sensitive to the fluctuations that occur within this minute. By design, this difference in the price metric introduces an artificial distortion in the comparison, resulting in figures that are less adherent than in reality. Therefore, the figures set forth below represent a conservative estimation of the true adherence between FBSP and the Benchmark, considering that the actual adherence to the Benchmark is higher than these results can indicate.[73]

[72] *See* Approval Order at 21681.

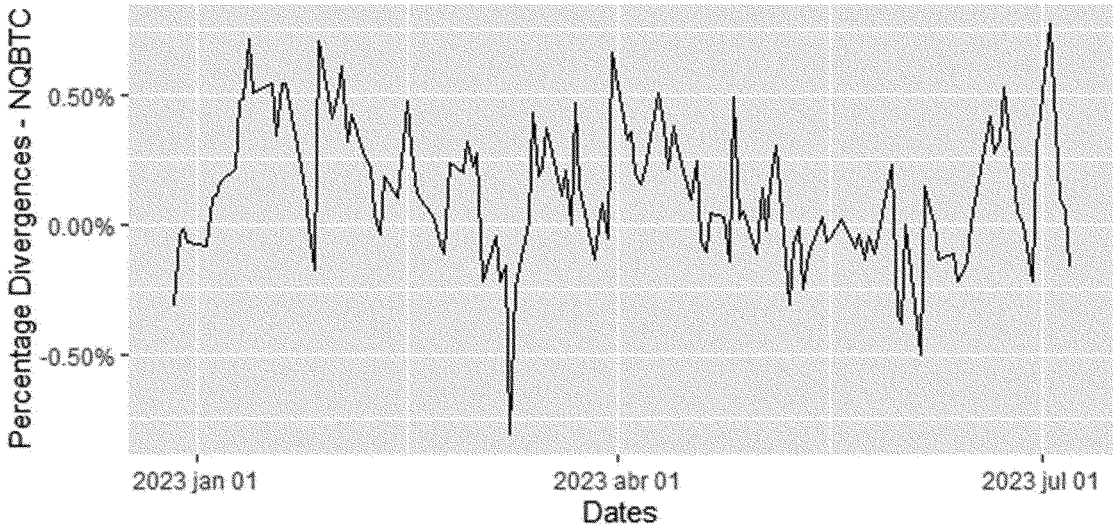
[73] The difference in the price metrics introduces an artificial distortion in the comparison. Indeed, a regression analysis shows that the ratio between the maximum and minimum spot prices within the Bitcoin Futures VWAP window is a significant variable that explains the absolute divergences between FBSP and the spot prices. The higher the ratio between the maximum and minimum spot prices, the higher expected absolute divergence between FBSP and the spot prices. The correlation of these two metrics in the case of the real time version of NQBTCS is approximately 30%, suggesting that the actual adherence between FBSP and the spot benchmarks is even higher than the figures discussed herein indicate.

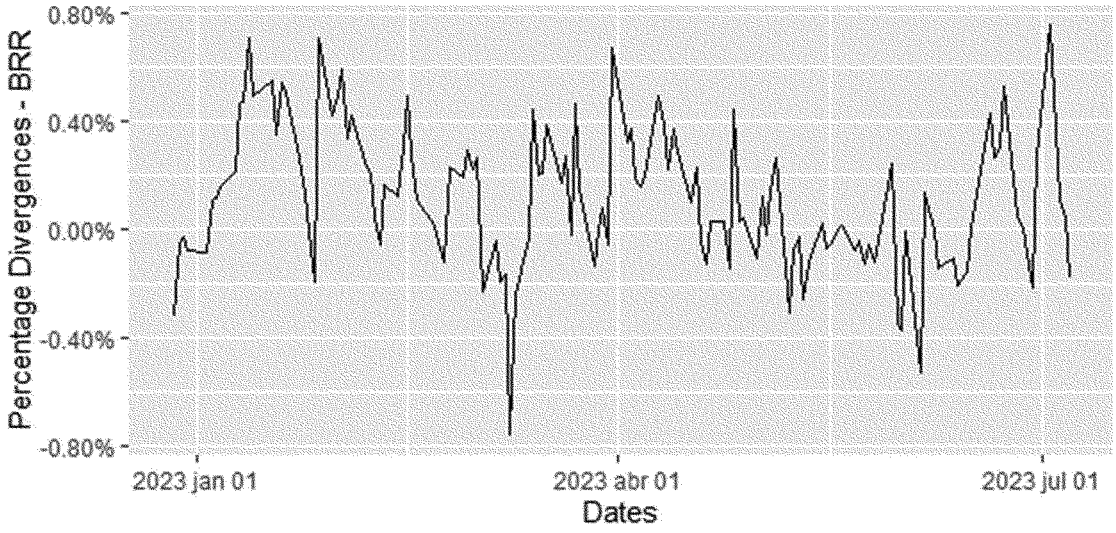
Using data available on Bloomberg on July 10, 2023, the Sponsor compared FBSP to NQBTCS and CME CF BRR from December 27, 2022 to July 7, 2023 and determined that FBSP behaves very similarly to both indexes. The following charts show a direct comparison between those two benchmark values and FBSP:



In the above charts, each black point indicates one day, and their proximity to the red line shows how similar FBSP is to each of NQBTCS and CME CF BRR. The correlations between FBSP and each of NQBTCS and CME CF BRR exceed 99.9%, and the mean absolute percentage divergences are 21 basis points (''bps'') and 22 bps, respectively, while the median absolute percentage divergences are 18 bps and 17 bps, respectively.

The charts below provide another visualization of the results of this comparison, as time series of the percentage divergences:





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These charts show that there are no clusters of abnormal divergences. In both cases, more than 90% of the days exhibit percentage divergences between −50 bps and +50 bps. The highest percentage divergence in absolute terms, with 81 bps for the NQBTCS and 76 bps for the CME CF BRR, was observed on March 9, 2023, and coincided with significant volatility in the Bitcoin markets; on that day, NQBTCS dropped 5.34% from $22,003.92 to $20,827.67 and the FBSP, which settles one hour later, dropped by 9.3%, from $22,055.85 to $20,012.10. The Sponsor notes that, even on the day with the highest percentage divergence between FBSP and the other two benchmarks, that percentage divergence was insignificant in comparison to the intraday volatility of Bitcoin itself and could be attributable to the different market structures of the regulated CME Market and the unregulated spot markets.

The Sponsor believes that this data strongly suggests that FBSP is a suitable choice for the NAV calculation, both for the settlement and the real time proxy, and that the following additional considerations further support the soundness of the FBSP methodology:

- Bitcoin is a highly volatile asset traded in multiple venues across the world, and divergences of the magnitude found in this analysis are not unusual across different price sources or exchanges.
- Although it is not a consensus, academic research [74] has found evidence that CME Bitcoin futures lead spot in the price discovery process, so the divergences presented here are impacted by the possibility that spot prices are delayed.
- As noted above, the mean absolute percentage divergences are 21 bps and 22 bps respectively, the median absolute percentage divergences are 18 bps and 17 bps, and March 9, 2023 was the day with the highest percentage divergence in absolute terms, with 81 bps for the NQBTCS and −76 bps for CME CF BRR. The Sponsor believes that these divergences between FBSP and the underlying benchmarks are in a reasonable range and support that FBSP closely tracks NQBTCS and CME CF BRR.

Finally, the Sponsor notes that, even considering that FBSP could create some level of uncertainty due to the potential divergences between the FBSP and the spot prices observed in unregulated markets, the Authorized Purchasers are able to hedge potential exposure by buying the basket of futures that represents FBSP and selling it during the futures settlement window. In doing so, APs can emulate a situation where they know ex ante the value of the creation basket. The opposite trade can have the same effect for the case of redemptions. Thus, the APs providing liquidity on the secondary market during the day will always be in a position to hedge their exposure using exclusively the CME Market, which will make them more likely to provide liquidity to the Fund thus making its market price converge to its NAV.

Preventing Manipulation

While the Commission has raised valid concerns about the potential influence of unregulated Bitcoin markets on the daily settlement price on CME Market, the Sponsor believes that the proposed methodology described above provides a significant and sufficient degree of insulation from such influences, for the following reasons:

1. *Regulated market influence:* The daily settlement price of Bitcoin Futures Contracts on the CME Market, which is the basis for the NAV calculation of both futures contracts and physical holdings of the Fund, is primarily influenced by trading activity within the regulated futures market itself. This market is subject to stringent oversight and surveillance mechanisms designed to detect and deter manipulative and fraudulent practices, thus significantly limiting the possible influence of unregulated Bitcoin markets on the daily settlement price.

2. *High liquidity and volume:* The CME Market is characterized by high liquidity and trading volume, such that any attempt to influence the daily settlement price through trading activity in other, unregulated Bitcoin markets would require a significant amount of capital and coordination. The Sponsor thus believes that any such manipulation attempts would be highly detectable by the CME Market's market surveillance.

3. *Complex pricing methodology:* The NAV calculation methodology is comprehensive and accounts for both the tenor and final settlement price of each futures contract. In addition, the FBSP used in the NAV calculation methodology incorporates all maturities of Bitcoin Futures Contracts, which exhibit a robust price relationship among themselves. As a result, attempting to manipulate these prices in a coordinated manner to generate a substantial impact on NAV would be very challenging for potential manipulators and likely financially unfeasible. The Sponsor thus believes that the complexity of the methodology provides an additional layer of protection against manipulation, as it would be extremely

[74] *See, e.g.,* Wu, Jinghong; Xu, Ke. *Fractional cointegration in bitcoin spot and futures markets.* The Journal of Futures Markets. Vol. 41, Is. 9 (September 2021), available at: *https://onlinelibrary.wiley.com/doi/epdf/10.1002/fut.22216#pane-pcw-references;* Chang, Alexander and Herrmann, William and Cai, William. *Efficient Price Discovery in the Bitcoin Markets* (October 14, 2020), available at SSRN: *https://ssrn.com/abstract=3733924;* Kapar, Burcu; Olmo, Jose. *An analysis of price discovery between Bitcoin futures and spot markets.* Economics Letters, Vol. 174 (January 2019), available at: *https://www.sciencedirect.com/science/article/abs/pii/S0165176518304440.*

difficult for a manipulator to influence all these factors in a coordinated way to impact the Fund's NAV without leaving a detectable trail that would alert market surveillance.

4. *Focus on near-term contracts:* The Fund's methodology gives more importance to futures contracts that are due for settlement in the near term because such contracts are more heavily traded, and their prices are more reliable indicators of the current spot price of Bitcoin. The Sponsor believes that the methodology's focus on near-term contracts further reduces the potential for manipulation, as these contracts are less susceptible to manipulation due to their higher trading volumes and liquidity.

The Sponsor also believes that it is highly unlikely that a person attempting to manipulate the NAV of the Fund could do so successfully by trading on unregulated spot and derivatives markets. Because of direct arbitrage, it is reasonable to assume that the ETP's market price (in the secondary market) would be highly adherent to the Fund's Intraday Net Asset Value, since APs can always create and redeem shares of the Fund hedging with a basket of Bitcoin Futures Contracts and the value of the creation basket is determined based on the NAV of the Fund, which is calculated using the FBSP prices that is based on such basket of Bitcoin Futures Contracts. Consequently, the likelihood of a potential manipulator of the ETP to succeed by exclusively trading in unregulated Bitcoin markets would depend on how much the prices in these markets have an impact over the CME Bitcoin Futures Contracts prices. The likelihood that a potential manipulator would undertake such an effort is also decreased when considering the financial burden of manipulating the unregulated markets and the overall expected profitability of any such manipulation.

To further assess such likelihood, the Sponsor carried out the following analysis to investigate the relationship between prices from relevant unregulated Bitcoin markets and the prices of the CME Bitcoin Futures Contracts, to assess the impact that a manipulation on those markets would have on CME. The Sponsor collected one-minute bars data between January 18, 2023 and July 26, 2023 [75] of prices for the nearest CME Bitcoin Futures Contract (''CME Futures'') and the following alternative Bitcoin prices (''ABP''): spot Bitcoin (in USD) on each of NQBTCS's Core Exchanges,[76] spot Bitcoin (in USDT), and BTCUSDT USDs-Margined Perpetuals on Binance. For each day and each ABP, a simple regression model was estimated with one-minute CME Futures log-returns as the dependent variable, and two independent variables: (1) the log CME Futures closing price of the previous minute (as a control variable) and (2) the difference between the ABP log return and the CME Futures log return in the previous minute (as the variable of interest).

The estimated coefficients associated with the variable of interest are a measure of the expected response from the CME Futures (as measured by its returns) to a divergence between its own return information and the one from ABP in the near past (one-minute lagged returns). Such divergences are expected to occur in cases of manipulation. A higher coefficient (closer to one) would indicate that CME Futures are more sensitive to and strongly influenced by the divergence, while a lower coefficient (closer to zero) would suggest that CME Futures are less responsive and not significantly influenced by the information coming from ABP. The Sponsor believes that these coefficients can be considered a conservative estimation of the real impact that manipulation in an ABP would have over the CME Futures price because the estimations are calculated under normal circumstances rather than under a manipulative attack, in which some other indicators, such as abnormal volume and volatility, would warn market participants and undermine their perception of the attacked ABP as a reliable price reference.

The results of the Sponsor's analysis are summarized in the table below: [77]

	Estimated Parameters				Market Depth	
ABP	**Average**	**1st Decile**	**Median**	**9th Decile**	**+2% Depth**	**-2% Depth**
Coinbase (spot USD)	0.39	0.21	0.41	0.53	$10,317,109	$17,320,315
Binance (spot USDT)	0.36	0.15	0.38	0.52	$17,523,531	$42,136,404
Kraken (spot USD)	0.22	0.03	0.23	0.40	$28,189,731	$30,375,259
Bitstamp (spot USD)	0.17	0.03	0.18	0.33	$5,083,934	$4,831,827
Gemini (spot USD)	0.15	-0.01	0.16	0.30		
ItBit (spot USD)	0.08	-0.07	0.07	0.23		
Binance (perpetual USDT)	0.01	-0.07	0.00	0.09		

The Sponsor's analysis suggests that the influence of ABP over the CME Futures prices is relatively low. For instance, if a would-be manipulator chose to attack Coinbase, which is an ABP with higher coefficients and thus higher potential to impact CME futures, the average coefficient of 0.39 means that in order to manipulate CME Futures prices by 1%, the would-be manipulator would have to distort Coinbase prices by more than 2.5% (1% divided by 0.39) on average. To be successful with 90% confidence (1st Decile) this manipulator would have to distort Coinbase prices by more than 4.7% (1% divided by 0.21). The Sponsor believes that its analysis supports that, even considering these conservative estimations, indirect manipulation would be extremely inefficient.

The market depth columns in the above table indicate that substantial financial resources, running into tens of millions of dollars, are present on both sides of the order book for the most influential ABPs (even without including hidden orders, bots, and arbitrageurs that effectively enhance liquidity). The considerable financial commitment that would be required makes the manipulation of these prices an expensive endeavor.

The Sponsor believes that its analysis demonstrates that the low efficiency of attempts to manipulate ABPs, coupled with the significant cost involved in influencing impactful ABPs, makes potential manipulation of spot Bitcoin markets an unattractive proposition, and that it is therefore highly unlikely that a potential manipulator of the ETP

[75] This date range represents days with intraday data available on Bloomberg as of July 27, 2023. Days with less than 40 observations for a given ABP were excluded from the analysis of such ABP.

[76] The core exchanges as of December 31, 2022 were BitStamp, Coinbase, Gemini, itBit, and Kraken.

[77] The market depth information was obtained from CoinMarketCap on July 19, 2023. The ABPs with blank cells in this table were not included in the July 19, 2023 snapshot.

could succeed by exclusively trading in unregulated Bitcoin markets. The combination of the high costs and the inefficiencies associated with manipulation makes it a daunting and unprofitable venture.

In summary, while the Sponsor acknowledges the potential for influence from trades settled in unregulated Bitcoin markets, the Sponsor believes that the NAV calculation methodology, coupled with the inherent characteristics of the CME, provides a significant degree of protection against such influence being deliberately used to manipulate the Fund's market price or NAV without it being subject to detection by CME market surveillance.

Investment Strategy

The Sponsor believes that the investment strategy of the Fund is designed to mitigate the risk of manipulation by diversifying its holdings and is responsive to the Commission's concerns with respect to an ETP that holds spot Bitcoin. Instead of holding 100% spot Bitcoin, which could make it more susceptible to price manipulation in the spot market, the Fund will hold a mix of Spot Bitcoin, Bitcoin Futures Contracts, and cash. This diversified portfolio is subject to investment restrictions, which further reduces the potential for manipulation, as explained below:

1. *Diversification:* By holding a combination of Spot Bitcoin, Bitcoin Futures Contracts, and cash, the Fund reduces its exposure to any single asset class. This diversification also makes it more difficult for a would-be manipulator to influence the NAV of the Fund by manipulating the price of spot Bitcoin alone; for instance, even if a manipulator were able to influence the spot price of Bitcoin, their actions would only affect a portion of the Fund's portfolio, thereby limiting the overall impact of such manipulation on the Fund's NAV.

2. *Investment restrictions:* The Fund's holdings of Spot Bitcoin would be subject to investment restrictions, which are further discussed below. These restrictions cap the amount of Spot Bitcoin that the Fund can hold, further reducing the potential for manipulation by, for example, preventing the Fund from becoming so large in relation to the spot market that it could be manipulated without influencing the futures market. The Sponsor believes that these investment restrictions ensure that any significant trading activity aimed at manipulating the Fund would likely spill over into the CME Market, a regulated market with robust surveillance mechanisms in place to detect and deter manipulation, and with which the Exchange could receive information pursuant to common ISG membership.

3. *Reduced dependence on spot market:* By holding Bitcoin Futures Contracts and cash in addition to Spot Bitcoin, the Fund reduces its dependence on the spot market, thereby mitigating concerns about potential manipulation in unregulated Bitcoin spot exchanges. Instead, the Fund will rely on Bitcoin Futures Contracts and Bitcoin futures EFPs that are traded on the CME Market, a regulated exchange, which provides a higher level of transparency and oversight compared to unregulated spot exchanges.

4. *Dynamic adjustment:* The mix of Spot Bitcoin, Bitcoin Futures Contracts, and cash in the Fund's portfolio can be dynamically adjusted based on market conditions and regulatory developments. This flexibility allows the Fund to respond quickly to any signs of potential manipulation or other market abuses, further enhancing its resilience against manipulation.

In summary, by diversifying its holdings and imposing investment restrictions, the Fund reduces its vulnerability to manipulation in any single market, thereby protecting investors and maintaining the integrity of the Fund.

Investment Restrictions on Spot Bitcoin

According to the Sponsor, the Fund will be subject to investment restrictions on Spot Bitcoin (the ''Investment Restrictions'') that are specific constraints on its exposure to Bitcoin, particularly with respect to spot holdings. These investment restrictions are designed to mitigate the risk of manipulation of the Fund's Shares by insulating the Fund from events impacting the Bitcoin spot market, are not fixed, and may be adjusted based on factors such as the Commission's recognition of the CME as a regulated market of significant size related to spot Bitcoin, the NAV of the Fund, and the prevailing trading conditions on the core exchanges of the Benchmark.

The Sponsor believes that the Investment Restrictions are intended to ensure that the Fund's notional exposure to Bitcoin will be restricted to a set proportion and are currently set at 100% of the 30-day Average Daily Traded Volume (''ADTV'') on the core exchanges of the NQBTCS that are subject to regulatory and reporting rules in the United States, including companies that are publicly traded in the United States.[78] The Sponsor believes that the Investment Restrictions serve two main purposes:

1. They deter potential manipulative actions directed towards the Fund's Shares by making the cost-benefit tradeoff highly unfavorable for the manipulator. To manipulate the Fund's price using an unregulated spot market, a manipulator would need to transact a volume that surpasses the Fund's total exposure in spot Bitcoin, making the potential costs of manipulation outweigh the benefits.

2. They ensure that the Fund's trading activities do not become the primary driving force behind price variations in the Bitcoin spot market. By restricting the Fund's notional exposure to a proportion of the ADTV, this constraint ensures that the Fund's trading activities are always a fraction of the overall market activity, thereby reducing the potential for the Fund to unduly influence market prices.

As an example, in the 30-day period ending on August 31, 2023, the ADTV of spot Bitcoin on Coinbase was $293 million. Thus, the Fund's notional exposure to Bitcoin is restricted to up to $293 million, meaning that if the Fund's AUM is, for example, $250 million, it could have up to 100% allocation to Spot Bitcoin. However, if the Fund's AUM is, for example, $1 billion, it could still only have up to $293 million of notional exposure to Spot Bitcoin, which would be the equivalent of up to 29% of the Fund's NAV, and the rest of the portfolio would need to be allocated to Bitcoin Futures Contracts, cash, or cash equivalents.

To ensure that the Fund's trading activities do not become the primary driving force of the Spot Bitcoin price, the Sponsor intends to keep its notional allocation to spot Bitcoin as a small proportion of the overall trading activity of spot bitcoin.

The Sponsor intends to do so by restricting the maximum notional exposure to Spot Bitcoin to a proportion of the 30-day ADTV, with the ADTV data based on the most trusted exchanges (meeting the double requirements of being a core exchange per the NQBTCS methodology and being subject to regulatory and reporting rules in the United States, which make them liable for any false volume data reporting).

Currently, only one exchange meets those requirements, and over the last three months, it accounted for 4.30% to 5.70% of all Bitcoin trading, whereas the largest unregulated spot Bitcoin exchange accounted for over 50% of the spot Bitcoin volume.[79]

[78] The Sponsor believes that the methodology could significantly reduce the potential influence of malicious agents targeting the Fund by only accepting data from sources subject to regulatory regimes that obligate them to ensure the integrity of data reported. As of the date of this filing, Coinbase Inc. is the only Bitcoin Exchange to satisfy this criterion.

[79] Source: *https://www.theblock.co/data/crypto-markets/spot/the-block-legitimate-volume-index-btc-only.*

SPOT BITCOIN 30-DAY ADTV [80]

	June 30, 2023	July 31, 2023	August 31, 2023
Top 10 Exchanges	$7,646.21 million	$5,569.71 million	$6,853.92 million.
Single Core Exchange meeting Sponsor's requirement	$419.60 million	317.43 million	$293.84 million.
Single Core Exchange's market share	5.5%	5.7%	4.3%.
All 5 Core Exchanges	$624.74 million	$438.04 million	$411.51 million.
All 5 Core Exchanges' market share	8.2%	7.9%	6.0%.

The Sponsor believes that it is therefore unlikely that the single exchange on which the Sponsor bases the ADTV data on will be the primary driver of spot Bitcoin price given its rather small market share. As a result, even with the Fund's notional Spot Bitcoin exposure limited at 100% of the ADTV on that single exchange, the Fund's Spot Bitcoin holdings would likely represent only 4.30% to 5.79% of the daily liquidity of the spot Bitcoin market and thus is unlikely to become the primary driver of the spot market price formation.

Additionally, with the spot Bitcoin notional exposure at 4.30% to 5.70% of ADTV, a would-be manipulator would need to trade on exchanges that account for most of the liquidity and, in particular, the largest one. The Sponsor believes that the cost benefit analysis of attempting to distort the price on the largest exchange, which accounts for approximately 50% of the liquidity (or approximately 9 times the size of the Fund), to manipulate the price of the Fund would not be compelling.

In summary, the Sponsor believes that the Investment Restrictions are a key tool in the Fund's strategy to prevent manipulation. By limiting the Fund's exposure to the spot market and ensuring that the Fund's trading activities do not become the predominant influence on market prices, these restrictions provide a robust defense against potential manipulation attempts.

Creations and Redemptions

According to the Sponsor (and as discussed further below), the Fund uses cash creations and redemptions. With respect to Spot Bitcoin, an Authorized Purchaser delivers cash to the Fund instead of Spot Bitcoin in the creation process, and an Authorized Purchaser receives cash instead of Spot Bitcoin in the redemption process. The cash delivered or received during the creation or redemption process is then used by the Sponsor to purchase or sell Bitcoin Futures Contracts with an aggregate market value that approximates the amount of cash received or paid upon the creation or redemption. On a daily basis, the Sponsor will analyze the current portfolio allocation of the Fund between Spot Bitcoin and Bitcoin Futures Contracts and, based on the Investment Restrictions and target portfolio exposure, may decide to engage in an EFP transaction on CME to buy or sell Spot Bitcoin for the equivalent position in Bitcoin Futures Contracts.

The Sponsor believes that this method protects against manipulation in the creation and redemption process and of the Fund's market price from trading in unregulated spot markets. Investment in spot Bitcoin will not be directly related to creation or redemption of Fund Shares, but instead on target portfolio exposure, such that trades can be performed in smaller sizes and at unpredictable times, reducing the risk of creation or redemption manipulation.

The Sponsor believes that the use of cash creations and redemptions in the Fund serves as a deterrent to manipulation in several ways:

1. *Decoupling from spot market:* By using cash instead of Spot Bitcoin for creations and redemptions, the Fund's operations are decoupled from the unregulated spot market. The creation and redemption process does not directly influence the unregulated spot market or vice versa, thereby reducing the potential for manipulation through this process.

2. *Unpredictable trading times:* The Fund's investment in Spot Bitcoin is not directly related to creations or redemptions, but instead on target portfolio exposure. As a result, trading can be done in smaller sizes and at unpredictable times, making it harder for potential manipulators to time their actions.

3. *Reduced impact of large trades:* By effecting creations and redemptions in cash, large trades that could potentially influence the unregulated spot market are mitigated. Instead, these trades are absorbed in the CME Market, which is sufficiently liquid and can reasonably be relied upon to assist in detecting and deterring fraudulent or manipulative misconduct.

4. *Reduced influence from unregulated spot exchanges:* In-kind creation may create a direct relationship between the Fund's market price and prices on unregulated exchanges such as Binance by arbitrage, because an AP could buy or sell Bitcoin from Binance and receive or deliver Bitcoin from the Fund through the creation or redemption process. With creations and redemptions in cash, however, that arbitrage cannot be executed without going through pricing and trading on the CME Market. Thus, the Sponsor believes that, by removing this direct causal relationship between unregulated markets and the Fund's market price, it is unlikely that a person attempting to manipulate the ETP would be reasonably successful by trading only on unregulated spot exchanges, such that the Exchange's common ISG membership with the CME Market would assist NYSE Arca in detecting and deterring misconduct.

The Sponsor believes that the Fund's creation and redemption process is designed to minimize the potential for market manipulation, thereby protecting investors and maintaining the integrity of the markets.

Exchange for Physical Transactions

EFP transactions, also known as Exchange for Related Position or EFRP transactions,[81] are a type of private agreement between two parties to trade a futures position for the underlying asset. In the context of the Fund, these transactions will be used to purchase and sell Spot Bitcoin by delivering or receiving the equivalent futures position.

In an EFP transaction, two parties exchange equivalent but offsetting positions in a Bitcoin Futures Contract and the underlying physical Bitcoin. One party is the buyer of futures and the seller of the physical Bitcoin, and the other party takes the opposite position (seller of futures and buyer of physical). While the EFP is a privately-negotiated transaction between the two parties to the trade, the consummated transaction must be reported to CME Market and its conditions and prices are subject to CME Market's market regulation oversight.

EFPs may be transacted at such commercially reasonable prices as are mutually agreed upon by the parties to the transaction, provided that the price conforms to the applicable futures price increments set forth for the relevant Futures contract. The Sponsor believes that EFPs executed at off-market prices

[80] Source: Messari, volume data is for USD, USDT and USDC traded against Bitcoin Core Exchanges.

[81] *See https://www.cmegroup.com/clearing/operations-and-deliveries/accepted-trade-types/efp-efr-eoo-trades.html.*

are more likely to be reviewed by CME's Market Regulation. CME's Rule 538 establishes that ''EFPs may not be priced off-market for the purpose of shifting substantial sums of cash from one party to another, to allocate gains and losses between the futures or options on futures and the cash or OTC derivative components of the EFRP, to evade taxes, to circumvent financial controls by disguising a firm's financial condition, or to accomplish some other unlawful purpose.''

Because both sides of the trade track the same benchmark (Bitcoin), an EFP is market-neutral. As such, the pricing of an EFP is quoted in terms of the basis between the price of the futures contract and the level of the underlying Bitcoin. Because the Fund proposes to use EFP transactions to purchase and sell Spot Bitcoin, the only non-cash assets held by the Fund (Bitcoin Futures Contracts and Bitcoin) are traded on CME Market. Because the Exchange and the CME Market are both ISG members, information shared by the CME Market with the Exchange can be used to assist in detecting and deterring fraudulent or manipulative misconduct related to those assets.

In the proposed strategy for the operation of the Fund, every time the Fund is required to purchase or sell Bitcoin, the Sponsor will perform a request for quotation auction (''RFQ Auction'') with multiple market makers using the settlement price as the reference for the futures contracts. Market makers present their quotes in terms of basis points (''bps''), where 1bp = 0.01% between the futures contract price and the spot price. The Sponsor will then confirm the trade with the best offer and report the EFP transaction to the CME Market. The Sponsor believes that performing an RFQ Auction with multiple market makers is an efficient price formation mechanism that generates enough competition and attracts sufficient liquidity to minimize the transaction costs for the ETP.

As an example, assume that the Fund needs to buy 50 bitcoins (BTC) in exchange for 10 units of the next maturity of Bitcoin Futures Contracts (''BTCA''). The Sponsor will perform an RFQ Auction by requesting 3 market makers to provide their best price for buying BTCA versus BTC. The Market Makers provide a bid/ask quote in terms of basis between the futures and spot. Market Maker 1 (MM1) bids +22bps, Market Maker 2 (MM2) bids +20bps, and Market Maker 3 (MM3) bids +25bps. The Sponsor will then agree to pay the best bid of +25bps from MM3. Assuming BTCA is at $26,060, the price for the spot transaction is fixed at $25,995.01. The transaction is then reported within the time period and in the manner specified by the CME Market. Upon completion of the EFP, the Fund and MM3 would have different positions but same exposure:

- The Fund was long 10 Bitcoin Futures Contracts and now has converted this exposure into 50 Bitcoins.
- MM3 had 50 Bitcoins and now holds an equal position long 10 Bitcoin Futures Contracts.

The table below illustrates the steps in this EFP transaction:

Steps	MM3	Fund
1. Starting position	50 BTC	10 BTCA.
2. EFP is privately negotiated	MM3 and the Fund agree to terms of the EFP: • Fund sells/MM3 buys 10 BTCA at $26,060. • Fund buys/MM3 sells 50 BTC at 25,995.01 (+25bps).	
3. MM3 sends bitcoin to the Fund	−50 BTC	+50 BTC.
4. EFP reported to CME	+10 BTCA	−10 BTCA.
5. Final position	10 BTCA	50 BTC.

As required by CME Market's regulation, the Fund and all other parties related to the transaction will maintain all records relevant to this transaction, including order tickets, RFQ Auction message history, and custody transaction records, and provide them to CME upon request for surveillance purposes pursuant to CFTC Regulation 1.35.

EFP volumes are reported daily on the CME Group website. Historically, trading activity in EFP transactions is sporadic as it depends on the demand for a regulated conversion between futures and spot positions. Nonetheless, the Sponsor believes that a large number of liquidity providers are ready to execute this type of transaction and can provide enough liquidity to support the proposed ETP's demand. A subset of firms that are ready to provide liquidity on EFP Bitcoin transactions is available on CME's website.[82]

The Sponsor believes that EFP transactions are a powerful tool in preventing market manipulation for several reasons:

1. *Regulated environment:* EFP transactions occur on the CME Market, which is a regulated exchange with processes in place to prevent market manipulation, including monitoring transaction prices and investigating potential manipulations, as outlined in CME Rule 538.[83] All transactions are monitored and subject to rules and regulations designed to prevent market manipulation. Moreover, all parties to an EFP transaction are required to maintain all records relevant to the transaction pursuant to CFTC Regulation 1.35, thus providing the ability for CME and the CFTC to conduct surveillance inquiries and investigations in an efficient and effective manner for the protection of customers and ensuring market integrity. Furthermore, as an additional protection measure, to enforce the highest standard on the sourcing of such underlying physical Bitcoin, the Sponsor represents that it will only participate in EFP transactions with broker-dealers that are FINRA regulated or part of corporate groups that are, which would provide another layer of regulatory oversight in how Bitcoin exposures are sourced, as those counterparties already have an ongoing commercial relationship with the Sponsor and are active participants in trading Bitcoin regulated products worldwide.

2. *Surveillance-sharing agreement:* NYSE Arca and the CME Market are both members of the ISG, which allows for the sharing of information and cooperation in investigations, which can help detect and deter market manipulation.

3. *Transparency:* EFP transactions must be reported to the CME Market, which is a regulated exchange, providing transparency and making it more difficult for manipulative practices to go unnoticed. Parties to EFP transactions must maintain all records relevant to the CME futures contract and the related position transaction, pursuant to CFTC Regulation 1.35, adding another layer of regulatory scrutiny and transparency. In addition, EFP transactions volumes are required to be reported with the daily large trader positions by each clearing member, omnibus account, and foreign broker.

4. *Market-neutrality:* Because EFP transactions involve exchanging equivalent

[82] *See https://www.cmegroup.com/trading/bitcoin-brokers-and-block-liquidity-providers.html.*

[83] *See https://www.cmegroup.com/rulebook/files/cme-group-Rule-538.pdf.*

but offsetting positions, they are market-neutral. As a result, EFP transactions do not create imbalances in the market that could be exploited for manipulative purposes.

5. *Unpredictability:* EFP transactions are privately negotiated between the fund and other parties, making them less predictable and therefore more difficult to manipulate.

The Sponsor believes that, by using EFP transactions to purchase and sell spot Bitcoin, the Fund would ensure that its operations are conducted in a regulated, transparent, and market-neutral manner, significantly reducing the dependency on and the risk of manipulation from unregulated spot exchanges.

Settlement of BTC Contracts and MBT Contracts

According to the Registration Statement, each BTC Contract and MBT Contract settles daily to the BTC Contract volume-weighted average price (''VWAP'') of all trades that occur between 2:59 p.m. and 3:00 p.m. Central Time, the settlement period, rounded to the nearest tradable tick.[84]

BTC Contracts and MBT Contracts each expire on the last Friday of the contract month and are settled with cash. The final settlement value is based on the CME CF BRR at 4:00 p.m. London time on the expiration day of the futures contract.

As proposed, the Fund will rollover its soon to expire Bitcoin Futures Contracts to extend the expiration or maturity of its position forward by closing the initial contract holdings and opening a new longer-term contract holding for the same underlying asset at the then-current market price. The Fund does not intend to hold any Bitcoin futures positions into cash settlement.

[84] VWAP is calculated based first on Tier 1 (if there are trades during the settlement period); then Tier 2 (if there are no trades during the settlement period); and then Tier 3 (in the absence of any trade activity or bid/ask in a given contract month during the current trading day, as follows: Tier 1: Each contract month settles to its VWAP of all trades that occur between 14:59:00 and 15:00:00 CT, the settlement period, rounded to the nearest tradable tick. If the VWAP is exactly in the middle of two tradable ticks, then the settlement will be the tradable price that is closer to the contract's prior day settlement price. Tier 2: If no trades occur on CME Globex between 14:59:00 and 15:00:00 CT, the settlement period, then the last trade (or the contract's settlement price from the previous day in the absence of a last trade price) is used to determine whether to settle to the bid or the ask during this period. a. If the last trade price is outside of the bid/ask spread, then the contract month settles to the nearest bid or ask price. b. If the last trade price is within the bid/ask spread, or if a bid/ask spread is not available, then the contract month settles to the last trade price. Tier 3: In the absence of any trade activity or bid/ask in a given contract month during the current trading day, the daily settlement price will be determined by applying the net change from the preceding contract month to the given contract month's prior daily settlement price.

Net Asset Value

According to the Registration Statement, the Fund's NAV per Share will be calculated by taking the current market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares.

The Administrator of the Fund will calculate the NAV once each trading day, as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. Eastern Standard Time (EST).

According to the Registration Statement, to determine the value of Bitcoin Futures Contracts, the Fund's Administrator will use the Bitcoin Futures Contract settlement price on the exchange on which the contract is traded, except that the ''fair value'' of Bitcoin Futures Contracts (as described in more detail below) may be used when Bitcoin Futures Contracts close at their price fluctuation limit for the day. The Fund's Administrator will determine the value of Fund investments as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. EST. The Fund's NAV will include any unrealized profit or loss on open Bitcoin futures contacts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

According to the Registration Statement, the fair value of the Fund's holdings will be determined by the Fund's Sponsor in good faith and in a manner that assesses the future Bitcoin market value based on a consideration of all available facts and all available information on the valuation date. When a Bitcoin Futures Contract has closed at its price fluctuation limit, the fair value determination will attempt to estimate the price at which such Bitcoin Futures Contract would be trading in the absence of the price fluctuation limit (either above such limit when an upward limit has been reached or below such limit when a downward limit has been reached). Typically, this estimate will be made primarily by reference to exchange traded instruments at 4:00 p.m. EST on settlement day. The fair value of BTC Contracts and MBT Contracts may not reflect such security's market value or the amount that the Fund might reasonably expect to receive for the BTC Contracts and MBT Contracts upon its current sale.

According to the Registration Statement and as discussed above, the value of Spot Bitcoin held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (the ''Digital Asset Adviser'') via an FBSP methodology that is sensitive to both the tenor of a Bitcoin Futures Contract and the final settlement price for such contract. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Bitcoin Futures Contract to the estimated current spot price of Bitcoin. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor will not use data from Bitcoin exchanges or directly from spot Bitcoin trading activity in determining the value of Spot Bitcoin held by the Fund.

Indicative Fund Value

According to the Registration Statement, in order to provide updated information relating to the Fund for use by investors and market professionals, ICE Data Indices, LLC will calculate an updated Indicative Fund Value (''IFV''). The IFV will be calculated by using the prior day's closing NAV per Share of the Fund as a base and will be updated throughout the Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T. to reflect changes in the value of the Fund's holdings during the trading day.

The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session.[85]

Creation and Redemption of Shares

According to the Registration Statement, the Shares issued by the Fund may only be purchased by Authorized Purchasers and only in blocks of 12,500 Shares called ''Creation Baskets.'' The amount of the purchase payment for a Creation Basket is equal to the total NAV of Shares in the Creation Basket. Similarly, only Authorized Purchasers may redeem Shares and only in blocks of 12,500 Shares called ''Redemption Baskets.'' The amount of the redemption proceeds for a Redemption Basket is equal to the total NAV of Shares in the Redemption Basket. The purchase price for Creation Baskets and the redemption price for Redemption Baskets are the actual NAV calculated at the end of the business day when a request for a purchase or redemption is received by the Fund. Shares of the Fund will be created and redeemed in cash.

Authorized Purchasers will be the only persons that may place orders to create and redeem Creation Baskets. Authorized Purchasers must be (1) either registered broker-dealers or other securities market participants, such as

[85] Several major market data vendors display and/or make widely available IFVs taken from the Consolidated Tape Association (''CTA'') or other data feeds.

banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions, and (2) DTC Participants. An Authorized Purchaser is an entity that has entered into an Authorized Purchaser Agreement with the Sponsor.

An Authorized Purchaser delivers cash to the Fund in the creation process, and an AP receives cash in the redemption process. The cash delivered or received during the creation or redemption process is then used by the Sponsor to purchase or sell Bitcoin Futures Contracts with an aggregate market value that approximates the amount of cash received or paid upon the creation or redemption. On a daily basis, the Sponsor will analyze the current portfolio allocation of the Fund between Spot Bitcoin and Bitcoin Futures Contracts and, based on the Investment Restrictions, may decide to engage in an EFP transaction on CME to buy or sell Spot Bitcoin for the equivalent position in Bitcoin Futures Contracts.

Creation Procedures

According to the Registration Statement, on any ''Business Day,'' an Authorized Purchaser may place an order with the Transfer Agent to create one or more Creation Baskets. For purposes of processing both purchase and redemption orders, a ''Business Day'' means any day other than a day when the CME or the New York Stock Exchange is closed for regular trading. Purchase orders for Creation Baskets must be placed by 3:00 p.m. EST or one hour prior to the close of trading on the New York Stock Exchange, whichever is earlier. The day on which the Distributor receives a valid purchase order is referred to as the purchase order date. If the purchase order is received after the applicable cut-off time, the purchase order date will be the next Business Day. Purchase orders are irrevocable.

By placing a purchase order, an Authorized Purchaser agrees to deposit cash with the Custodian.

Redemption Procedures

According to the Registration Statement, the procedures by which an Authorized Purchaser can redeem one or more Creation Baskets will mirror the procedures for the creation of Creation Baskets. On any Business Day, an Authorized Purchaser may place an order with the Transfer Agent to redeem one or more Creation Baskets.

The redemption procedures allow Authorized Purchasers to redeem Creation Baskets. Individual shareholders may not redeem directly from the Fund. By placing a redemption order, an Authorized Purchaser agrees to deliver the Creation Baskets to be redeemed through DTC's book entry system to the Fund by the end of the next Business Day following the effective date of the redemption order or by the end of such later business day.

Determination of Redemption Distribution

According to the Registration Statement, the redemption distribution from the Fund will consist of an amount of cash and/or cash equivalents that is in the same proportion to the total assets of the Fund on the date that the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received.

Delivery of Redemption Distribution

According to the Registration Statement, an Authorized Purchaser who places a purchase order will transfer to the Custodian the required amount of cash and/or cash equivalents by the end of the next business day following the purchase order date or by the end of such later business day, not to exceed three business days after the purchase order date, as agreed to between the Authorized Purchaser and the Custodian when the purchase order is placed (the ''Purchase Settlement Date''). Upon receipt of the deposit amount, the Custodian will direct DTC to credit the number of Creation Baskets ordered to the Authorized Purchaser's DTC account on the Purchase Settlement Date.

Availability of Information

The NAV for the Fund's Shares will be calculated and disseminated daily and will be made available to all market participants at the same time. The intraday, closing prices, and settlement prices of the Bitcoin Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Complete real-time data for the Bitcoin Futures Contracts will be available by subscription through on-line information services. ICE Futures U.S. and CME also provide delayed futures and options on futures information on current and past trading sessions and market news free of charge on their respective websites. The specific contract specifications for Bitcoin Futures Contracts will also be available on such websites, as well as other financial informational sources. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. Quotation information for cash equivalents and commodity futures may be obtained from brokers and dealers who make markets in such instruments. Intra-day price and closing price level information for the Benchmark will be available from major market data vendors. The Benchmark value will be disseminated once every 15 seconds during the Core Trading Session. The Benchmark components and methodology will be made publicly available. The IFV will be available through on-line information services.

In addition, the Fund's website, *https://hashdex-etfs.com/,* will display the applicable end of day closing NAV. The daily holdings of the Fund will be available on the Fund's website. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Shares' ticker and CUSIP information along with additional quantitative information updated on a daily basis, including: (1) the prior Business Day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the bid/ask spread at the time of NAV calculation (the ''Bid/Ask Price'') against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of the Fund's holdings, (ii) the counterparty to and value of forward contracts and any other financial instruments tracking the Benchmark, and (iii) the total cash and cash equivalents held in the Fund's portfolio, if applicable.

The Fund's website will be publicly available at the time of the public offering of the Shares and accessible at no charge.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of

the Fund.[86] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in BTC and/or MBT Contracts and the securities and/or the financial instruments composing the daily disclosed portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The Exchange may halt trading during the day in which an interruption to the dissemination of the IFV or the value of the Benchmark occurs. The Benchmark value will be disseminated once every 15 seconds during the Core Trading Session. The Benchmark components and methodology will be made publicly available. If the interruption to the dissemination of the IFV, or to the value of the Benchmark persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. in accordance with NYSE Arca Rule 7.34–E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.500–E. The trading of the Shares will be subject to NYSE Arca Rule 8.500–E(g), which sets forth certain restrictions on Equity Trading Permit Holders (''ETP Holders'') acting as registered Market Makers in Trust Issued Receipts [sic] to facilitate surveillance. Pursuant to NYSE Arca Rule 8.500–E(f), an ETP Holder acting as a registered Market Maker in Trust Units must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the Market Maker may have or over which it may exercise investment discretion. No Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records, the ETP Holder acting as a Market Maker in Trust Units shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

For initial and continued listing, the Fund will be in compliance with Rule 10A–3 under the Act, the Trust will rely on the exception contained in Rule 10A–3(c)(7).[87] A minimum of 50,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

Surveillance

The Exchange represents that trading in the Shares of the Fund will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[88] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares, the physical commodities underlying the futures contracts through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in futures contracts) occurring on US futures exchanges, which are members of the ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Bitcoin Futures Contracts held by the Fund will be listed on an exchange that is a member of the ISG or is a market with which the Exchange has a CSSA.[89]

All statements and representations made in this filing regarding (a) the description of the portfolios of the Fund

[86] *See* NYSE Arca Rule 7.12–E.

[87] *See* Rule 10A–3(c)(7), 17 CFR 240.10A–3(c)(7) (stating that a listed issuer is not subject to the requirements of Rule 10A–3 if the issuer is organized as an unincorporated association that does not have a board of directors and the activities of the issuer are limited to passively owning or holding securities or other assets on behalf of or for the benefit of the holders of the listed securities).

[88] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[89] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Fund may trade on markets that are members of ISG or with which the Exchange has in place a CSSA.

or Benchmark, (b) limitations on portfolio holdings or the Benchmark, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading of the Shares, the Exchange will inform its ETP Holders in an information bulletin (''Information Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) the risks involved in trading the Shares during the Early and Late Trading Sessions when an updated IFV will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares in Creation Baskets and Redemption Baskets (and that Shares are not individually redeemable); (3) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (4) how information regarding the IFV is disseminated; (5) how information regarding portfolio holdings is disseminated; (6) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (7) trading information.

In addition, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Fund. The Exchange notes that investors purchasing Shares directly from the Fund will receive a prospectus. ETP Holders purchasing Shares from the Fund for resale to investors will deliver a prospectus to such investors. The Information Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. In addition, the Information Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement.

The Information Bulletin will also disclose the trading hours of the Shares and that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day. The Information Bulletin will disclose that information about the Shares will be publicly available on the Fund's website.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [90] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes the proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest because it would reflect the change in the Fund's name, as set forth in the Registration Statement. Specifically, the proposed rule change would reflect a change in the Fund's name from the Hashdex Bitcoin Futures ETF to the Hashdex Bitcoin ETF. The proposed change is also designed to remove impediments to and perfect the mechanism of a free and open market, promote just and equitable principles of trade, and protect investors and the public interest by ensuring that the Fund's name is consistent with the Registration Statement and reflects the Fund's proposed updated investment strategy.

The Exchange believes that the proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market and, in general to protect investors and the public interest because the NQBTCS would provide reliable pricing on which to base the Benchmark because it is administered by an independent index administrator, it is intended to provide an institutional-grade reference price for Bitcoin, and the pricing methodology underlying the NQBTCS is reasonably designed to be resistant to potential price manipulation. Specifically, NQBTCS is calculated via a rigorous and publicly available methodology that incorporates trade data captured from cryptocurrency exchanges that meet eligibility criteria of the NCI and that is designed to adjust for variances in price, volume and volatility across a wide range of sources, as well as to protect against the impact of anomalous trading activity that could impact the NQBTCS price. Accordingly, the proposed use of NQBTCS would remove impediments to and perfect the mechanism of a free and open market and, in general to protect investors and the public interest by allowing the Fund to calculate a Benchmark that would track Bitcoin pricing broadly, consistent with the proposed change regarding the Fund's investment strategy as discussed above.

The Exchange believes the proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest because it reflects the Fund's proposed investment strategy, through which the Fund would seek to achieve its investment objectives by investing in both Bitcoin futures and Spot Bitcoin, in addition to being able to hold part of its net assets in cash. The Exchange believes that the Fund's strategy of holding a mix of Spot Bitcoin, Bitcoin futures and cash would remove impediments to and perfect the mechanism of a free market and protect investors and the public interest because it would allow the Fund to limit its exposure to any single asset class, while offering investors exposure to Spot Bitcoin without relying on unregulated products or markets. The Exchange also believes that the Sponsor has designed the Fund to includes features intended to provide a robust framework for mitigating the risks of market manipulation, such as its proposed investment strategy, its use of futures-based pricing for Spot Bitcoin, the proposed Investment Restrictions, the use of EFP transactions on the CME Market for Spot Bitcoin, and the use of cash creations and redemptions, which would remove impediments to and perfect the mechanism of a free and open market and promote the protection of investors and the public interest. The Exchange also believes that, given these features of the Fund, the CME Market could be considered the regulated market of significant size in relation to the Fund and that there is a reasonable likelihood that a person attempting to manipulate the Fund would also have to trade on the CME Market to do so, such that information shared pursuant to NYSE Arca and the CME Market's common ISG membership would aid the Exchange in detecting and deterring potential misconduct.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that

[90] 15 U.S.C. 78f(b)(5).

the Shares would be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.500–E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and the Fund's holdings through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in Bitcoin Futures Contracts) occurring on US futures exchanges, which are members of the ISG. The intraday, closing prices, and settlement prices of the Bitcoin Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors website or on-line information services. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Complete real-time data for the Bitcoin Futures Contracts will be available by subscription from on-line information services. ICE Futures U.S. and CME also provide delayed futures information on current and past trading sessions and market news free of charge on the Fund's website. The specific contract specifications for Bitcoin Futures Contracts will also be available on such websites, as well as other financial informational sources. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the NYSE Arca Core Trading Session. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Share's ticker and CUSIP information along with additional quantitative information updated on a daily basis, including, for the Fund: (1) the prior business day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of Bitcoin Futures Contracts, (ii) the counterparty to and value of forward contracts, and (iii) other financial instruments, if any, and the characteristics of such instruments and cash equivalents, and amount of cash held in the Fund's portfolio, if applicable.

Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in BTC and/or MBT Contracts and the securities and/or the financial instruments composing the daily disclosed portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of Trust Units based on Bitcoin that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of Trust Units based on Bitcoin and that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEARCA–2023–58 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEARCA–2023–58. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use

only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEARCA–2023–58 and should be submitted on or before October 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[91]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21789 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98559; File No. SR–OCC–2023–003]

Self-Regulatory Organizations; Options Clearing Corporation; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Partial Amendment No. 1, Concerning Clearing Member Cybersecurity Obligations

September 27, 2023.

On March 21, 2023, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2023–003 pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4[2] thereunder to amend certain provisions in OCC's Rules relating to each Clearing Member's obligation to address a ''Security Incident'' (*i.e.,* the occurrence of a cyber-related disruption or intrusion) of that Clearing Member.[3] The proposed rule change was published for public comment in the **Federal Register** on April 5, 2023.[4] The Commission has received comments regarding the proposed rule change.[5]

On May 18, 2023, pursuant to Section 19(b)(2) of the Exchange Act,[6] the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[7] On May 24, 2023, OCC filed Partial Amendment No. 1 to the proposed rule change.[8] On July 3, 2023, the Commission instituted proceedings, pursuant to Section 19(b)(2)(B) of the Exchange Act,[9] to determine whether to approve or disapprove the Proposed Rule Change, as modified by Partial Amendment No. 1 (hereinafter defined as ''Proposed Rule Change'').[10]

Section 19(b)(2) of the Exchange Act[11] provides that proceedings to determine whether to approve or disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination.[12] The 180th day after publication of the Notice in the **Federal Register** is October 2, 2023.

The Commission is extending the period for Commission action on the Proposed Rule Change. The Commission finds that it is appropriate to designate a longer period within which to take action on the Proposed Rule Change so that the Commission has sufficient time to consider the issues raised by the Proposed Rule Change and to take action on the Proposed Rule Change. Accordingly, pursuant to Section 19(b)(2)(B)(ii)(II) of the Exchange Act,[13] the Commission designates December 1, 2023, as the date by which the Commission should either approve or disapprove the Proposed Rule Change SR–OCC–2023–003.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21784 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98572; File No. SR–ICC–2023–013]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to ICC's Treasury Operations Policies and Procedures

September 27, 2023.

I. Introduction

On August 15, 2023, ICE Clear Credit LLC (''ICC''), 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 to revise the ICC Treasury Operations Policies and Procedures (''Treasury Policy''). The proposed rule change was published for comment in the **Federal Register** on August 28, 2023.[3] The Commission has not received any comments on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

ICC is registered with the Commission as a clearing agency for the purpose of

[91] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 4, at 88 FR at 20195.

[4] Securities Exchange Act Release No. 97225 (Mar. 30, 2023), 88 FR 20195 (Apr. 5, 2023) (File No. SR–OCC–2023–003) (''Notice of Filing'').

[5] Comments on the proposed rule change are available at *https://www.sec.gov/comments/sr-occ-2023-003/srocc2023003.htm.*

[6] 15 U.S.C. 78s(b)(2).

[7] Securities Exchange Act Release No. 97525 (May 18, 2023), 88 FR 33655 (May 24, 2023) (File No. SR–OCC–2023–003).

[8] Securities Exchange Act Release No. 97602 (May 26, 2023), 88 FR 36351 (Jun. 2, 2023) (File No. SR–OCC–2023–003) (''Partial Amendment No. 1'').

[9] 15 U.S.C. 78s(b)(2)(B).

[10] Securities Exchange Act Release No. 97832 (July 3, 2023), 88 FR 43640 (July 10, 2023) (File No. SR–OCC–2023–003).

[11] 15 U.S.C. 78s(b)(2).

[12] 15 U.S.C 78s(b)(2)(B)(ii)(II).

[13] *Id.*

[14] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 98200 (Aug. 22, 2023), 88 FR 58628 (Aug. 28, 2023) (File No. SR–ICC–2023–013) (''Notice'').

clearing CDS contracts.[4] ICC requires that its Clearing Participants post margin to collateralize their credit exposure to ICC, based on the size and risk of their cleared positions. On a daily basis, ICC determines margin requirements (i) for a Clearing Participant's own cleared positions (referred to as ''house'' positions) and (ii) for the cleared positions of its clients. ICC also requires that Clearing Participants contribute to its Guaranty Fund.

ICC's Treasury Department is responsible for daily cash and collateral management of margin and Guaranty Fund assets, including Client-Related Initial Margin assets.[5] The Treasury Policy contains policies and procedures that aid the ICC Treasury Department in carrying out these responsibilities.[6]

Aside from non-substantive, typographical changes (for example, the addition of quotation marks around the word ''haircuts''), ICC proposes to make two categories of changes to the Treasury Policy. First, ICC proposes clarifications and changes to the way it values the collateral that Clearing Participants provide to ICC to cover their margin and Guaranty Fund requirements. Second, ICC proposes adding a new section to its Treasury Policy addressing circumstances under which it would use a foreign exchange facility to convert one currency to another.

1. ICC's Collateral Valuation

In valuing collateral, ICC's currently effective Treasury Policy aims to accurately and effectively price assets posted as collateral and haircut those assets for their native market risks[7] and related cross-currency risks.[8] The proposed rule change would not change these overall aims, but ICC notes that it would clarify and simplify some already-existing procedures which achieve these aims.[9] It would also change the haircut process for Great British Pounds posted as Client-Related Initial Margin to cover a Euro-denominated product requirement.

Current Valuation Process

ICC's valuation process depends on the type of collateral. Currently, ICC accepts US Treasuries, US Dollars (''USD''), Euros, and for client-related margin only, Great British Pounds (''GBP''). Moreover, ICC currently clears products denominated in USD and in Euros.

With respect to US Treasuries covering a USD-denominated product requirement, the currently effective Treasury Policy provides that ICC calculates the cover value as follows: accrued interest plus mid-price multiplied by principal less applicable haircut established by the ICC Risk Department.[10] For US Treasuries or USD covering a Euro-denominated product requirement, ICC haircuts the USD value at the currency haircut for Euros (after first converting the US Treasuries to USD).

With respect to Euro covering a Euro-denominated product requirement, there is no haircut. With respect to Euro covering a USD-denominated product requirement, ICC first converts the Euro to the USD value and then haircuts the USD value at the Euro currency haircut established by the ICC Risk Department.

With respect to GBP covering a USD-denominated product requirement, ICC first converts the GBP to the USD value and then haircuts the USD value at the GBP currency haircut established by the ICC Risk Department. With respect to GBP covering a Euro-denominated product requirement, ICC first converts the GBP to the USD value and then haircuts the USD value at the GBP currency haircut established by the ICC Risk Department. ICC then converts the Euro-denominated product requirement to the USD value, and ICC then grosses up the resulting USD requirement by the Euro currency haircut.

Amended Valuation Process

The proposed rule change would delete much of the currency-specific language and replace it with general principles that would apply to any currency ICC accepts. In doing so, the proposed rule change would not alter the substance of the current process, except with respect to the valuation of GBP in certain circumstances, as discussed below.

The proposed rule change would delete the language described above related to collateral posted in the currency of the obligation, and replace it with general language stating that posted cash collateral used to cover a specific currency obligation in the currency of the posted collateral is not subject to a haircut. Language related to collateral posted in a currency other than the currency of the obligation would also be deleted. In its place, the proposed rule change would add language stating that posted cash collateral used to cover a specific currency obligation is first converted to its value expressed in the currency of the obligation, and further haircut to capture the potential foreign exchange risk between the posted cash collateral and the currency of the obligation.

With respect to U.S. Treasuries, the proposed rule change would maintain the current language regarding cover value. As under the current Treasury Policy, ICC would determine the cover value as accrued interest plus mid-price multiplied by principal, less applicable haircut. Finally, the proposed rule change would specify that the cover value of U.S. Treasuries used to cover a specific non-USD currency obligation is computed by foreign exchange haircutting the corresponding USD-equivalent cover value, where the applicable foreign exchange haircut captures the potential foreign exchange risk between the USD cash and the currency of the obligation.

For U.S. Treasuries, USD, and Euros, this proposed change is consistent with currently effective policies. However, the proposed rule change would alter ICC's process for GBP. With respect to GBP used to cover a Euro-denominated product requirement, the proposed rule change would delete a provision requiring ICC to convert the GBP cash value to its USD value, haircut the USD value, convert the Euro-denominated product requirement to its USD value, and gross up the resulting USD requirement by the Euro currency haircut. Deleting the currently effective haircut process related to GBP used to cover a Euro-denominated product requirement and replacing it with the proposed changes makes the process more efficient by eliminating what amounts to a double haircut.[11]

2. ICC's Use of a Foreign Exchange Facility

ICC also proposes adding a new section to its Treasury Policy titled ''Non-Committed FX Facility.'' This section addresses circumstances under which ICC would use a foreign exchange facility to convert one currency to another. The proposed

[4] Capitalized terms not otherwise defined herein have the meanings assigned to them in ICC's Clearing Rules or the Treasury Policy, as applicable.

[5] Notice, 88 FR at 58628.

[6] *Id.*

[7] ICC defines native market risk as the risk of a decrease in value of the asset posted as collateral. *Id.*

[8] ICC defines cross-currency risk as the risk of the change in value of one currency as compared to the value of another currency. *Id.*

[9] Notice, 88 FR at 58628.

[10] ICC's Risk Department calculates haircuts on an on-going basis. ICE Clear Credit LLC Treasury Operations Policies and Procedures. ICC describes the qualitative manner in which it derives its collateral haircuts in its Collateral Risk Management Framework. Securities Exchange Act Release No. 96557 (Dec. 21, 2022), 87 FR 79922 (Dec. 28, 2022) (File No. SR–ICC–2022–013) (''Order'').

[11] Notice, 88 FR at 58628; *see, infra,* note 20 and related text.

section begins by noting that ICC has access to foreign exchange facilities with various commercial counterparties. The facilities are uncommitted, which means that they do not require ICC's counterparties to provide requested currencies, but ICC still may use them to convert one currency to another for same day settlement.

The proposed section also describes circumstances under which ICC would need to convert Client-Related Initial Margin, posted by Clearing Participants in GBP, into another currency. ICC may need to convert Client-Related Initial Margin posted in GBP in the context of a default of the client that provided the GBP as margin. None of the contracts that ICC clears settles in GBP. Therefore, to the extent that margin is posted in GBP, it would need to be converted to the currency of an obligation before it is used to satisfy that obligation.

ICC proposes to state in the Policy that the circumstances where it would need to convert GBP to another currency are very narrow. The added section provides two reasons to support ICC's position. First, as mentioned above, ICC does not currently clear any contracts that are settled in GBP; thus, GBP is not required for daily settlement. Second, use of Client-Related Initial Margin in the context of a Clearing Participant default is very limited.[12] The proposed section closes by noting that if ICC needs to convert GBP collateral to either USD or Euro in the context of a Clearing Participant default, ICC would use one of its non-committed foreign exchange arrangements to do so.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act requires the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the organization.[13] For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act [14] and Rule 17Ad–22(e)(5).[15]

A. Consistency With Section 17A(b)(3)(F) of the Act

Under Section 17A(b)(3)(F) of the Act, ICC's rules, among other things, must be ''designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible . . . and, in general, to protect investors and the public interest . . . .'' [16] Based on its review of the record, and for the reasons discussed below, the Commission believes that ICC's proposed rule change is consistent with Section 17A(b)(3)(F) because it helps ensure ICC can monitor its collateral and enhances ICC's ability to deal with a potential default.

ICC's proposed changes to its collateral valuation process do not change any fundamental aspects of the process, but instead serve to simplify and make more efficient the description of the process; thus, ICC's proposed changes help to ensure that the collateral valuation process is clearer and more transparent to members. As noted above, ICC's currently effective Treasury Policy aims to accurately and effectively price assets posted as collateral and haircut those assets for their native market risks and related cross-currency risks.[17] ICC's proposed changes align with these aims related to collateral valuation. A number of ICC's proposed changes—for example, ICC's non-material edits to policies governing the valuation process for U.S. Treasuries posted as collateral—merely clarify and simplify pre-existing procedures related to collateral valuation. ICC's proposal to add text requiring that posted cash used to cover a specific currency obligation is first converted to its value expressed in the currency of the obligation and then haircut to capture the potential foreign exchange risk supports its stated aim to accurately price assets and haircut them for their cross-currency risks. The changes help to make the process clearer and more transparent, which would in turn facilitate the accurate valuation of ICC's financial resources and ensure that ICC is able to determine whether it needs to bolster resources available to it in order to clear and settle trades.

ICC's proposed addition of the Non-Committed FX Facility section to its Treasury Policy enhances ICC's ability to deal with a potential default. ICC proposes to add a Non-Committed FX Facility section to its Treasury Policy that notes that ICC has access to non-committed foreign exchange facilities with various commercial counterparties that may be used to convert currency, including GBP, to another currency for same day settlement. Adding the Non-Committed FX Facility section of the Treasury Policy ensures that members have knowledge of ICC's access to non-committed foreign exchange facilities and notice of the potential for specific scenarios, such as the possibility that ICC would be unable to exchange currency using ICC's non-committed foreign exchange facilities to satisfy certain obligations. Such notice should make it easier for ICC and its Clearing Participants to manage these scenarios should they ever arise during a potential default. Therefore, the addition of the Committed FX Facility section promotes the prompt and accurate clearance and settlement of securities transactions and assures the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.

The Commission believes, therefore, that the proposed rule change is consistent with the requirements of Section 17A(b)(3)(F) of the Act.[18]

B. Consistency With Rule 17Ad–22(e)(5)

Rule 17Ad–22(e)(5) requires ICC to ''establish, implement, maintain, and enforce written policies and procedures reasonably designed to . . . limit the assets it accepts as collateral to those with low credit, liquidity, and market risks, and set and enforce appropriately conservative haircuts and concentration limits . . . .'' [19] Based on its review of the record, and for the reasons discussed below, the Commission believes that ICC's proposed rule change is consistent with Rule 17Ad–22(e)(5) because the change to its haircut process for GBP used to cover a Euro-denominated product requirement is appropriately conservative.

ICC proposes to alter its currently effective haircut process for GBP used to cover a Euro-denominated product requirement. The currently effective haircut process requires that ICC convert the GBP cash value to its USD value and haircut the USD value at the GBP currency haircut. It also requires that the Euro-denominated product requirement be converted to its USD value. The USD value of the Euro-denominated product requirement is then grossed up by the EUR currency haircut.[20] ICC proposes to eliminate this

[12] For example, ICC would use a client's Client-Related Initial Margin only where that particular client has defaulted.

[13] 15 U.S.C. 78s(b)(2)(C).

[14] 15 U.S.C. 78q–1(b)(3)(F).

[15] 17 CFR 240Ad–22(e)(5).

[16] 15 U.S.C. 78q–1(b)(3)(F).

[17] Notice, 88 FR at 58628.

[18] 15 U.S.C. 78q–1(b)(3)(F).

[19] 17 CFR 240.17Ad–22(e)(2).

[20] The USD value of the Euro-denominated product requirement is grossed up by the EUR currency haircut because ICC's treasury system automatically would haircut the Euro value in the process of converting it to the USD value. Securities Exchange Act Release No. 97489 (May 11, 2023), 88 FR 31571, 31573 (May 17, 2023) (File No. SR–ICC–2023–003).

process, which is in effect is a double haircut requirement, and replace it with an approach in which the posted GBP is converted directly to the currency of the obligation and then haircut once.

ICC's proposed process would still align with its collateral valuation process, which requires that assets posted as collateral are haircut for their native market risks and cross-currency risk. The proposed process would still apply a haircut that addresses cross-currency risk, but would eliminate an extraneous haircut that, according to ICC, is a byproduct of its previous clearing system business logic.[21] As such, the Commission believes that the proposed change is consistent with Rule 17Ad–22(e)(5) because it remains appropriately conservative.

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, Section 17A(b)(3)(F) of the Act[22] and Rule 17Ad–22(e)(5) thereunder.[23]

It is therefore ordered pursuant to Section 19(b)(2) of the Act that the proposed rule change (SR–ICC–2023–013) be, and hereby is, approved.[24]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98563; File No. SR–NASDAQ–2023–035]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of a Proposed Rule Change To List and Trade Shares of the Hashdex Nasdaq Ethereum ETF Under Nasdaq Rule 5711(i)

September 27, 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 20, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the shares of the Hashdex Nasdaq Ethereum ETF under Nasdaq Rule 5711(i) (''Trust Units''). The units of the Trust are referred to herein as the ''Shares.''

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade Shares of the Hashdex Nasdaq Ethereum ETF (the ''Fund'') under Nasdaq Rule 5711(i),[3] which governs the listing and trading of Trust Units on the Exchange.

The Fund is a series of Tidal Commodities Trust I (the ''Trust''), a Delaware statutory trust.[4] The Fund is managed and controlled by Toroso Investments LLC (''Sponsor''). The Sponsor is registered as a commodity pool operator (''CPO'') with the Commodity Futures Trading Commission (''CFTC'') and is a member of the National Futures Association (''NFA'').

The Fund's Investment Objective and Strategy

According to the Registration Statement, the Chicago Mercantile Exchange, Inc. (''CME'') currently offers two Ether futures contracts (''Ether Futures Contracts''), one contract representing 50 ether (''ETH Contracts'') and another contract representing 0.10 ether (''MET Contracts'').[5] Each ETH Contract and MET Contract settles daily to the ETH Contract volume-weighted average price (''VWAP'') of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick. ETH Contracts and MET Contracts each expire on the last Friday of the contract month, and the final settlement value for each contract is based on the CME CF Ether Dollar Reference Rate (''ETHUSD_RR'').[6]

ETH Contracts and MET Contracts each trade six consecutive monthly contracts plus two additional December contract months (if the 6 consecutive months include December, only one additional December contract month is listed). Because ETH Contracts and MET Contracts are exchange-listed, they allow investors to gain exposure to ether

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[21] Notice, 88 FR at 58628 n.5.

[22] 15 U.S.C. 78q–1(b)(3)(F).

[23] 17 CFR 240.17Ad–22(e)(5).

[24] In approving the proposed rule change, the Commission considered the proposal's impacts on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission approved Nasdaq Rule 5711 in Securities Exchange Act Release No. 66648 (March 23, 2012), 77 FR 19428 (March 30, 2012) (SR–NASDAQ–2012–013).

[4] On September 8, 2023, the Trust confidentially filed a draft registration statement under the Securities Act (the ''Registration Statement''). The Jumpstart Our Business Startups Act (the ''JOBS Act''), enacted on April 5, 2012, added Section 6(e) to the Securities Act. Secction 6(e) of the Securities Act provides that an ''emerging growth company'' may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than $1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently submitted its Registration Statement to the Commission on a confidential basis. The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement.

[5] ETH Contracts began trading on the CME Globex (''Globex'') trading platform on February 8, 2021 under the ticker symbol ''ETH'' and are cash-settled in U.S. dollars. MET Contracts began trading on the Globex trading platform on December 6, 2021 under the ticket symbol ''MET'' and are also cash-settled in U.S. dollars.

[6] The ETHUSD_RR is a daily reference rate of the U.S. dollar price of one ether calculated daily as of 4:00 p.m. London time. It is calculated by the CME based on the ether trading activity on CME-specified consituent spot ether exchanges during a calculation window between 3:00 p.m. and 4:00 p.m. London time. The CME launched the ETHUSD_RR in May 2018.

(the native cryptocurrency to the Ethereum blockchain, herein referred to interchangeably as ''Ether'' or ''Ethereum'') without having to hold the underlying cryptocurrency. Like a futures contract on a commodity or stock index, ETH Contracts and MET Contracts allow investors to hedge investment positions or speculate on the future price of Ether.

According to the Registration Statement, the Fund's investment objective is to have the daily changes in the net asset value (''NAV'') of the Shares reflecting the daily changes in the price of the Nasdaq Ether Reference Price (NQETH) (the ''Benchmark''), less expenses from the Fund's operations. The Benchmark is designed to track the price performance of Ether. Under normal market conditions,[7] the Fund will invest in Ether, Ether Futures Contracts listed on the CME, and in cash and cash equivalents.[8] Because the Fund's investment objective is to track the price of the Benchmark by investing in Ether and Ether Futures Contracts, changes in the price of the Shares may vary from changes in the spot price of Ether. The Benchmark is calculated using the Nasdaq Ethereum Reference Price—Settlement (the ''NQETHS'').[9] According to the Sponsor, the NQETHS is designed to allow investors to track the price of Ether by applying a rigorous methodology to trade data captured from cryptocurrency exchanges that meet eligibility criteria of the Nasdaq Crypto Index (''NCI''). The NQETHS is calculated once every trading day through the application of a publicly available rules-based pricing methodology to a diverse collection of pricing sources to provide an institutional-grade reference price for Ethereum.[10] The pricing methodology is designed to account for variances in price across a wide range of sources, each of which has been vetted according to criteria identified in the methodology. Specifically, the settlement value is the Time Weighted Average Price (''TWAP'') calculated across VWAPs for each minute in the settlement price window, which is between 2:50:00 and 3:00:00 p.m. New York Time. Where there are no transactions observed in any given minute of the settlement price window, that minute is excluded from the calculation of the TWAP.

According to the Sponsor, the NQETHS methodology also utilizes penalty factors to mitigate the impact of anomalous trading activity such as manipulation, illiquidity, large block trading, or operational issues that could compromise price representation. Three types of penalties are applied: abnormal price penalties, abnormal volatility penalties, and abnormal volume penalties. These penalties are defined as adjustment factors on the weight of information from each exchange that contributes pricing information based on the deviation of an exchange's price, volatility, or volume from the median across all exchanges. For example, if a core exchange's price is 2.5 standard deviations away from the median price, its price penalty factor will be a ½.5 multiplier.

Finally, as a means of achieving the highest degrees of confidence in the reported volume, data is sourced only from ''core exchanges'' that are screened, selected, and approved by the Nasdaq Crypto Index Oversight Committee (the ''NCIOC''). Core exchanges must: (1) have strong forking controls; (2) have effective anti-money laundering (AML) controls; (3) have reliable and transparent application programming interface (API) that provides real-time and historical trading data; (4) charge fees for trading and structure trading incentives that do not interfere with the forces of supply and demand; (5) be licensed by a public independent governing body; (6) include surveillance for manipulative trading practices and erroneous transactions; (7) evidence a robust IT infrastructure; (8) demonstrate active capacity management; (9) evidence cooperation with regulators and law enforcement; and (10) have a minimum market representation for trading volume. Additionally, the NCIOC conducts further diligence to assess an exchange's eligibility and will consider additional criteria such as the exchange's organizational and ownership structure, security history, and reputation; the list of existing core exchanges will be recertified by the NCIOC at minimum on an annual basis.

The Sponsor believes that the NQETHS is suitable for use in calculating the Benchmark because (i) it would provide reliable pricing for purposes of tracking the actual performance of spot Ether, (ii) it is administered by an independent index administrator, and (iii) its methodology is specifically designed to mitigate potential manipulation coming from unregulated markets. Specifically, the Sponsor believes that (i) by tracking the actual price of spot Ether, NQETHS is transparent and adequate for the Fund's investors; (ii) using a Benchmark that has its own independent index administrator provides investors the best practices in governance and accountability and benchmark quality; and (iii) the pricing methodology underlying the NQETHS is designed to be resistant to potential price manipulation by applying a robust methodology to trade data captured from NCI core exchanges, which have to meet strict criteria created by the NCIOC, thereby drawing on a diverse collection of trustworthy pricing sources to provide an institutional-grade reference price for Ether that accounts for variances in price across a wide range of sources and that adjusts to mitigate the impact of anomalous trading activity that could compromise the integrity of the NQETHS price.

According to the Registration Statement, the Fund seeks to maintain its holdings in Ether Futures Contracts with a roughly constant expiration profile. Therefore, the Fund's positions in Ether Futures Contracts will be changed or ''rolled'' on a regular basis by closing out first to expire contracts prior to settlement, and then entering into second to expire contracts. Accordingly, the Fund will never carry futures positions all the way to cash settlement—the Fund will price only off of the daily settlement prices of the Ether Futures Contracts.[11] To achieve this, the Fund will roll its futures holdings prior to cash settlement of the expiring contract.

In seeking to achieve the Fund's investment objective, the Sponsor will employ a ''neutral'' investment strategy that is intended to track the changes in the Benchmark regardless of whether the Benchmark goes up or goes down. The Fund will endeavor to trade in Ether and Ether Futures Contracts so that the Fund's average daily tracking error against the Benchmark will be less than 10 percent over any period of 30 trading days. The Fund's ''neutral'' investment strategy is designed to permit investors generally to purchase and sell the Fund's Shares for the purpose of investing in the Ether and Ether Futures Contracts (as discussed

[7] The term ''normal market conditions'' includes, but is not limited to, the absence of: trading halts in the applicable financial markets generally; operational issues (*e.g.,* systems failure) causing dissemination of inaccurate market information; or force majeure type events such as a natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. *See* Nasdaq Rules 4120 and 4121.

[8] The term ''cash equivalents'' includes short term Treasury bills, money market funds, and demand deposit accounts.

[9] *See https://indexes.nasdaqomx.com/Index/Overview/NQETHS.*

[10] *See https://indexes.nasdaqomx.com//docs/methodology/NCI.pdf.*

[11] As discussed in more detail below, the CME determines the daily settlements for Ether futures based on trading activity on CME Globex between 14:59:00 and 15:00:00 Central Time (CT), which is the ''settlement period.''

below). Such investors may include participants in the Ether market seeking to hedge the risk of losses in their Ether-related transactions, as well as investors seeking price exposure to the Ether market.

According to the Registration Statement, one factor determining the total return from investing in futures contracts is the price relationship between soon to expire contracts and later to expire contracts. If the futures market is in a state of backwardation (*i.e.,* when the price of ETH Contracts and MET Contracts in the future is expected to be less than the current price), the Fund will buy later to expire contracts for a lower price than the sooner to expire contracts that it sells. Hypothetically, and assuming no changes to either prevailing ETH Contracts and MET Contracts' prices or the price relationship between soon to expire contracts and later to expire contracts, the value of a contract will rise as it approaches expiration. Over time, if backwardation remained constant, the performance of a portfolio would continue to be affected. If the futures market is in contango, the Fund will buy later to expire contracts for a higher price than the sooner to expire contracts that it sells. Hypothetically, and assuming no other changes to either prevailing ETH Contracts and MET Contracts' prices or the price relationship between the spot price, soon to expire contracts and later to expire contracts, the value of a contract will fall as it approaches expiration. Over time, if contango remained constant, the performance of a portfolio would continue to be affected. Frequently, whether contango or backwardation exists is a function, among other factors, of the prevailing market conditions of the underlying market and government policy.

The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2Xs, 3Xs, –2Xs, and –3Xs) of the Fund's Benchmark.

According to the Registration Statement, the Fund will seek to achieve its investment objective by investing not only in Ether Futures Contracts, but also in physical Ether to the extent allowed by the Fund's investment restrictions on spot Ether, using a pricing methodology, for purposes of calculating the Fund's NAV, that will derive spot Ether prices from Ether Futures Contracts and not from unregulated exchanges, as further explained below (''Spot Ether''). In doing so, the Sponsor expects to provide Ether exposure to investors while still using Ether Futures Contracts in its strategy and relying on the CME as its ''market of relevant size.'' In particular, to avoid any exposure to potential manipulation from unregulated exchanges, the Fund's NAV will be calculated using a Spot Ether price derived from CME futures prices, as further explained below, and the Fund expects to purchase and sell physical Ether via CME's Exchange for Physical Transactions, which are subject to CME's market surveillance.

The Ethereum Network and Ether Transactions

As discussed in further detail below, Ether is the digital asset that is native to, created and transmitted through the operations of, the peer-to-peer Ethereum network, an open-source protocol of the network of computers that operates on cryptographic protocols and governs the creation, movement, and ownership of Ether and hosts the public ledger, or ''blockchain,'' (''Ethereum Network''). The decentralized nature of the Ethereum Network allows parties to transact directly with one another based on cryptographic proof instead of relying on a trusted third party. No single entity owns or operates the Ethereum Network, the infrastructure of which is collectively maintained by a decentralized user base. The Ethereum Network allows people to exchange tokens of value and settle multiple types of data, which are recorded on the blockchain.

Ether is the native token for the Ethereum Network. Such a statement implies that, in order to settle any information on the Ethereum Network, there will be a fee (named ''gas fee'') to be paid in Ether, in order to use that block space. Ether may be also used as a medium of exchange, unit of account or store of value. Ethers exist and are stored on the blockchain, which serves as the decentralized transaction ledger for the Ethereum Network. All transactions, including the creation of new ethers through staking, are recorded on the blockchain, ensuring the verification of each ether's location in specific digital wallets.

The responsibility for maintaining the Ether Account lies with the Ether Custodian, who utilizes cold storage mechanisms for the vault account. Digital wallets can be accessed using their respective private keys, which are held by the Ether Custodians in cold storage at various vaulting locations. The locations of these vaulting premises are kept confidential to enhance security. ''Cold storage'' refers to a safeguarding method where private keys associated with ethers are kept offline, away from internet-connected devices. This could involve storing the private keys on a non-networked computer or electronic device. To send ethers from a digital wallet with private keys in cold storage, the private keys must be retrieved and entered into an ether software program for transaction signing, or the unsigned transaction is sent to a ''cold'' server where the private keys are held for signature.

The Ethereum Network is decentralized and does not require governmental authorities or financial institution intermediaries to create, transmit, or determine the value of Ether. In addition, no party may easily censor transactions on the Ethereum Network. As a result, the Ethereum Network is often referred to as decentralized and censorship resistant.

The value of Ether is determined by the supply of and demand for Ether. New tokens are created (or ''minted'') and rewarded to the parties providing security to the Ethereum Network (the ''stakes''), by staking their own Ether and running a computer node in order to verify transactions and add them to the blockchain.

The Crypto Industry Has Progressed and Matured Significantly

Ether and Bitcoin are the two largest and most well-known cryptoassets. In a similar vein to the Ethereum Network, the bitcoin network governs the creation, transaction, and ownership of its native token (''Bitcoin'' and ''Bitcoin Network''). The Bitcoin Protocol was launched in 2009 and lays out the rate of issuance of new Bitcoins within the Bitcoin Network, a rate that is reduced by half approximately every four years with an eventual hard cap of 21 million. It is generally understood that the combination of these two features—a systemic hard cap of 21 million Bitcoin and the ability to transact with anyone connected to the Bitcoin Network—gives Bitcoin its value.

After ''The Merge,'' which marked the merging of Ethereum's original execution layer with its new ''proof-of-stake'' consensus layer, known as the Beacon Chain, a significant change occurred. This modification eliminated the resource-intensive mining process, replacing it with the option to secure the network through the utilization of staked Ether. In October 2022, Ether supply dynamics transitioned as more Ether was burned verifying transactions than was created in the same period, which became a constant trend ever since that period. This behavior, similar to Bitcoin's capped supply (limited to 21 million), plays a significant role in

influencing its long-term price dynamics.

The first rule filing proposing to list an exchange-traded product to provide exposure to crypto in the U.S. was submitted by the Cboe BZX Exchange, Inc. on June 30, 2016.[12] At that time, blockchain technology, and digital assets that utilized it, were relatively new to the broader public. No registered offering of digital asset securities or shares in an investment vehicle with exposure to a digital asset had yet been conducted, and the regulated infrastructure for conducting a digital asset securities offering had not begun to develop. Conversely, the first rule filing proposing to list an exchange-traded product to provide exposure to Ether in the U.S. was submitted on August 18, 2021.[13] When CME Globex began trading ETH Contracts in February 2021, the digital assets financial ecosystem had progressed, and matured significantly.

The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities and shares in investment vehicles holding crypto futures. Additionally, licensed, and regulated service providers have emerged to provide fund custodial services for digital assets, among other services. For example, in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3–3 under the Exchange Act.[14] In September 2020, the Commission released a no-action letter permitting certain broker-dealers to operate a non-custodial Alternative Trading System (''ATS'') for digital asset securities, subject to specified conditions.[15] In October 2019, the Commission granted temporary relief from the clearing agency registration requirement to an entity seeking to establish a securities clearance and settlement system based on distributed ledger technology;[16] and multiple transfer agents who provide services for digital asset securities have registered with the Commission.[17]

Beyond the Commission's purview, the regulatory landscape has also changed significantly since 2016, and cryptocurrency markets have grown and evolved as well. The U.S. Office of the Comptroller of the Currency (the ''OCC'') has made clear that federally chartered banks are able to provide custody services for cryptocurrencies and other digital assets.[18] The OCC recently granted conditional approval of two charter conversions by state-chartered trust companies to national banks, both of which provide cryptocurrency custody services.[19] NYDFS has granted no fewer than twenty-five BitLicenses, including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services. The U.S. Treasury Financial Crimes Enforcement Network (''FinCEN'') has released extensive guidance regarding the applicability of the Bank Secrecy Act (''BSA'') and implementing regulations to virtual currency businesses,[20] and has proposed rules imposing requirements on entities subject to the BSA that are specific to the technological context of virtual currencies.[21] In addition, the Treasury's Office of Foreign Assets Control (''OFAC'') has brought enforcement actions over apparent violations of the sanction's laws in connection with the provision of wallet management services for digital assets.[22]

In addition to the mentioned regulatory advancements, there is a noticeable trend of increased acceptance of digital assets among traditional financial market participants. Notably, major insurance companies,[23] investment banks,[24] asset managers,[25] credit card companies,[26] university endowments,[27] pension funds,[28] and even previously crypto-wary fund managers[29] are now allocating funds to the crypto space.

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[12] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the ''Winklevoss II Order''). This proposal was subsequently disapproved by the Commission.

[13] *See https://www.nasdaq.com/articles/vaneck-proshares-abruptly-withdraw-ether-futures-etf-proposals-2021-08-20.*

[14] *See* Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7–25–20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

[15] *See* Letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), *available at: https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role- in-settlement-of-digital-asset-security-trades-09252020.pdf.*

[16] *See* Letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), *available at: https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf.*

[17] *See, e.g.,* Form TA–1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, *available at: https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xslFTA1X01/primary__doc.xml.*

[18] *See* OCC News Release 2021–2 (January 4, 2021), *available at: https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2.html.*

[19] *See* OCC News Release 2021–6 (January 13, 2021), *available at: https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6.html* and OCC News Release 2021–19 (February 5, 2021), *available at: https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19.html.*

[20] *See* FinCEN Guidance FIN–2019–G001 (May 9, 2019) (Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies), *available at: https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf.*

[21] *See* U.S. Department of the Treasury Press Release: ''The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions'' (December 18, 2020), *available at: https://home.treasury.gov/news/press-releases/sm1216.*

[22] *See* U.S. Department of the Treasury Enforcement Release: ''OFAC Enters Into $98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions'' (December 30,2020), *available at: https://home.treasury.gov/system/files/126/20201230__bitgo.pdf.*

[23] On December 10, 2020, Massachusetts Mutual Life Insurance Company (MassMutual) announced that it had purchased $100 million in Bitcoin for its general investment account. See MassMutual Press Release ''Institutional Bitcoin provider NYDIG announces minority stake purchase by MassMutual'' (December 10, 2020), *available at: https://www.massmutual.com/about-us/news-and-press-releases/press-releases/2020/12/institutional-bitcoin-provider-nydig-announces-minority-stake-purchase-by-massmutual.*

[24] *See, e.g.,* ''Morgan Stanley to Offer Rich Clients Access to Bitcoin Funds'' (March 17, 2021) *available at: https://www.bloomberg.com/news/articles/2021-03-17/morgan-stanley-to-offer-rich-clients-access-to-bitcoin-funds.*

[25] *See, e.g.,* ''BlackRock's Rick Rieder says the world's largest asset manager has 'started to dabble' in Bitcoin'' (February 17, 2021), *available at: https://www.cnbc.com/2021/02/17/blackrock-has-started-to-dabble-in-bitcoin-says-rick-rieder.html* and ''Guggenheim's Scott Minerd Says Bitcoin Should Be Worth $400,000'' (December 16, 2020), *available at: https://www.bloomberg.com/news/articles/2020-12-16/guggenheim-s-scott-minerd-says-bitcoin-should-be-worth-400-000.*

[26] *See, e.g.,* ''Visa Moves to Allow Payment Settlements Using Cryptocurrency'' (March 29, 2021), *available at: https://www.reuters.com/business/autos-transportation/exclusive-visa-moves-allow-payment-settlements-using-cryptocurrency-2021-03-29/.*

[27] *See, e.g.,* ''Harvard and Yale Endowments Among Those Reportedly Buying Crypto'' (January 25, 2021), *available at: https://www.bloomberg.com/news/articles/2021-01-26/harvard-and-yaleendowments-among-those-reportedly-buying-crypto.*

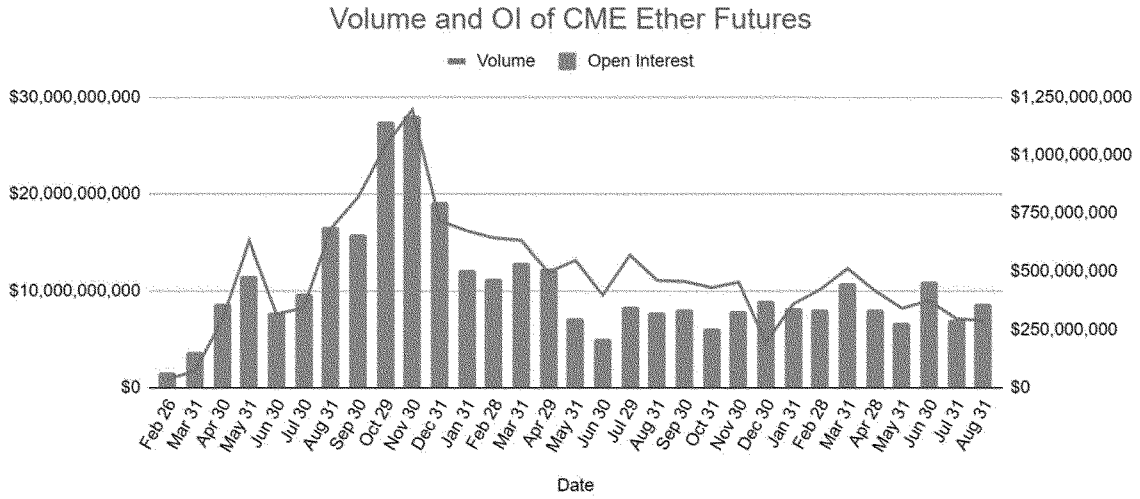
[28] *See, e.g.,* ''Virginia Police Department Reveals Why its Pension Fund is Betting on Bitcoin'' (February 14, 2019), *available at: https://finance.yahoo.com/news/virginia-police-department-reveals-why- 194558505.html.*

[29] *See, e.g.,* ''Bridgewater: Our Thoughts on Bitcoin'' (January 28, 2021) *available at: https://www.bridgewater.com/research-and-insights/our-thoughts-on-bitcoin* and ''Paul Tudor Jones says he

Continued

The Ether Futures Market Has Developed Alongside the Ether Spot Market Into a Strong and Viable Marketplace That Stands On Its Own

CME began offering trading in Ether Futures Contracts in 2021, and each of the contract's final cash settlement is based on the CME CF Ether Dollar Reference Rate (the ''ETHUSD_RR'').[30] The contracts trade and settle like other cash-settled commodity futures contracts. According to the Sponsor, trading in CME Ether futures contracts has increased significantly, in particular with respect to ETH Contracts. Nearly every measurable metric related to ETH Contracts has trended consistently up since launch and/or accelerated upward. For example, there was approximately $12.53 billion in trading in ETH Contracts in July 2023 compared to $7.53 billion in total trading in December 2022. ETH Contracts traded over $544.78 million per day in July 2023 and represented $403.58 million in open interest compared to $337.99 million in December 2022. This general upward trend in trading volume and open interest is captured in the following chart.



Similarly, the number of large open interest holders has continued to increase even as the price of Ether has risen, as have the number of unique accounts trading Ether Futures Contracts.[31]

The Structure and Operation of the Trust Satisfies Commission Requirements for Cryptocurrencies-Based Exchange Traded Products

The Sponsor believes that the Fund's holding a combination of Ether Futures Contracts, Spot Ether, and cash could significantly mitigate the risk of market manipulation while still providing the market with a regulated product that tracks the actual price of Ethereum, creating a secure way for U.S. investors to gain exposure to Spot Ether without having to rely on unregulated products, offshore regulated products, or indirect strategies such as investing in publicly traded companies that hold Ether.

In determining whether to approve listing and trading of new exchange-traded products (''ETPs''), the Commission conducts a thorough analysis to ensure the proposal is consistent with Section 6(b)(5) of the Act. Section 6(b)(5) of the Act mandates that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. With respect to ETPs, the Commission often considers how the listing exchange would access necessary information to detect and deter market manipulation, illegal trading, and other abuses, which listing exchanges may accomplish by entering into a comprehensive surveillance-sharing agreement (''CSSA'') with other entities, such as the markets trading the ETP's underlying assets. Historically, for commodity-trust ETPs, there has always been at least one regulated market of significant size for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper. Then, the listing exchange would enter into CSSA with, or hold Intermarket Surveillance Group (''ISG'') membership in common with, that regulated market.[32] As the Commission has stated, it considers two markets to have a comprehensive surveillance-sharing agreement with one another if they are both members of the ISG, even if they do not have a separate bilateral surveillance-sharing agreement.

In the context of Ethereum, the CME Ether Futures Market (the ''CME Market'') is currently the only regulated market in the U.S.

The Commission has previously interpreted the terms ''significant

likes bitcoin even more now, rally still in the 'first inning' '' (October 22, 2020), *available at: https://www.cnbc.com/2020/10/22/-paul-tudor-jones-says-he-likes-bitcoin-even-more-now-rally-still-in-the-first-inning.html*.

[30] According to the CME, the ETHUSD__RR aggregates the trade flow of major Ether spot exchanges during a specific calculation window into a once-a-day reference rate of the U.S. dollar price of Ether. Calculation rules are geared toward maximum transparency and real-time replicability in underlying spot markets, including Bitstamp, Coinbase, Gemini, itBit, and Kraken. For additional information, refer to *https://www.cmegroup.com/trading/files/ether-futures-fact-card-launch.pdf*.

[31] *See https://www.cmegroup.com/newsletters/quarterly-cryptocurrencies-report/2022-q3-cryptocurrency-recap.html*.

[32] *See* Order Setting Aside Action by Delegated Authority and Disapprovng a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 at 37592–94 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (the ''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 87267 (Oct. 9, 2019), 84 FR 55382 at 55383, 55410 (Oct. 16, 2019) (SR–NYSEArca–2019–01) (the ''Bitwise Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 at 12609 (March 3, 2020) (SR–NYSEArca–2019–39) (the ''Wilshire Phoenix Order'').

market'' and ''market of significant size'' to include a market (or group of markets) where:

1. There is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, such that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct; and

2. It is unlikely that trading in the ETP would be the predominant influence on prices in that market.[33]

With respect to the first prong of the Commission's interpretation, the Commission has previously explained that the lead/lag relationship between the Bitcoin futures market and the spot market is central to understanding this first prong. With respect to the second prong, the Commission's prior analysis has focused on the potential size and liquidity of the ETP compared to the size and liquidity of the market.

The Commission recognized in the Teucrium Approval Order[34] that ''the CME [Market] is a 'significant market' related to CME bitcoin futures contracts,'' and thus that the Exchange has entered into the requisite surveillance-sharing agreement with respect to its Bitcoin Futures Contracts holdings. However, there is still a lack of consensus on whether the CME Market is of ''significant size'' in relation to the spot Bitcoin or Ether market based on the test historically applied by the Commission.

Interrelationship Between the CME and the Fund

The Commission has previously stated that ''the interpretation of the term market of significant size depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.'' [35] The Sponsor intends to adopt an innovative approach to mitigate the risks of fraud and manipulation that are unique to the Fund. The core principle of this approach would be to structure the operation of the Fund such that the regulated market of significant size in relation to the Fund is the CME Market because it is the same market on which the Fund trades its non-cash assets. Therefore, the Sponsor's strategy aims to establish a comprehensive interrelationship between the CME Market and the Fund to unequivocally classify the CME Market as the market of significant size in relation to the ETP. The Sponsor notes that, although the Fund may, as proposed, hold physical ether, it does not rely on any information or services from unregulated ether spot exchanges (such as Coinbase or Binance). Therefore, no spot ether exchange could be considered a ''market of relevant size'' in relation to the Fund.

The Sponsor has designed the Fund to have five features that underscore its significant interrelationship with the CME:

1. *Investment strategy:* The Fund will hold a mix of Ether Futures Contracts, Spot Ether, and cash and cash equivalents, subject to certain investment restrictions (as further discussed below).

2. *Futures-based pricing for Spot Ether:* The price determination for Spot Ether holdings in the NAV calculation will be derived from the CME Market's Ether futures curve. As a result, the price of Spot Ether holdings will depend solely on Ether futures settlement prices on the CME Market and will not depend directly on price information from unregulated spot Ether markets (as further below).

3. *Investment restrictions on Spot Ether:* The Fund will be subject to dynamic investment restrictions that are designed to mitigate the risk that Shares of the Fund could be manipulated by manipulating the Ether spot market and ensuring that the CME Market is the only ''market of significant size'' with respect to the Fund.

4. *Physical Ether purchases on the CME Market:* The Fund will use the CME Market's Exchange for Physical (''EFP'')[36] transactions to acquire and dispose of Spot Ether, instead of transactions on unregulated spot exchanges. Moreover, as described below, the transactions are quoted as basis points over the Ethereum futures contracts prices, creating a direct and unequivocal lead-lag relationship between the prices on CME and the spot market transaction prices that the Fund engages. Accordingly, the only non-cash assets held by the Fund (Ether Futures Contracts and Ether via EFP) would be traded on the CME Market, such that the exchanges' ability to share information pursuant to their common ISG membership could assist in detecting and deterring fraudulent or manipulative misconduct related to those assets.

5. *Creations and redemptions:* The Fund will use cash creations and redemptions[37] to deter intraday Share price manipulation that could originate from in kind creation or redemption from physical spot Ether sourced in unregulated spot markets. Investment in Spot Ether thus would not be directly related to creation/redemptions, but instead on target portfolio exposure, as allowed by the investment restrictions on spot Ether. Trading for Spot Ether could thus be accomplished in smaller sizes and at unpredictable times, reducing the risk of manipulation in the creation or redemption processes.

The Sponsor believes that these features of the Fund are designed to provide a robust framework for mitigating the risks of market manipulation, thereby protecting investors, and maintaining the integrity of the market, and further believes that, given these features of the Fund, the CME Market would be considered the regulated market of significant size in relation to the Fund.

Additionally, as further discussed below, the Sponsor believes that the Fund investment strategy is designed such that it would be highly unlikely that a person attempting to manipulate the Fund could be successful by trading on unregulated spot and derivatives markets. Thus, no market other than CME could be considered as of significant size in relation to the Fund.

The Sponsor further believes that the novel approach proposed is in line with the first prong of the Commission's interpretation of the definition of ''regulated market of significant size'' as to the CME Market and that there is a reasonable likelihood that a person attempting to manipulate the Fund would also have to trade on the CME Market to successfully manipulate the ETP (and, accordingly, the exchange's common ISG membership would aid the Exchange in detecting and deterring potential misconduct).

According to the Sponsor, the Sponsor's approach is designed in such a way that any attempt to manipulate the Fund would require trading on the CME Market, for the following reasons:

[33] *See, e.g.,* Winklevoss Order, 83 FR at 37594. The Commission further noted that ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants.'' *Id.*

[34] *See* Securities Exchange Act Release No. 34–94620 (April 6, 2022) (SR–NYSEArca–2021–53) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200–E, Commentary .02 (Trust Issued Receipts)) (the ''Teucrium Approval Order'').

[35] *See* Securities Exchange Act Release No. 95180 (June 29, 2022), 87 FR 40299 at 40312 (July 6, 2022) (SR–NYSEArca–2021–90) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Grayscale Bitcoin Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)).

[36] *See https://www.cmegroup.com/trading/equity-index/exchange-for-physical-efp-transactions.html.*

[37] In a cash creation/redemption format, the AP delivers cash to the fund instead of Spot Ether.

1. *Futures-based pricing for Spot Ether:* Because the price determination for Spot Ether holdings in the Fund would be derived from the CME Market futures curve, any attempt to manipulate the price of the Fund would require influencing the futures curve on the CME Market because the spot price (which could be a target for manipulation) does not directly influence the price of the Fund. There is thus a direct and unequivocal lead-lag relationship in which CME Market prices lead both the spot price used by the Fund to determine its NAV and the Fund's market price.

2. *Investment restrictions on Spot Ether:* The dynamic investment restrictions in place for the Fund (as discussed in the section below entitled ''Investment Restrictions on Spot Ether'') ensure that any significant trading activity aimed at the Fund would likely spill over into the CME Market because the investment restrictions are designed to prevent the Fund from becoming so large in relation to the unregulated spot market that the cost-benefit tradeoff is favorable for the potential manipulator to execute without influencing the futures market.

3. *Spot Ether operations via EFP on the CME Market:* Because the Fund's Spot Ether operations would take place via CME Market EFP transactions, any attempt to manipulate the Fund's transactions in Spot Ether holdings would need to occur on the CME Market. Accordingly, any potential manipulation of the Fund is closely tied to the CME Market.

4. *Creations and redemptions:* The Fund's use of cash creations and redemptions also reduces the potential for manipulation through the creation and redemption processes. Any significant creation or redemption activity aimed at manipulating the Fund would likely influence the futures market, given that the investment in spot is based on target portfolio exposure and not directly related to creations or redemptions.

Given these factors, the Sponsor believes that the Exchange and CME Market's common membership in the ISG would be an effective tool in assisting the Exchange in detecting and deterring potential misconduct. The agreement would provide the Exchange with access to necessary trading data from the CME Market, which is intrinsically linked to the Fund, allowing for comprehensive oversight and the ability to quickly identify and investigate any suspicious trading activity.

The Sponsor believes that trading in the Fund is unlikely to have a predominant impact on prices in the CME Market, primarily due to the volume and size of the CME futures market, and the significant liquidity available in the spot market. In addition, considering the Investment Restrictions on Spot Ether detailed below, the holding of Ether Spot by the Fund will not alter its impact on prices in the ''significant market''.

In relation to crypto futures market, the Commission has previously stated that the CME ''comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts'' and that the ''CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the [Fund] by manipulating the price of CME Bitcoin Futures Contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market.'' [38] The Commission further noted that, as a result, ''when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the [Fund]''.[39] The Sponsor further believes that CME surveillance can be relied upon to capture any possible manipulation of the CME Ether futures markets, even when the attempt is made indirectly by trading outside the CME in unregulated markets.

When discussing the second prong of the analysis in the Teucrium Approval Order, the Commission observed that the CME bitcoin futures market has progressed and matured significantly, and nearly every measurable metric related to bitcoin futures contracts has trended consistently up since the launch of 1940 Act [40]-registered bitcoin futures ETFs. This fact persuaded the Commission that trading in the proposed ETP is not likely to be the predominant influence on prices in the CME bitcoin futures market. In that case, the Commission concluded that the CME bitcoin futures market had sufficiently developed to support ETPs seeking exposure to bitcoin by holding CME futures contracts.

The Sponsor understands that a similar effect would happen to Ether: the approval of Ether products could potentially facilitate the maturation of the market. Moreover, based on the Commission's findings regarding the Bitcoin futures market, the Sponsor anticipates that the approval of the proposed ETP is unlikely to significantly impact prices in the CME Ether futures market. Market dynamics and the influence of these cryptocurrencies-based products on prices are expected to follow comparable patterns. Just as the bitcoin futures ETF did not disrupt the CME bitcoin futures market's equilibrium, the Sponsor anticipates a similar behavior upon the introduction of an Ether-based ETP.

Nevertheless, the Sponsor believes that the analysis below illustrates that the progress observed in the Ether Futures Contracts and Ether Spot markets in the last few years is on par with what was observed for the bitcoin futures and spot markets right before the approval of the 1940 Act-registered bitcoin futures ETFs. Nearly every measurable metric related to Ether is trending up and the Ether market is still growing in volume and liquidity, approaching the size of markets for other commodity interests.

As the CME Market continues to develop and more closely resemble other commodity futures markets, the Sponsor believes that it is reasonable to expect that the relationship between the Ether futures market and Ether spot market will behave similarly to other future/spot market relationships, where the spot market may have no relationship to the futures market (although the current proposal does not depend on such similarity).

Despite the negative price performance of Ether in 2022, there has been significant growth in CME Ether Futures Markets relative to unregulated spot and derivatives markets. The Sponsor also notes that in the same period during which CME Market trading volume increased 11.3%, the trading volume of unregulated Ether futures and spot markets had a significant drawdown of 38%.

[38] *See* Teucrium Approval Order of the Hashdex Bitcoin Futures ETF, 87 FR at 21679.

[39] *Id.*

[40] Investment Company Act of 1940 (''1940 Act'').

TRADING VOLUME

	August 31, 2022 (millions)	August 31, 2023 (millions)	1-year % variation
CME Ether Futures Market[41]	$327	$364	11.3
Unregulated Futures Market[42]	$7,930	$4,930	−37.8
Spot Ether Market[43]	$7,950	$4,930	−38

The Sponsor believes that the data above suggests an increase in market appetite for regulated products (*e.g.,* CME Market Ether futures) vis-a-vis a significant decrease in interest for unregulated products (*e.g.,* unregulated futures and spot Ether).

The Sponsor further considers that the CME Market managed to maintain its open interest level despite the price volatility that Ether experienced in 2022, demonstrating its resilience and that it is sufficiently developed such that it is unlikely that trading in the Fund would be the predominant influence on its prices.

CHICAGO MERCANTILE EXCHANGE ETHER FUTURES

	August 31, 2022	August 31, 2023
Open Interest	207,650 ETH	219,650 ETH

The CME Market is also sufficiently developed to support ETPs that seek exposure to Ether by holding a mix of CME Market Ether Futures Contracts and physical Ether through the use of CME Market EFP transactions, and thus the CME Market is the only market on which the Fund's only proposed non-cash assets would trade. Thus, the CME Market remains the ''significant market'' in relation to the Fund, as proposed.

Moreover, as detailed above, the Sponsor's proposed investment strategy ensures that no unregulated spot exchange could be considered a ''market of relevant size'' in relation to the Fund, given that the Fund does not rely on any information or services coming from unregulated markets. All of the Fund's operations, including the purchase and sale of spot Ether and its NAV determination, are conducted through the CME Market. Thus, all transactions are registered and monitored on a regulated exchange, providing an additional layer of security and transparency. Because any attempt to manipulate the Fund would require significant trading on the CME Market, and not on any unregulated spot Ether exchange, there is significantly reduced potential for manipulation and fraud, further protecting investors and maintaining the integrity of the market.

The Sponsor further believes that the holding of Spot Ether would not significantly alter the influence of the Fund's trading on the CME Market. The Spot Ether in the Fund's portfolio would be converted from futures positions using EFP transactions on the CME Market. The Fund's Spot Ether holdings would thus be directly linked to the futures market and would not introduce a new, independent variable that could significantly influence the futures market. Indeed, because both sides of the trade track the same benchmark, an EFP is market-neutral and, as such, the pricing of an EFP is quoted in terms of the basis between the price of the futures contract and the level of the underlying index.

Additionally, the dynamic investment restrictions and futures-based pricing for Spot Ether would ensure that the Fund's Spot Ether holdings remain at a level where they are unlikely to impact the futures market significantly and that the futures market continues to influence the price of the Fund's Spot Ether holdings (and not the other way around).

The Sponsor believes that, even with the holding of Spot Ether by using EFP transactions on the CME Market, the Fund's trading would not become the predominant influence on prices of the futures market. Therefore, considering the maturation of the CME Ether futures market since its inception, including but not limited to the overall size, volume, liquidity, and number of years of trading, the Sponsor considers that the second prong of the standard for ''market of significant size'' has been established.

In reviewing prior proposals to list and trade shares of various cryptoassets-based trust issued receipts, the Commission noted that some of such proposals did not adequately demonstrate that they were designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest, consistent with Section 6(b)(5) of the

[41] Data in this table is sourced from: Bloomberg.

[42] *https://www.theblock.co/data/crypto-markets/futures.*

[43] *https://www.coinglass.com/currencies/ETH.*

Act.[44] The Commission does not apply a ''cannot be manipulated'' standard, but instead seeks to examine whether a proposal meets the requirements of the Act.[45] The Commission has explained that a proposal could satisfy the requirements of the Act in the first instance by demonstrating that the listing exchange has entered into a CSSA with a regulated ''market of significant size'' related to the underlying or reference crypto-assets.[46] The Commission has also recognized that a listing exchange would not necessarily need to enter into such an agreement with a regulated significant market if the underlying commodity market inherently possessed a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets or if the listing exchange could demonstrate that there were sufficient ''other means to prevent fraudulent and manipulative acts and practices.'' [47] As the Commission explained in the Teucrium Approval Order, the approval of that fund was based on a finding that the CME is a ''significant market'' related to the exclusive non-cash holdings of the proposed ETPs, which in that case would be CME bitcoin futures contracts.[48]

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the Commission has identified with respect to potential fraud and manipulation in the context of a crypto product. Further, as the Commission has previously acknowledged, trading in an Ether-based ETP on a national securities exchange, as compared to trading in an unregulated Ether spot market, may provide additional protection to investors.[49] The Sponsor also believes that listing of the Shares on the Exchange will provide investors with such an opportunity to obtain exposure to Ether within a regulated environment.

Futures-Based Spot Price (''FBSP'')

The value of Spot Ether held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (the ''Digital Asset Adviser'') in good faith based on a methodology that is entirely derived from the settlement prices of Ether Futures Contracts on the CME Market and that considers all available facts and all available information on the valuation date.

The method involves a calculation that is sensitive to both the length of time (the ''tenor'') until each Ether Futures Contract is due for settlement and the final settlement price for each contract. The calculation takes into account each contract's tenor and the tenor squared. This approach is designed to give more importance to contracts that are due for settlement in the near term, considering that the prices of these near-term contracts are more reliable indicators of the current spot price of Ether and are also more heavily traded. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor do not use data from Ether exchanges or directly from spot Ether trading activity in determining the value of Spot Ether held by the Fund.

As an example, the table below demonstrates how the weights of each hypothetical Ether Futures Contract change over time as the first contract gets closer to maturity.

[44] *See e.g.,* Order Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, To List and Trade Shares, Issued by the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 80206 (March 10,2017), 82 FR 14076 (March 16, 2017) (SR–BatsBZX–2016–30) (the ''Winklevoss I Order'') the Winklevoss II Order; Order Disapproving a Proposed Rule change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 87267 (October 9, 2019), 84 FR 55382 (October 16, 2019 (SR–NYSEArca–2019–01) (the ''Bitwise Order''); the Wilshire Phoenix Order; Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProSharess Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (August 22, 2018), 83 FR 43934 (August 28, 2018) SR–NYSEArca–2017–139); Order Disapproving a Proposed Rule Change Relating to Listing and Trading of the Direxion Daily Bitcoin Bear IX Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares Under NYSE Arca Rule 8.200–E, Securities Exchange Act Release No. 83912 (August 22, 2018), 83 FR 43912 (August 28, 2018) (SR–NYSEArca–2018–02); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (August 22, 2018), 83 FR 43923 (August 28, 2018) (SR–CboeBZX–2018–01) (the ''GraniteShares Order'').

[45] *See* Winklevoss II Order, 83 FR at 37582.

[46] *See* Wilshire Phoenix Order, 85 FR at 12596–97.

[47] *See* Winkle II Order, 83 FR at 37580, 37582–91; Bitwise Order, 84 FR at 55383, 55385–406; Wilshire Phoenix Order, 85 FR at 12597.

[48] *See* Teucrium Approval Order.

[49] *See* GraniteShares Order, 83 FR at 43931 *See also* Hester M. Peirce, U.S Sec. Exch. Comm'n, Dissent of Commissioner Hester M. Peirce to Release No. 34–83723 (July 26, 2018), *available at: https://www.sec.gov/news/public-statement/peirce-dissent-34-83723* (''An ETP based on bitcoin would offer investors indirect exposure to bitcoin through a product that trades on a regulated securities market and in manner that eliminates some of the frictions and worries of buying and holding bitcoin dirctly. If we were to approve the ETP at issue here, investors could choose whether to buy it or avoid it'').

	First future tenor				
Future	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

The Sponsor believes that the accuracy of the proposed pricing methodology can be measured by comparing its pricing results to the real time version of Ether price benchmarks such as ETHUSD_RR and NQETHS. FBSP is derived from futures settlement prices, which are usually VWAPs from all contracts traded on Globex between 14:59:00 and 15:00:00 Central Time (''CT''). Accordingly, for purposes of developing a useful proxy, the Sponsor's analysis uses the arithmetic average of the Benchmark closing prices at 14:59:00 and 15:00:00 CT, which is not sensitive to the fluctuations that occur within this minute. By design, this difference in the price metric introduces an artificial distortion in the comparison, resulting in figures that are less adherent than in reality. Therefore, the figures set forth below represent a conservative estimation of the true adherence between FBSP and the Benchmark, considering that the actual adherence to the Benchmark is higher than these results can indicate.[50]

Using data available on Bloomberg on August 28, 2023, the Sponsor compared FBSP to NQETHS and ETHUSD_RR from February 16, 2023 to August 28, 2023 and determined that FBSP behaves very similarly to both indexes. The following charts show a direct comparison between those two benchmark values and FBSP:

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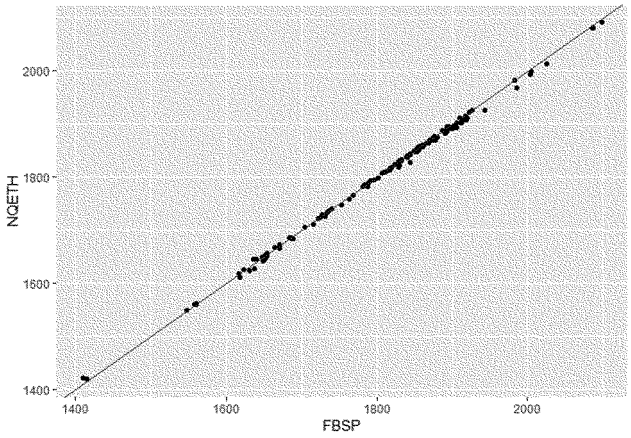
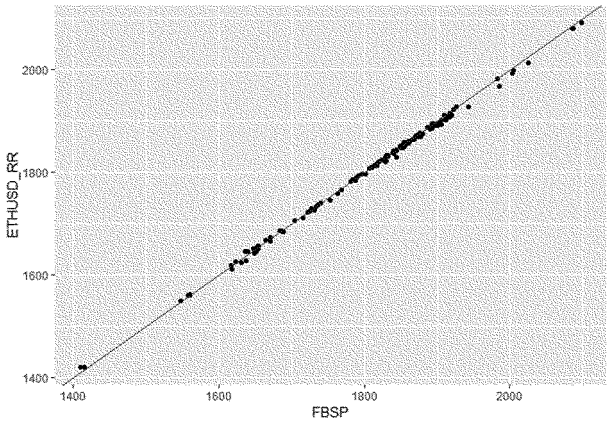
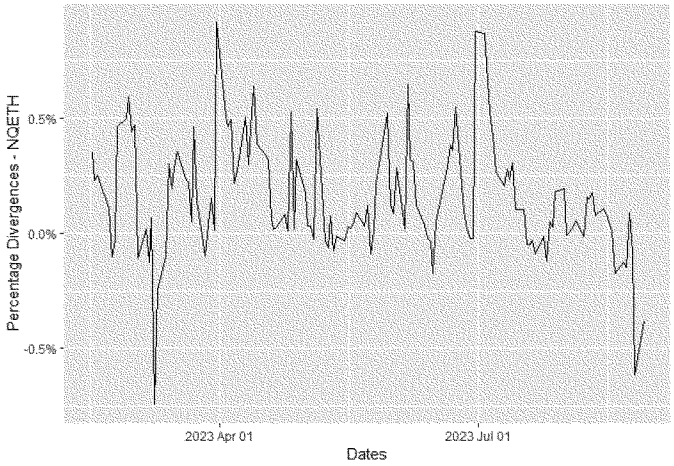
[50] The difference in the price metrics introduces an artificial distortion in the comparison. Indeed, a regression analysis shows that the ratio between the maximum and minimum spot prices within the Ether Futures VWAP window is a significant variable that explains the absolute divergences between FBSP and the spot prices. The higher the ratio between the maximum and minimum spot prices, the higher expected absolute divergence between FBSP and the spot prices. The correlation of these two metrics in the case of the real time version of NQETHS is approximately 17%, suggesting that the actual adherence between FBSP and the spot benchmarks is even higher than the figures discussed herein indicate.

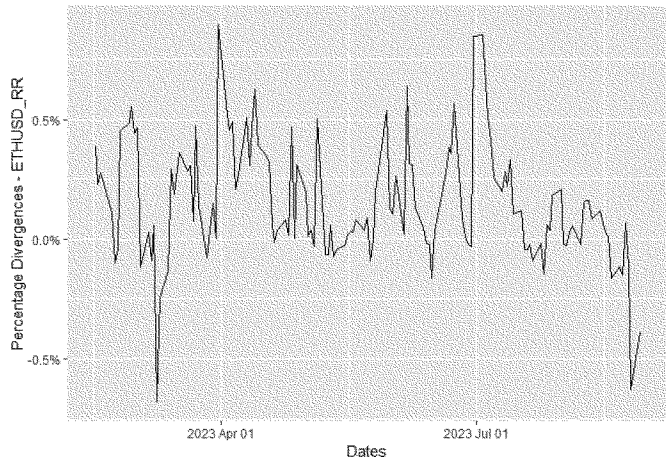




In the above charts, each black point indicates one day, and their proximity to the red line shows how similar FBSP is to each of NQETHS and ETHUSD_RR. The correlations between FBSP and each of NQETHS and ETHUSD_RR exceed 99.8%, and the mean absolute percentage divergences are 21 basis points (''bps'') and 21 bps, respectively, while the median absolute percentage divergences are 12 bps and 13 bps, respectively.

The charts below provide another visualization of the results of this comparison, as time series of the percentage divergences:





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These charts show that there are no clusters of abnormal divergences. In both cases, more than 90% of the days exhibit percentage divergences below 51 bps. The highest percentage divergence in absolute terms, with 91 bps for the NQETHS and 89 bps for the ETHUSD_RR, was observed on March 31, 2023, and coincided with significant volatility in the Ether markets; on that day, NQETHS gain 2.60% from $1780.66 to $1826.99 and the FBSP, which settles one hour later, gain 3.54%, from $1781.28 to $1844.39. The Sponsor notes that, even on the day with the highest percentage divergence between FBSP and the other two benchmarks, that percentage divergence was insignificant in comparison to the intraday volatility of Ether itself and could be attributable to the different market structures of the regulated CME Market and the unregulated spot markets.

The Sponsor believes that this data strongly suggests that FBSP is a suitable choice for the NAV calculation, both for the settlement and the real time proxy, and that the following additional considerations further support the soundness of the FBSP methodology:

- Ether is a highly volatile asset traded in multiple venues across the world, and divergences of the magnitude found in this analysis are not unusual across different price sources or exchanges.
- As noted above, the mean absolute percentage divergences are 21 bps and 21 bps respectively, the median absolute percentage divergences are 12 bps and 13 bps, and March 31, 2023 was the day with the highest percentage divergence in absolute terms, with 91 bps for the NQETHS and 89 bps for ETHUSD_RR. The Sponsor believes that these divergences between FBSP and the underlying benchmarks are in a reasonable range and support that FBSP closely tracks NQETHS and ETHUSD_RR.

Finally, the Sponsor notes that, even considering that FBSP could create some level of uncertainty due to the potential divergences between the FBSP and the spot prices observed in unregulated markets, the authorized participants (''APs'') are able to hedge potential exposure by buying the basket of futures that represents FBSP and selling it during the futures settlement window. In doing so, APs can emulate a situation where they know ex ante the value of the creation basket. The opposite trade can have the same effect for the case of redemptions. Thus, the APs providing liquidity on the secondary market during the day will always be in a position to hedge their exposure using exclusively the CME Market, which will make them more likely to provide liquidity to the Fund thus making its market price converge to its NAV.

Preventing Manipulation

While the Commission has raised valid concerns about the potential influence of unregulated Ether markets on the daily settlement price on CME Market, the Sponsor believes that the proposed methodology described above provides a significant and sufficient

degree of insulation from such influences, for the following reasons:

1. Regulated market influence: The daily settlement price of Ether Futures Contracts on the CME Market, which is the basis for the NAV calculation of both futures contracts and physical holdings of the Fund, is primarily influenced by trading activity within the regulated futures market itself. This market is subject to stringent oversight and surveillance mechanisms designed to detect and deter manipulative and fraudulent practices, thus significantly limiting the possible influence of unregulated Ether markets on the daily settlement price.

2. *High liquidity and volume:* The CME Market is characterized by high liquidity and trading volume, such that any attempt to influence the daily settlement price through trading activity in other, unregulated Ether markets would require a significant amount of capital and coordination. The Sponsor thus believes that any such manipulation attempts would be highly detectable by the CME Market's market surveillance.

3. *Complex pricing methodology:* The NAV calculation methodology is comprehensive and accounts for both the tenor and final settlement price of each futures contract. In addition, the FBSP used in the NAV calculation methodology incorporates all maturities of Ether Futures Contracts, which exhibit a robust price relationship among themselves. As a result, attempting to manipulate these prices in a coordinated manner to generate a substantial impact on NAV would be very challenging for potential manipulators and likely financially unfeasible. The Sponsor thus believes that the complexity of the methodology provides an additional layer of protection against manipulation, as it would be extremely difficult for a manipulator to influence all these factors in a coordinated way to impact the Fund's NAV without leaving a detectable trail that would alert market surveillance.

4. *Focus on near-term contracts:* The Fund's methodology gives more importance to futures contracts that are due for settlement in the near term because such contracts are more heavily traded, and their prices are more reliable indicators of the current spot price of Ether. The Sponsor believes that the methodology's focus on near-term contracts further reduces the potential for manipulation, as these contracts are less susceptible to manipulation due to their higher trading volumes and liquidity.

The Sponsor also believes that it is highly unlikely that a person attempting to manipulate the NAV of the Fund could do so successfully by trading on unregulated spot and derivatives markets. Because of direct arbitrage, it is reasonable to assume that the ETP's market price (in the secondary market) would be highly adherent to the Fund's Intraday Net Asset Value, since APs can always create and redeem shares of the Fund hedging with a basket of Ether Futures Contracts and the value of the creation basket is determined based on the NAV of the Fund, which is calculated using the FBSP prices that is based on such basket of Ether Futures Contracts. Consequently, the likelihood of a potential manipulator of the ETP to succeed by exclusively trading in unregulated Ether markets would depend on how much the prices in these markets have an impact over the CME Ether Futures Contracts prices. The likelihood that a potential manipulator would undertake such an effort is also decreased when considering the financial burden of manipulating the unregulated markets and the overall expected profitability of any such manipulation.

To further assess such likelihood, the Sponsor carried out the following analysis to investigate the relationship between prices from relevant unregulated Ether markets and the prices of the CME Ether Futures Contracts, to assess the impact that a manipulation on those markets would have on CME. The Sponsor collected one-minute bars data between February 21 and September 6 [51] of prices for the nearest CME Ether Futures Contract (''CME Futures'') and the following alternative Ether prices (''AEP''): spot Ether (in USD) on BitStamp, Coinbase, Gemini and Kraken, spot Ether (in USDT), and ETHUSDT USDs-Margined Perpetuals on Binance. For each day and each AEP, a simple regression model was estimated with one-minute CME Futures log-returns as the dependent variable, and two independent variables: (1) the log CME Futures closing price of the previous minute (as a control variable) and (2) the difference between the AEP log return and the CME Futures log return in the previous minute (as the variable of interest).

The estimated coefficients associated with the variable of interest are a measure of the expected response from the CME Futures (as measured by its returns) to a divergence between its own return information and the one from AEP in the near past (one-minute lagged returns). Such divergences are expected to occur in cases of manipulation. A higher coefficient (closer to one) would indicate that CME Futures are more sensitive to and strongly influenced by the divergence, while a lower coefficient (closer to zero) would suggest that CME Futures are less responsive and not significantly influenced by the information coming from AEP. The Sponsor believes that these coefficients can be considered a conservative estimation of the real impact that manipulation in an AEP would have over the CME Futures price because the estimations are calculated under normal circumstances rather than under a manipulative attack, in which some other indicators, such as abnormal volume and volatility, would warn market participants and undermine their perception of the attacked AEP as a reliable price reference. The results of the Sponsor's analysis are summarized in the table below:[52]

[51] This date range represents days with intraday data available on Bloomberg as of September 6. Days with less than 40 observations for a given AEP were excluded from the analysis of such AEP.

[52] The market depth information was obtained from CoinMarketCap on August 31, 2023. The AEPs with blank cells in this table were not included in the August 31, 2023 snapshot.

	Estimated Parameters				Market Depth	
ABP	Average	1st Decile	Median	9th Decile	+2% Depth	-2% Depth
Binance (spot USDT)	0.33	0.12	0.33	0.47	$6,931,230	$9,006,045
Binance (perpetual USDT)	0.32	0.15	0.33	0.47		
Coinbase (spot USD)	0.23	-0.03	0.24	0.53	$9,540,548	$10,509,099
Kraken (spot USD)	0.18	-0.02	0.19	0.37	$3,401,860	$5,115,258
Bitstamp (spot USD)	0.18	0.02	0.18	0.36		
Gemini (spot USD)	0.15	-0.05	0.15	0.32		

The Sponsor's analysis suggests that the influence of AEP over the CME Futures prices is relatively low. For instance, if a would-be manipulator chose to attack Binance Spot (ETH–USDT), which is an AEP with higher coefficients and thus higher potential to impact CME futures, the average coefficient of 0.33 means that in order to manipulate CME Futures prices by 1%, the would-be manipulator would have to distort Binance's prices by 3% (1% divided by 0.33) on average. To be successful with 90% confidence (1st Decile) this manipulator would have to distort Binance's prices by more than 8.3% (1% divided by 0.12). The Sponsor believes that its analysis supports that, even considering these conservative estimations, indirect manipulation would be extremely inefficient.

The market depth columns in the above table indicate that substantial financial resources, running into millions of dollars, are present on both sides of the order book for the most influential AEPs (even without including hidden orders, bots, and arbitrageurs that effectively enhance liquidity). The considerable financial commitment that would be required makes the manipulation of these prices an expensive endeavor.

The Sponsor believes that its analysis demonstrates that the low efficiency of attempts to manipulate AEPs, coupled with the significant cost involved in influencing impactful AEPs, makes potential manipulation of spot Ether markets an unattractive proposition, and that it is therefore highly unlikely that a potential manipulator of the ETP could succeed by exclusively trading in unregulated Ether markets. The combination of the high costs and the inefficiencies associated with manipulation makes it a daunting and unprofitable venture.

In summary, while the Sponsor acknowledges the potential for influence from trades settled in unregulated Ether markets, the Sponsor believes that the NAV calculation methodology, coupled with the inherent characteristics of the CME, provides a significant degree of protection against such influence being deliberately used to manipulate the Fund's market price or NAV without it being subject to detection by CME market surveillance.

Investment Strategy

The Sponsor believes that the investment strategy of the Fund is designed to mitigate the risk of manipulation by diversifying its holdings and is responsive to the Commission's concerns with respect to an ETP that holds spot Ether. Instead of holding 100% spot Ether, which could make it more susceptible to price manipulation in the spot market, the Fund will hold a mix of Spot Ether, Ether Futures Contracts, and cash. This diversified portfolio is subject to investment restrictions, which further reduces the potential for manipulation, as explained below:

1. *Diversification:* By holding a combination of Spot Ether, Ether Futures Contracts, and cash, the Fund reduces its exposure to any single asset class. This diversification also makes it more difficult for a would-be manipulator to influence the NAV of the Fund by manipulating the price of spot Ether alone; for instance, even if a manipulator were able to influence the spot price of Ether, their actions would only affect a portion of the Fund's portfolio, thereby limiting the overall impact of such manipulation on the Fund's NAV.

2. *Investment restrictions:* The Fund's holdings of Spot Ether would be subject to investment restrictions, which are further discussed below. These restrictions cap the amount of Spot Ether that the Fund can hold, further reducing the potential for manipulation by, for example, preventing the Fund from becoming so large in relation to the spot market that it could be manipulated without influencing the futures market. The Sponsor believes that these investment restrictions ensure that any significant trading activity aimed at manipulating the Fund would likely spill over into the CME Market, a regulated market with robust surveillance mechanisms in place to detect and deter manipulation, and with which the Exchange could receive information pursuant to common ISG membership.

3. *Reduced dependence on spot market:* By holding Ether Futures Contracts and cash in addition to Spot Ether, the Fund reduces its dependence on the spot market, thereby mitigating concerns about potential manipulation in unregulated Ether spot exchanges. Instead, the Fund will rely on Ether Futures Contracts and Ether futures EFPs that are traded on the CME Market, a regulated exchange, which provides a higher level of transparency and oversight compared to unregulated spot exchanges.

4. *Dynamic adjustment:* The mix of Spot Ether, Ether Futures Contracts, and cash in the Fund's portfolio can be dynamically adjusted based on market conditions and regulatory developments. This flexibility allows the Fund to respond quickly to any signs of potential manipulation or other market abuses, further enhancing its resilience against manipulation.

In summary, by diversifying its holdings and imposing investment restrictions, the Fund reduces its vulnerability to manipulation in any single market, thereby protecting investors and maintaining the integrity of the Fund.

Investment Restrictions on Spot Ether

According to the Sponsor, the Fund will be subject to investment restrictions on Spot Ether (the ''Investment Restrictions'') that are specific constraints on its exposure to Ether, particularly with respect to spot holdings. These investment restrictions, which are designed to mitigate the risk of manipulation of the Fund's Shares by insulating the Fund from events impacting the Ether spot market, are variable based on factors such as the Commission's recognition of the CME as a regulated market of significant size related to spot Ether, the NAV of the Fund, and the prevailing trading conditions on the core exchanges of the Benchmark.

The first constraint, termed in the Registration Statement as the ''Spot Ether Relative Position Restriction,'' caps the Fund's exposure to the ether spot market to a specified proportion of the Fund's NAV. This limit is designed to curb the potential success of any attempts to materially manipulate the Fund's Share prices through undue influence on the ether spot market.

The second constraint, referred to in the Registration Statement as the ''Spot Ether Notional Exposure Restriction,'' restricts the Fund's notional exposure to ether to a set proportion. The dual objectives of this second constraint are: (a) to deter potential manipulative actions on the Shares by making the cost-benefit tradeoff highly unfavorable for the manipulator, as it would require them to transact a volume that surpasses the Fund's total exposure in the ether spot market, thus making the potential costs of manipulation outweigh the benefits, and (b) to restrict the Fund's trading activities in such a way that they are not expected to become the primary driving force behind price variations in the ether spot market.

The Sponsor believes that the Investment Restrictions serve two main purposes:

1. They deter potential manipulative actions directed towards the Fund's Shares by making the cost-benefit tradeoff highly unfavorable for the manipulator. To manipulate the Fund's price using an unregulated spot market, a manipulator would need to transact a volume that surpasses the Fund's total exposure in spot Ether, making the potential costs of manipulation outweigh the benefits.

2. They ensure that the Fund's trading activities do not become the primary driving force behind price variations in the Ether spot market. By restricting the Fund's notional exposure to a proportion of the ADTV, this constraint ensures that the Fund's trading activities are always a fraction of the overall market activity, thereby reducing the potential for the Fund to unduly influence market prices.

As an example, in the 30-day period ending on August 31, 2023, the ADTV of spot Ether on Coinbase was $146 million. Thus, the Fund's notional exposure to Ether is restricted to up to $146 million, meaning that if the Fund's AUM is, for example, $100 million, it could have up to 100% allocation to Spot Ether. However, if the Fund's AUM is, for example, $1 billion, it could still only have up to $146 million of notional exposure to Spot Ether, which would be the equivalent of up to 14.6% of the Fund's NAV, and the rest of the portfolio would need to be allocated to Ether Futures Contracts, cash, or cash equivalents.

To ensure that the Fund's trading activities do not become the primary driving force of the Spot Ether price, the Sponsor intends to keep its notional allocation to spot Ether as a small proportion of the overall trading activity of spot Ether.

The Sponsor intends to do so by restricting the maximum notional exposure to Spot Ether to a proportion of the 30-day ADTV, with the ADTV data based on the most trusted exchanges (meeting the double requirements of being a core exchange per the NQETHS methodology and being subject to regulatory and reporting rules in the United States, which make them liable for any false volume data reporting).

Currently, only one exchange meets those requirements, and over the last three months, it accounted for 9.75% to 11.83% of all Ether trading, whereas the largest unregulated spot Ether exchange accounted for 35% to 40% of the spot Ether volume over the same period.[53]

SPOT ETHER 30-DAY ADTV[54]

	June 30, 2023	July 31, 2023	August 31 2023
Top 10 Exchanges	$2,012.24 million	$1,560.15 million	$1,499.43 million
Single Core Exchange meeting Sponsor's requirement	$203.56 million	$184.64 million	$146.22 million
Single Core Exchange's market share	10.12%	11.83%	9.75%
All 5 Core Exchanges	$271.02 million	$227.84 million	$187.53 million
All 5 Core Exchanges' market share	13.47%	14.60%	12.51%

The Sponsor believes that it is therefore unlikely that the single exchange on which the Sponsor bases the ADTV data on will be the primary driver of spot Ether price given its relatively small market share. As a result, even with the Fund's notional Spot Ether exposure limited at 100% of the ADTV on that single exchange, the Fund's Spot Ether holdings would likely represent only 9.75% to 11.83% of the daily liquidity of the spot Ether market (on the biggest 10 exchanges by volume) and thus is unlikely to become the primary driver of the spot market price formation.

Additionally, with the spot Ether notional exposure at 9.75% to 11.83 of ADTV, a would-be manipulator would need to trade on exchanges that account for most of the liquidity and, in particular, the largest one. The Sponsor believes that the cost benefit analysis of attempting to distort the price on the largest exchange, which accounts for approximately 35% to 40% of the liquidity (or approximately 3 to 4 times the size of the Fund), to manipulate the price of the Fund would not be compelling.

In summary, the Sponsor believes that the Investment Restrictions are a key tool in the Fund's strategy to prevent manipulation. By limiting the Fund's exposure to the spot market and ensuring that the Fund's trading activities do not become the predominant influence on market prices, these restrictions provide a robust defense against potential manipulation attempts.

Investor Protection and Spot and Proxy Exposure

The Sponsor believes that U.S. investor exposure to Ether directly through holding Ether itself has grown and the potential risk to U.S. investors has also grown. As described, premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are exposing U.S. investors to risks that could potentially be eliminated through access to an Ether futures-based fund with investment restrictions on its exposure to Spot Ether. The Sponsor believes that the Commission's concerns have been sufficiently mitigated by the use of futures contracts, the investment restrictions and EFP transactions. Accordingly, the Sponsor believes that

[53] *See https://www.theblock.co/data/crypto-markets/spot/the-block-legitimate-volume-index-eth-only.*

[54] *See* Messari, volume data is for USD, USDT and USDC traded against Bitcoin. Core Exchanges.

the Fund represents an opportunity for U.S. investors to gain price exposure to Ether in a regulated and transparent exchange-traded vehicle that limits risks by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; and (iii) reducing risks associated with investing in operating companies that are imperfect proxies for Ether exposure.

According to the Sponsor, exposure to Ether through the Fund also presents certain advantages for retail investors compared to buying spot Ether directly. A retail investor holding Spot Ether directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.,* insufficient password protection, lost key, etc.), which could cause them to lose some or all of their Ether holdings. In addition, retail investors will be able to hold the Shares in traditional brokerage accounts which provide SIPC protection if a brokerage firm fails.

Creations and Redemptions

According to the Sponsor (and as discussed further below), the Fund uses cash creations and redemptions. With respect to Spot Ether, an AP delivers cash to the Fund instead of Spot Ether in the creation process, and an AP receives cash instead of Spot Ether in the redemption process. The cash delivered or received during the creation or redemption process is then used by the Sponsor to purchase or sell Ether Futures Contracts with an aggregate market value that approximates the amount of cash received or paid upon the creation or redemption. On a daily basis, the Sponsor will analyze the current portfolio allocation of the Fund between Spot Ether and Ether Futures Contracts and, based on the Investment Restrictions and target portfolio exposure, may decide to engage in an EFP transaction on CME to buy or sell Spot Ether for the equivalent position in Ether Futures Contracts.

The Sponsor believes that this method protects against manipulation in the creation and redemption process and of the Fund's market price from trading in unregulated spot markets. Investment in spot Ether will not be directly related to creation or redemption of Fund Shares, but instead on target portfolio exposure, such that trades can be performed in smaller sizes and at unpredictable times, reducing the risk of creation or redemption manipulation.

The Sponsor believes that the use of cash creations and redemptions in the Fund serves as a deterrent to manipulation in several ways:

1. *Decoupling from spot market:* By using cash instead of Spot Ether for creations and redemptions, the Fund's operations are decoupled from the unregulated spot market. The creation and redemption process does not directly influence the unregulated spot market or vice versa, thereby reducing the potential for manipulation through this process.

2. *Unpredictable trading times:* The Fund's investment in Spot Ether is not directly related to creations or redemptions, but instead on target portfolio exposure. As a result, trading can be done in smaller sizes and at unpredictable times, making it harder for potential manipulators to time their actions.

3. *Reduced impact of large trades:* By effecting creations and redemptions in cash, large trades that could potentially influence the unregulated spot market are mitigated. Instead, these trades are absorbed in the CME Market, which is sufficiently liquid and can reasonably be relied upon to assist in detecting and deterring fraudulent or manipulative misconduct.

4. *Reduced influence of Ether sourced from unregulated spot exchanges:* In-kind creation may create a direct relationship between the Fund's market price and prices on unregulated exchanges such as Binance by arbitrage, because an AP could buy or sell Ether from Binance and receive or deliver Ether from the Fund through the creation or redemption process. With creations and redemptions in cash, however, that arbitrage cannot be executed without going through pricing and trading on the CME Market.

The Sponsor believes that the Fund's creation and redemption process is designed to minimize the potential for market manipulation, thereby protecting investors and maintaining the integrity of the markets.

Exchange for Physical Transactions

EFP transactions, also known as Exchange for Related Position or EFRP transactions,[55] are a type of private agreement between two parties to trade a futures position for the underlying asset. In the context of the Fund, these transactions will be used to purchase and sell Spot Ether by delivering or receiving the equivalent futures position.

In an EFP transaction, two parties exchange equivalent but offsetting positions in an Ether Futures Contract and the underlying physical Ether. One party is the buyer of futures and the seller of the physical Ether, and the other party takes the opposite position (seller of futures and buyer of physical). While the EFP is a privately-negotiated transaction between the two parties to the trade, the consummated transaction must be reported to CME Market and its conditions and prices are subject to CME Market's market regulation oversight.

EFPs may be transacted at such commercially reasonable prices as are mutually agreed upon by the parties to the transaction, provided that the price conforms to the applicable futures price increments set forth for the relevant futures contract. The Sponsor believes that EFPs executed at off-market prices are more likely to be reviewed by CME's Market Regulation. CME's Rule 538 establishes that ''EFPs may not be priced off-market for the purpose of shifting substantial sums of cash from one party to another, to allocate gains and losses between the futures or options on futures and the cash or OTC derivative components of the EFRP, to evade taxes, to circumvent financial controls by disguising a firm's financial condition, or to accomplish some other unlawful purpose.''

Because both sides of the trade track the same benchmark (Ether), an EFP is market-neutral. As such, the pricing of an EFP is quoted in terms of the basis between the price of the futures contract and the level of the underlying Ether. Because the Fund proposes to use EFP transactions to purchase and sell Spot Ether, the only non-cash assets held by the Fund (Ether Futures Contracts and Ether) are traded on CME Market. Because the Exchange and the CME Market are both ISG members, information shared by the CME Market with the Exchange can be used to assist in detecting and deterring fraudulent or manipulative misconduct related to those assets.

In the proposed strategy for the operation of the Fund, every time the Fund is required to purchase or sell Ether, the Sponsor will perform a request for quotation auction (''RFQ Auction'') with multiple market makers using the settlement price as the reference for the futures contracts. Market makers present their quotes in terms of basis points (''bps''), where 1bp = 0.01% between the futures contract price and the spot price. The Sponsor will then confirm the trade with the best offer and report the EFP transaction to the CME Market. The Sponsor believes that performing an RFQ Auction with multiple market makers is an efficient price formation mechanism that generates enough competition and

[55] *See https://www.cmegroup.com/clearing/operations-and-deliveries/accepted-trade-types/efp-efr-eoo-trades.html.*

attracts sufficient liquidity to minimize the transaction costs for the ETP.

As an example, assume that the Fund needs to buy 500 ethers (ETH) in exchange for 10 units of the next maturity of Ether Futures Contracts (''ETHA''). The Sponsor will perform an RFQ Auction by requesting 3 market makers to provide their best price for buying ETHA versus ETH. The Market Makers provide a bid/ask quote in terms of basis between the futures and spot. Market Maker 1 (MM1) bids +22bps, Market Maker 2 (MM2) bids +20bps, and Market Maker 3 (MM3) bids +25bps. The Sponsor will then agree to pay the best bid of +25bps from MM3. Assuming ETHA is at $1,634, the price for the spot transaction is fixed at $1,629.92. The transaction is then reported within the time period and in the manner specified by the CME Market. Upon completion of the EFP, the Fund and MM3 would have different positions but same exposure:

- The Fund was long 10 Ether Futures Contracts and now has converted this exposure into 500 Ethers.
- MM3 had 500 Ethers and now holds an equal position long 10 Ether Futures Contracts.

The table below illustrates the steps in this EFP transaction:

Steps	MM3	Fund
1. Starting Position	500 ETH	10 ETHA.
2. EFP is privately negotiated	MM3 and the Fund agree to terms of the EFP: • Fund sells/MM3 buys 10 ETHA at $1,634. • Fund buys/MM3 sells 500 ETH at 1,629.92 (+25bps).	
3. MM3 sends Ether to the Fund	−500 ETH	+ 500 ETH.
4. EFP reported to CME	+ 10 ETHA	−10 ETHA.
5. Final Position	10 ETHA	500 ETH.

As required by CME Market's regulation, the Fund and all other parties related to the transaction will maintain all records relevant to this transaction, including order tickets, RFQ Auction message history, and custody transaction records, and provide them to CME upon request for surveillance purposes pursuant to CFTC Regulation 1.35.

EFP volumes are reported daily on the CME Group website. Historically, trading activity in EFP transactions is sporadic as it depends on the demand for a regulated conversion between futures and spot positions. Nonetheless, the Sponsor believes that a large number of liquidity providers are ready to execute this type of transaction and can provide enough liquidity to support the proposed ETP's demand. A subset of firms that are ready to provide liquidity on EFP Ether transactions is available on CME's website.[56]

1. *Regulated environment:* EFP transactions occur on the CME Market, which is a regulated exchange with processes in place to prevent market manipulation, including monitoring transaction prices and investigating potential manipulations, as outlined in CME Rule 538.[57] All transactions are monitored and subject to rules and regulations designed to prevent market manipulation. Moreover, all parties to an EFP transaction are required to maintain all records relevant to the transaction pursuant to CFTC Regulation 1.35, thus providing the ability for CME and the CFTC to conduct surveillance inquiries and investigations in an efficient and effective manner for the protection of customers and ensuring market integrity. Since the transactions are quoted as basis points based on the ethereum futures contracts prices, the Sponsor believes that there is a direct and unequivocal lead-lag relationship between the prices on CME and the spot market price that the Fund trades. Furthermore, as an additional protection measure, to enforce the highest standard on the sourcing of such underlying physical Ether, the Sponsor represents that it will only participate in EFP transactions with broker-dealers that are FINRA regulated or part of corporate groups that are, which would provide another layer of regulatory oversight in how Ether exposures are sourced, as those counterparties already have an ongoing commercial relationship with the Sponsor and are active participants in trading Ether regulated products worldwide.

2. *Surveillance-sharing agreement:* Nasdaq and the CME Market are both members of the ISG, which allows for the sharing of information and cooperation in investigations, which can help detect and deter market manipulation.

3. *Transparency:* EFP transactions must be reported to the CME Market, which is a regulated exchange, providing transparency and making it more difficult for manipulative practices to go unnoticed. Parties to EFP transactions must maintain all records relevant to the CME futures contract and the related position transaction, pursuant to CFTC Regulation 1.35, adding another layer of regulatory scrutiny and transparency. In addition, EFP transactions volumes are required to be reported with the daily large trader positions by each clearing member, omnibus account, and foreign broker.

4. *Market-neutrality:* Because EFP transactions involve exchanging equivalent but offsetting positions, they are market-neutral. As a result, EFP transactions do not create imbalances in the market that could be exploited for manipulative purposes.

5. *Unpredictability:* EFP transactions are privately negotiated between the fund and other parties, making them less predictable and therefore more difficult to manipulate.

The Sponsor believes that, by using EFP transactions to purchase and sell spot Ether, the Fund would ensure that its operations are conducted in a regulated, transparent, and market-neutral manner, significantly reducing the dependency on and the risk of manipulation from unregulated spot exchanges.

Settlement of ETH and MET Contracts

According to the Registration Statement, each ETH Contract and MET Contract settles daily to the ETH Contract volume-weighted average price (''VWAP'') of all trades that occur between 2:59 p.m. and 3:00 p.m., Central Time, the settlement period, rounded to the nearest tradable tick.[58]

[56] *See https://www.cmegroup.com/trading/bitcoin-brokers-and-block-liquidity-providers.html.*

[57] *See https://www.cmegroup.com/rulebook/files/cme-group-Rule-538.pdf.*

[58] VWAP is calculated based first on Tier 1 (if there are trades during the settlement period); then Tier 2 (if there are no trades during the settlement period); and then Tier 3 (in the absence of any trade activity or bid/ask in a given contract month during the current trading day, as follows: Tier 1: Each contract month settles to its VWAP of all trades that occur between 14:59:00 and 15:00:00 CT, the settlement period, rounded to the nearest tradable tick. If the VWAP is exactly in the middle of two tradable ticks, then the settlement will be the tradable price that is closer to the contract's prior day settlement price. Tier 2: If no trades occur on CME Globex between 14:59:00 and 15:00:00 CT, the settlement period, then the last trade (or the

ETH Contracts and MET Contracts each expire on the last Friday of the contract month and are settled with cash. The final settlement value is based on the ETHUSD_RR at 4:00 p.m. London time on the expiration day of the futures contract.[59]

As proposed, the Fund will rollover its soon to expire Ether Futures Contracts to extend the expiration or maturity of its position forward by closing the initial contract holdings and opening a new longer-term contract holding for the same underlying asset at the then-current market price. The Fund does not intend to hold any Ether futures positions into cash settlement.

Net Asset Value

According to the Registration Statement, the Fund's NAV per Share will be calculated by taking the current market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares.

The Sub-Administrator of the Fund will calculate the NAV once each trading day, as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time.

According to the Registration Statement, to determine the value of Ether Futures Contracts, the Fund's Sub-Administrator will use the Ether Futures Contract settlement price on the exchange on which the contract is traded, except that the ''fair value'' of Ether Futures Contracts (as described in more detail below) may be used when Ether Futures Contracts close at their price fluctuation limit for the day. The Fund's Sub-Administrator will determine the value of Fund investments as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. New York time. The Fund's NAV will include any unrealized profit or loss on open Ether futures contacts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

According to the Registration Statement, the value of spot Ether held by the Fund is determined by the Sponsor in good faith based on a methodology that is entirely derived from the settlement prices of Ether Futures Contracts on the CME. The method involves a calculation that is a function of both the length of time (the tenor) until each Ether Futures Contract is due for settlement, and the final settlement price for each contract on that day. The calculation takes into account each contract's tenor and the tenor squared. This approach is designed to give more importance to contracts that are due for settlement in the near term, considering that the prices of these near-term contracts are more reliable indicators of the current spot price of Ether and are also more heavily traded. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Fund does not use data from ether exchanges or from spot ether trading activity. By way of example, the table below shows how the weights of each hypothetical Ether Futures Contract change over time as the first contract gets closer to maturity.

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contract's settlement price from the previous day in the absence of a last trade price) is used to determine whether to settle to the bid or the ask during this period. a. If the last trade price is outside of the bid/ask spread, then the contract month settles to the nearest bid or ask price. b. If the last trade price is within the bid/ask spread, or if a bid/ask spread is not available, then the contract month settles to the last trade price. Tier 3: In the absence of any trade activity or bid/ask in a given contract month during the current trading day, the daily settlement price will be determined by applying the net change from the preceding contract month to the given contract month's prior daily settlement price.]

[59] The ETHUSD_RR is a daily reference rate of the U.S. dollar price of one ether calculated daily as of 4:00 p.m. London time. It is calculated by the CME based on the ether trading activity on CME-specified constituent spot ether exchanges during a calculation window between 3 p.m. and 4 p.m. London time. The CME launched the ETHUSD_RR in May 2018.

	First future tenor				
Future	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

	First future tenor				
Future	27 days	21 days	15 days	9 days	3 days
1st	130.81%	125.92%	120.39%	113.79%	105.33%
2nd	1.91%	-0.84%	-2.94%	-3.80%	-2.26%
3rd	-8.92%	-7.57%	-5.86%	-3.76%	-1.31%
4th	-9.19%	-7.05%	-4.89%	-2.78%	-0.83%
5th	-7.81%	-5.73%	-3.78%	-2.02%	-0.57%
6th	-6.26%	-4.47%	-2.86%	-1.47%	-0.39%
9th	-2.61%	-1.76%	-1.05%	-0.50%	-0.12%
12th	-0.29%	-0.14%	-0.04%	0.01%	0.01%
18th	2.35%	1.65%	1.04%	0.53%	0.14%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

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The Fund's Sub-Administrator will determine the value of Fund investments as of the earlier of the close of the Nasdaq or 4:00 p.m. New York time. The Fund's NAV will include any unrealized profit or loss on open Ether futures contacts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

According to the Registration Statement, the fair value of the Fund's holdings will be determined by the Fund's Sponsor in good faith and in a manner that assesses the future Ether market value based on a consideration of all available facts and all available information on the valuation date. When an Ether Futures Contract has closed at its price fluctuation limit, the fair value determination will attempt to estimate the price at which such Ether Futures Contract would be trading in the absence of the price fluctuation limit (either above such limit when an upward limit has been reached or below such limit when a downward limit has been reached). Typically, this estimate will be made primarily by reference to exchange traded instruments at 4:00 p.m. New York time on settlement day. The fair value of ETH Contracts and MET Contracts may not reflect such security's market value or the amount that the Fund might reasonably expect to receive for the ETH Contracts and MET Contracts upon its current sale.

According to the Registration Statement and as discussed above, the value of Spot Ether held by the Fund would be determined by the Sponsor and by Hashdex Asset Management Ltd. (the ''Digital Asset Adviser'') via an FBSP methodology that is sensitive to both the tenor of an Ether Futures Contract and the final settlement price for such contract. The calculation produces a set of weighting factors, with each factor indicating the contribution of the corresponding Ether Futures Contract to the estimated current spot price of Ether. The estimated spot price is the component of the result corresponding to a tenor of zero days. The Sponsor and Digital Asset Advisor will not use data from Ether exchanges or directly from spot Ether trading activity in determining the value of Spot Ether held by the Fund.

Indicative Fund Value

According to the Registration Statement, in order to provide updated information relating to the Fund for use by investors and market professionals, a third party financial data provider will calculate an updated Indicative Fund Value (''IFV''). The IFV will be calculated by using the prior day's closing NAV per Share of the Fund as a base and will be updated throughout the Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T. to reflect changes in the value of the Fund's holdings during the trading day.

The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session.[60]

Creation and Redemption of Shares

According to the Registration Statement, the Shares issued by the Fund may only be purchased by APs and only in blocks of 10,000 Shares called ''Creation Baskets.'' The amount of the purchase payment for a Creation Basket is equal to the total NAV of Shares in the Creation Basket. Similarly, only APs may redeem Shares and only

[60] Several major market data vendors display and/or make widely available IFVs taken from the Consolidated Tape Association (''CTA'') or other data feeds.

in blocks of 10,000 Shares called ''Redemption Baskets.'' The amount of the redemption proceeds for a Redemption Basket is equal to the total NAV of Shares in the Redemption Basket. The purchase price for Creation Baskets and the redemption price for Redemption Baskets are the actual NAV calculated at the end of the business day when a request for a purchase or redemption is received by the Fund.

''APs'' will be the only persons that may place orders to create and redeem Creation Baskets. APs must be (1) either registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions, and (2) DTC Participants. An AP is an entity that has entered into an Authorized Purchaser Agreement with the Sponsor.

With respect to Spot Ether, an AP delivers cash to the Fund instead of Spot Ether in the creation process, and an AP receives cash instead of Spot Ether in the redemption process. The cash delivered or received during the creation or redemption process is then used by the Sponsor to purchase or sell Ether Futures Contracts with an aggregate market value that approximates the amount of cash received or paid upon the creation or redemption. On a daily basis, the Sponsor will analyze the current portfolio allocation of the Fund between Spot Ether and Ether Futures Contracts and, based on the Investment Restrictions and target portfolio exposure, may decide to engage in an EFP transaction on CME to buy or sell Spot Ether for the equivalent position in Ether Futures Contracts.

Creation Procedures

According to the Registration Statement, on any ''Business Day,'' an AP may place an order with the Transfer Agent to create one or more Creation Baskets. For purposes of processing both purchase and redemption orders, a ''Business Day'' means any day other than a day when the CME or Nasdaq is closed for regular trading. Purchase orders for Creation Baskets must be placed by 3:00 p.m. New York time or one hour prior to the close of trading on Nasdaq, whichever is earlier. The day on which the Distributor receives a valid purchase order is referred to as the purchase order date. If the purchase order is received after the applicable cut-off time, the purchase order date will be the next Business Day. Purchase orders are irrevocable.

By placing a purchase order, an AP agrees to deposit cash with the Custodian.

Redemption Procedures

According to the Registration Statement, the procedures by which an AP can redeem one or more Creation Baskets will mirror the procedures for the creation of Creation Baskets. On any Business Day, an AP may place an order with the Transfer Agent to redeem one or more Creation Baskets.

The redemption procedures allow APs to redeem Creation Baskets. Individual shareholders may not redeem directly from the Fund. By placing a redemption order, an AP agrees to deliver the Creation Baskets to be redeemed through DTC's book entry system to the Fund by the end of the next Business Day following the effective date of the redemption order or by the end of such later business day.

Determination of Redemption Distribution

According to the Registration Statement, the redemption distribution from the Fund will consist of an amount of cash, that is in the same proportion to the total assets of the Fund on the date that the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received.

Delivery of Redemption Distribution

According to the Registration Statement, an AP who places a purchase order will transfer to the Custodian the required amount of cash, cash equivalents and/or Ether futures by the end of the next business day following the purchase order date or by the end of such later business day, not to exceed three business days after the purchase order date, as agreed to between the AP and the Custodian when the purchase order is placed (the ''Purchase Settlement Date''). Upon receipt of the deposit amount, the Custodian will direct DTC to credit the number of Creation Baskets ordered to the AP's DTC account on the Purchase Settlement Date.

Availability of Information

The NAV for the Fund's Shares will be disseminated daily to all market participants at the same time. The intraday, closing prices, and settlement prices of the Ether Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Complete real-time data for the Ether Futures Contracts will be available by subscription through on-line information services. Nasdaq and CME also provide delayed futures and options on futures information on current and past trading sessions and market news free of charge on their respective websites. The specific contract specifications for Ether Futures Contracts will also be available on such websites, as well as other financial informational sources. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. Quotation information for cash equivalents and commodity futures may be obtained from brokers and dealers who make markets in such instruments. Intra-day price and closing price level information for the Benchmark will be available from major market data vendors. The Benchmark value will be disseminated once every 15 seconds. The IFV will be available through on-line information services.

In addition, the Fund's website, *https://hashdex-etfs.com/,* will display the applicable end of day closing NAV and the daily holdings of the Fund. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Shares' ticker and CUSIP information along with additional quantitative information updated on a daily basis, including: (1) the prior Business Day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the bid/ask spread at the time of NAV calculation (the ''Bid/Ask Price'') against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of the Fund's holdings, (ii) the counterparty to and value of forward contracts and any other financial instruments tracking the Benchmark, and (iii) the total cash and cash equivalents held in the Fund's portfolio, if applicable.

The Fund's website will be publicly available at the time of the public

offering of the Shares and accessible at no charge.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including without limitation the conditions specified in Nasdaq Rule 4120(a)(9) and the trading pauses under Nasdaq Rules 4120(a)(11) and (12).

Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (i) the extent to which trading is not occurring in the Ether Futures Contracts or the Ether underlying the Shares; or (ii) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the intraday indicative value of the Fund's NAV (''IIV'') or the value of the underlying Ether Futures Contracts or underlying Ether is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the underlying Ether Futures Contracts or underlying Ether occurs. If the interruption to the dissemination of the IIV or the value of the underlying Ether Futures Contracts or underlying Ether persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Exchange will allow trading in the Shares from 4:00 a.m. to 8:00 p.m. (ET). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The Shares of the Fund will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(i).

Surveillance

The Exchange represents that trading in the Shares of the Fund will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority, Inc. (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[61] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares, the physical commodities underlying the futures contracts through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in futures contracts) occurring on US futures exchanges, which are members of the ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

[61] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

All statements and representations made in this filing regarding (a) the description of the portfolios of the Funds or Benchmark, (b) limitations on portfolio holdings or the Benchmark, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq Rule 5800 Series.

Information Circular

Prior to the commencement of trading of the Shares, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Section 10 of Nasdaq General Rule 9, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the IIV is disseminated; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated IIV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares. The Information Circular will disclose that information about the Shares will be publicly available on the Trust's website.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [62] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria set forth in Nasdaq Rule 5711(i). The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and the Fund's holdings through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in Ether Futures Contracts) occurring on US futures exchanges, which are members of the ISG. The intraday, closing prices, and settlement prices of the Ether Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors website or on-line information services.

Complete real-time data for the Ether Futures Contracts will be available by subscription from on-line information services. Nasdaq and CME also provide delayed futures information on current and past trading sessions and market news free of charge on the Fund's website. The specific contract specifications for Ether Futures Contracts will also be available on such websites, as well as other financial informational sources. Information regarding options will be available from the applicable exchanges or major market data vendors. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Share's ticker and CUSIP information along with additional quantitative information updated on a daily basis, including, for the Fund: (1) the prior business day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of Ether Futures Contracts, (ii) the counterparty to and value of forward contracts, and (iii) other financial instruments, if any, and the characteristics of such instruments and cash equivalents, and amount of cash held in the Fund's portfolio, if applicable.

Trading in Shares of the Fund will be halted if the circuit breaker parameters have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in ETH and/or MET Contracts and the securities and/or the financial instruments composing the daily disclosed portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of Trust Units based on Ether that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of Trust Units based on Ether and that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or

[62] 15 U.S.C. 78f(b)(5).

• Send an email to *rule-comments@sec.gov.* Please include file number SR–NASDAQ–2023–035 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–NASDAQ–2023–035. 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–NASDAQ–2023–035 and should be submitted on or before October 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[63]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21788 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

[63] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98566; File No. SR–CboeBZX–2023–069]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the VanEck Ethereum ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

September 27, 2023.

On September 6, 2023, Cboe BZX Exchange, Inc. (''BZX'' or ''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 to list and trade shares of the VanEck Ethereum ETF under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on September 26, 2023.[3] The Commission has received no comments on the proposal.

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 November 10, 2023. The Commission is extending this 45-day time period.

The Commission finds it 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 and the issues raised therein. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates December 25, 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–CboeBZX–2023–069).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21791 Filed 10–2–23; 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. 98457 (Sept. 20, 2023), 88 FR 66076.

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98557 File No. SR–CBOE–2023–018]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Make Permanent the Operation of Its Flexible Exchange Options Pilot Program Regarding Permissible Settlement Values for FLEX Index Options

September 27, 2023.

On April 10, 2023, Cboe Exchange, Inc. (''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 to make permanent the operation of its Flexible Exchange Options (''FLEX Options'') pilot program (''Pilot Program'') regarding permissible exercise settlement values for FLEX Index Options. The proposed rule change was published for comment in the **Federal Register** on April 28, 2023.[3] On June 8, 2023, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On July 19, 2023, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act[6] to

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97368 (April 24, 2023), 88 FR 26353, (April 28, 2023) (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 97672 (June 8, 2023), 88 FR 38930 (June 14, 2023). The Commission designated July 20, 2023, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

determine whether to approve or disapprove the proposed rule change.[7]

Section 19(b)(2) of the Act[8] provides that, after initiating proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of the notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for comment in the **Federal Register** on April 28, 2023.[9] The 180th day after publication of the Notice is October 25, 2023. The Commission is extending the time period for approving or disapproving the proposed rule change for an additional 60 days.

The Commission finds that it is appropriate to designate a longer period within which to issue an order approving or disapproving 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,[10] designates December 24, 2023, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–CBOE–2023–018).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21782 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

[7] *See* Securities Exchange Act Release No. 97950 (July 19, 2023), 88 FR 47930 (July 25, 2023).

[8] 15 U.S.C. 78s(b)(2).

[9] *See* Notice, supra Note 3.

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98568; File No. SR–BOX–2023–20]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change To Adopt Rules To Govern FLEX Equity Options and a New Order Type To Trade FLEX Equity Options on the BOX Trading Floor

September 27, 2023.

On September 1, 2023, BOX Exchange LLC (the ''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 to adopt Rules 5055 and 7605 which, among other applicable rules, will govern the trading of flexible exchange equity options (''FLEX Equity Options'') on the BOX Trading Floor, and make related changes to Rules 100 (Definitions), 7620 (Accommodation Transactions), and 12140 (Imposition of Fines for Minor Rule Violations). The proposed rule change was published for comment in the **Federal Register** on September 19, 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 November 3, 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 December 18, 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–BOX–2023–20).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21793 Filed 10–2–23; 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. 98380 (September 13, 2023), 88 FR 64482.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98571; File No. SR–CBOE–2023–055]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Relating to the Sale of Open-Close Volume Data

September 27, 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 25, 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 relating to the sale of Open-Close volume data. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 to offer a free trial for an ad-hoc request of up to six (6) historical months of Intraday Open-Close historical data to all Cboe Options Trading Permit Holders (''TPHs'') and non-TPHs who have never subscribed to the Intraday Open-Close historical files or previously received a free trial, effective September 25, 2023.

By way of background, the Exchange currently offers End-of-Day (''EOD'') and Intraday Open-Close Data (collectively, ''Open-Close Data''). EOD Open-Close Data is an end-of-day volume summary of trading activity on the Exchange at the option level by origin (customer, professional customer, broker-dealer, and market maker), side of the market (buy or sell), price, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts). The Open-Close Data is proprietary Cboe Options trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The Exchange also offers Intraday Open-Close Data, which provides similar information to that of Open-Close Data but is produced and updated every 10 minutes during the trading day. Data is captured in ''snapshots'' taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period.[3] The Intraday Open-Close Data provides a volume summary of trading activity on the Exchange at the option level by origin (customer, professional customer, broker-dealer, and market maker), side of the market (buy or sell), and transaction type (opening or closing). The customer and professional customer volume are further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts). The Intraday Open-Close Data is also proprietary Cboe Options trade data and does not include trade data from any other exchange.

Cboe LiveVol, LLC (''LiveVol''), a wholly owned subsidiary of the Exchange's parent company, Cboe Global Markets, Inc., makes the Open-Close Data available for purchase to TPHs and non-TPHs on the LiveVol DataShop website (*datashop.cboe.com*). Customers may currently purchase Intraday Open-Close Data on a subscription basis (monthly or annually) or by ad hoc request for a specified month (*e.g.,* request for Intraday Open-Close Data for month of August 2023).

Open-Close Data is subject to direct competition from similar end-of-day and intraday options trading summaries offered by several other options exchanges.[4] All of these exchanges offer essentially the same end-of-day and intraday options trading summary information.

Free Trial

The Exchange seeks to re-establish a free trial for historical ad hoc requests for Intraday Open-Close Data for new purchasers. Currently, ad hoc requests for historical Intraday Open-Close Data are available to all customers at the same price and in the same manner. The current charge for this historical Intraday Open-Close Data covering all of the Exchange's securities (Equities, Indexes & ETF's) is $1,000 per month. The Exchange previously offered a free trial during the months of September, October, November and December 2022 for an ad-hoc request of three (3) historical months of Intraday Open-Close historical data to all Cboe Options Trading Permit Holders (''TPHs'') and non-TPHs who have never before subscribed to the Intraday Open-Close historical files.[5]

The Exchange now proposes to reestablish a free trial and amend the Fees Schedule to provide a total up to six (6) historical months of Intraday Open-Close Data to any TPH or non-TPH that has not previously subscribed to this offering or previously received a free trial.[6] As noted above, the Exchange previously offered a free trial period recently for the months of September through December 2022. The Exchange believes bringing back the proposed trial, on a general six-month basis, will again serve as an incentive for new users who have never purchased Intraday Open-Close historical data (or received such data via a previous free trial offer) to start purchasing Intraday Open-Close historical data. Particularly, the Exchange believes it will give potential subscribers the ability to use and test the data offering before signing up for additional months. The Exchange also notes another exchange offers a free trial for new subscribers of a similar data product.[7] Lastly, the purchase of Intraday Open-Close historical data is discretionary and not compulsory.

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.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] 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,

[3] For example, subscribers to the intraday product will receive the first calculation of intraday data by approximately 9:42 a.m. ET, which represents data captured from 9:30 a.m. to 9:40 a.m. Subscribers will receive the next update at 9:52 a.m., representing the data previously provided together with data captured from 9:40 a.m. through 9:50 a.m., and so forth. Each update will represent the aggregate data captured from the current ''snapshot'' and all previous ''snapshots.''

[4] These substitute products are: Nasdaq PHLX Options Trade Outline, Nasdaq Options Trade Outline, ISE Trade Profile, GEMX Trade Profile data; open-close data from C2 Options, BZX, and EDGX; and Open Close Reports from MIAX Options, Pearl, and Emerald.

[5] *See* Securities Exchange Act Release No. 34–95736 (September 12, 2022), 87 FR 57005 (September 16, 2022) (SR–CBOE–2022–044).

[6] For example, if a TPH or non-TPH that has never made an ad-hoc request for a specified month of Intraday Open-Close historical data wishes to purchase Intraday Open-Close Data for the months of January, February, March, April, May and June 2023 during the month of September 2023, the historical files for those months would be provided free of charge. If a new user wishes to purchase Intraday Open-Close historical data for the months of January, February, March, April, May, June, and July 2023 during the month of September 2023, then the data for January, February, March, April, May, and June 2023 would be provided free of charge, and the new user would be charged $1,000 for the July 2023 historical file.

[7] *See* Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

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) [10] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes the proposed fee change will further broaden the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. Open-Close Data is designed to help investors understand underlying market trends to improve the quality of investment decisions. Indeed, subscribers to the data may be able to enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies. The Exchange believes Open-Close Data provides a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading and as noted above, is entirely optional. Moreover, several other exchanges offer a similar data product which offer same type of data content through end-of-day or intraday reports.[11]

The Exchange also operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. Based on publicly available information, no single options exchange has more than 15% of the market share.[12] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [13] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchange's data product as more or less attractive than the competition they can and do switch between similar products. The proposed fees are a result of the competitive environment, as the Exchange seeks to adopt a fee waiver to attract future purchasers of historical Intraday Open-Close Data.

The Exchange believes that the proposed free trial for any TPH or non-TPH who has not previously purchased Intraday Open-Close historical data or received a free trial is reasonable because such users would not be subject to fees for up to 6 months' worth of Intraday Open-Close historical data. The Exchange believes the proposed free trial is also reasonable as it will give potential subscribers the ability to use and test the Intraday Open-Close historical data prior to purchasing additional months and will therefore encourage and promote new users to purchase the Intraday Open-Close historical data. The Exchange believes that the proposed discount is equitable and not unfairly discriminatory because it will apply equally to all TPHs and non-TPHs who have not previously purchased Intraday Open-Close historical data or previously received a free trial. Also as noted above, another exchange offers a free trial to new users for a similar data product [14] and the Exchange itself recently offered a similar free trial.[15] Lastly, the purchase of this data product is discretionary and not compulsory.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment in which the Exchange must continually adjust its fees to remain competitive. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

As discussed above, Open-Close Data is subject to direct competition from several other options exchanges that offer substitutes to Open-Close. Moreover, purchase of Open-Close is optional. It is designed to help investors understand underlying market trends to improve the quality of investment decisions, but is not necessary to execute a trade.

The proposed rule change is grounded in the Exchange's efforts to compete more effectively. The Exchange is proposing to provide a free trial for market participants to test investment strategies and trading models, and develop market sentiment indicators. This change will not cause any unnecessary or inappropriate burden on intermarket competition, but rather will promote competition by encouraging new market participants to investigate the product. Other exchanges are, of course, free to match this change or undertake other competitive responses, enhancing overall competition. Indeed, as discussed, another exchange currently offers a similar free-trial period for similar data.[16]

The proposed rule change will not cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposed rule change will apply to all TPHs and non-TPHs who have never made an ad-hoc request to purchase Intraday Open-Close historical data. Moreover, purchase of Intraday Open-Close historical files is discretionary and not compulsory.

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 [17] and paragraph (f) of Rule 19b–4 [18] 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

[10] *Id.*

[11] *See supra* note 4.

[12] *See* Cboe Global Markets U.S. Options Market Month-to-Date Volume Summary (September 12, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[14] *See supra* note 7.

[15] *See supra* note 5.

[16] *See supra* note 7.

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f).

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–CBOE–2023–055 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–2023–055. 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–2023–055 and should be submitted on or before October 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21795 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98573; File No. SR–ICEEU–2023–021]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to Its Operational Risk and Resilience Policy

September 27, 2023.

On August 15, 2023, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–ICEEU–2023–021 pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4[2] thereunder to amend its Operational Risk and Resilience Policy to make certain updates and enhancements.[3] On August 24, 2023, ICE Clear Europe filed Amendment No. 1 to the proposed rule change to make certain changes to the Exhibits 5.[4] The proposed rule change, as modified by Amendment No. 1 (hereafter ''the Proposed Rule Change''), was published for public comment in the **Federal Register** on September 5, 2023.[5] The Commission has not received comments regarding the proposal described in the Proposed Rule change.

Section 19(b)(2) of the Exchange Act[6] 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 of Filing is October 20, 2023. The Commission is extending this 45-day time period.

In order to provide the Commission with sufficient time to consider the Proposed Rule Change, the Commission finds that it is appropriate to designate a longer period within which to take action on the Proposed Rule Change.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Exchange Act,[7] designates December 4, 2023, as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove proposed rule change SR–ICEEU–2023–021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21780 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98562; File No. SR–CboeBZX–2023–072]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To List and Trade Shares of the Franklin Bitcoin ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

September 27, 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 26, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 5, 88 FR 60001.

[4] Amendment No. 1 corrects the presentation of changes in Exhibit 5 by reflecting the deletion of the prior ''Oversight of the Policy'' section as part of the updated governance and oversight provisions. This amendment was filed with the Commission on August 24, 2023.

[5] Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to its Operational Risk and Resilience Policy, Exchange Act Release No. 98237 (August 29, 2023); 88 FR 60727 (September 5, 2023) (SR–ICEEU–2023–021) (''Notice'').

[6] 15 U.S.C. 78s(b)(2).

[7] *Id.*

[8] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (''BZX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposed rule change to list and trade shares of the Franklin Bitcoin ETF (the ''Fund''), a series of Franklin Templeton Digital Holdings Trust (the ''Trust''),[3] under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(e)(4),[4] which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.[5] Franklin Holdings, LLC is the sponsor of the Fund (''Sponsor''). The Shares will be registered with the Commission by means of the Trust's registration statement on Form S–1 (the ''Registration Statement'').[6] Coinbase Custody Trust Company, LLC (the ''Bitcoin Custodian''), which is a third-party U.S.-based trust company and qualified custodian, will be responsible for custody of the Fund's bitcoin holdings and Bank of New York Mellon will be the custodian for the Fund's cash holdings, if any (the ''Cash Custodian'' and together with the Bitcoin Custodian, the ''Custodians'').

As further discussed below, the Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.[7] Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the ''CFTC'') regulated futures market.[8]

[3] The Trust was formed as a Delaware statutory trust on September 6, 2023, and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

[4] The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

[5] All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

[6] *See* Form S–1 Registration Statement filed on September 12, 2023 (Registration No. 333–274474). The Registration Statement is not yet effective, and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

[7] *See* Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. *See* Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the ''Winklevoss Order'').

[8] *See* streetTRACKS Gold Shares, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR–NYSE–2004–22) (the ''First Gold Approval Order''); iShares COMEX Gold Trust, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR–Amex–2005–072); ETFS Gold Trust, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR–NYSEArca–2009–40); ETFS Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR–NYSEArca–2009–28); ETFS Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR–NYSEArca–2009–94) (notice of proposed rule change included NYSE Arca's representation that ''[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,'' that ''NYMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); ETFS Platinum Trust, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR–NYSEArca–2009–95) (notice of proposed rule change included NYSE Arca's representation that ''[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,'' that ''NYMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); Sprott Physical Gold Trust, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010) (SR–NYSEArca–2009–113) (notice of proposed rule change included NYSE Arca's representation that the COMEX is one of the ''major world gold markets,'' that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010)); Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR–NYSEArca–2010–84); ETFS Precious Metals Basket Trust, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR–NYSEArca–2010–56) (notice of proposed rule change included NYSE Arca's representation that ''the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); ETFS White Metals Basket Trust, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR–NYSEArca–2010–71) (notice of proposed rule change included NYSE Arca's representation that ''the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); ETFS Asian Gold Trust, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR–NYSEArca–2010–95) (notice of proposed rule change included NYSE Arca's representation that ''the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,'' that ''COMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); Sprott Physical Platinum and Palladium Trust, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR–NYSEArca–2012–111) (notice of proposed rule change included NYSE Arca's representation that ''[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange . . . and Tokyo Commodities Exchange'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); APMEX Physical—1 oz. Gold Redeemable Trust, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR–NYSEArca–2012–18) (notice of proposed rule change included NYSE Arca's representation that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the

Continued

Further to this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order ''was based on an assumption that the currency market and the spot gold market were largely unregulated.'' [9]

As such, the regulated market of significant size test does not require that the spot bitcoin market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act. With this in mind, the CME Bitcoin Futures market is the proper market to consider in determining whether there is a related regulated market of significant size.

Further to this point, the Exchange notes that the Commission has approved proposals related to the listing and trading of funds that would primarily hold CME Bitcoin Futures that are registered under the Securities Act of 1933.[10] In the Teucrium Approval, the Commission found the CME Bitcoin Futures market to be a regulated market of significant size as it relates to CME Bitcoin Futures; a position that represents a departure from prior disapproval orders for ETPs that would hold actual bitcoin instead of derivatives contracts (''Spot Bitcoin ETPs'') that use the exact same pricing methodology as the CME Bitcoin Futures. In the recently decided *Grayscale Investments, LLC* v. *Securities and Exchange Commission*,[11] however, the court addressed this conflict by finding that the SEC had failed to provide a coherent explanation as to why it had approved the Bitcoin Futures ETPs while disapproving the proposal to list and trade shares of the Grayscale Bitcoin Trust and vacating the disapproval order.[12] As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME Bitcoin Futures market represents a regulated market of significant size as it relates both to the CME Bitcoin Futures market and to the spot bitcoin market and that this proposal should be approved, consistent with the Teucrium precedent and in view of the court's findings relating to the Grayscale Order.

Finally, as discussed in greater detail below, by using professional custodians and other service providers, the Fund provides investors interested in exposure to bitcoin via the securities markets with important protections that are not always available to investors that invest directly in bitcoin, including protection against counterparty insolvency, cyber attacks, and other risks. For example, an exchange-traded vehicle such as the Fund, which will be subject to the registration and periodic reporting requirements of the 1933 Act and the 1934 Act, would offer U.S. investors an alternative to directing their bitcoin investments into loosely regulated offshore vehicles (including loosely regulated centralized exchanges that have since faced bankruptcy proceedings or other insolvencies).

Background

Bitcoin is a digital asset based on the decentralized, open source protocol of the peer-to-peer computer network launched in 2009 that governs the creation, movement, and ownership of bitcoin and hosts the public ledger, or ''blockchain,'' on which all bitcoin transactions are recorded (the ''Bitcoin Network'' or ''Bitcoin''). The decentralized nature of the Bitcoin Network allows parties to transact directly with one another based on cryptographic proof instead of relying on a trusted third party. The protocol also lays out the rate of issuance of new bitcoin within the Bitcoin Network, a rate that is reduced by half approximately every four years with an eventual hard cap of 21 million. It's generally understood that the combination of these two features—a systemic hard cap of 21 million bitcoin and the ability to transact trustlessly with anyone connected to the Bitcoin Network—gives bitcoin its value. The first rule filing proposing to list an exchange-traded product to provide exposure to bitcoin in the U.S. was submitted by the Exchange on June 30, 2016.[13] At that time, blockchain technology, and digital assets that utilized it, were relatively new to the broader public. The market capitalization of all bitcoin in existence at that time was approximately $10 billion. No registered offering of digital asset securities or shares in an investment vehicle with exposure to bitcoin or any other cryptocurrency had yet been conducted, and the regulated infrastructure for conducting a digital asset securities offering had not begun to develop.[14] Similarly, regulated U.S. Bitcoin Futures contracts did not exist. The CFTC had determined that bitcoin

ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the ''major world gold markets,'' Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); JPM XF Physical Copper Trust, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR–NYSEArca–2012–28); iShares Copper Trust, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR–NYSEArca–2012–66); First Trust Gold Trust, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR–NYSEArca–2013–61) (notice of proposed rule change included NYSE Arca's representation that FINRA, on behalf of the exchange, may obtain trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets ''with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,'' and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the ''major world gold markets,'' Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013)); Merk Gold Trust, Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR–NYSEArca–2013–137) (notice of proposed rule change included NYSE Arca's representation that ''COMEX is the largest gold futures and options exchange'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' including with respect to transactions occurring on COMEX pursuant to CME and NYMEX's membership, or from exchanges ''with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,'' Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013)); Long Dollar Gold Trust, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR–NYSEArca–2016–84).

[9] *See* Winklevoss Order at 37592.

[10] *See* Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the ''Teucrium Approval'') and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the ''Bitcoin Futures Approvals'').

[11] *Grayscale Investments, LLC* v. *Securities and Exchange Commission*, et al., Case No. 22–1142 (the ''Grayscale Order'').

[12] *Id.*

[13] *See* Winklevoss Order.

[14] Digital assets that are securities under U.S. law are referred to throughout this proposal as ''digital asset securities.'' All other digital assets, including bitcoin, are referred to interchangeably as ''cryptocurrencies'' or ''virtual currencies.'' The term ''digital assets'' refers to all digital assets, including both digital asset securities and cryptocurrencies, together.

is a commodity,[15] but had not engaged in significant enforcement actions in the space. The New York Department of Financial Services (''NYDFS'') adopted its final BitLicense regulatory framework in 2015, but had only approved four entities to engage in activities relating to virtual currencies (whether through granting a BitLicense or a limited-purpose trust charter) as of June 30, 2016.[16] While the first over-the-counter bitcoin fund launched in 2013, public trading was limited and the fund had only $60 million in assets.[17] There were very few, if any, traditional financial institutions engaged in the space, whether through investment or providing services to digital asset companies. In January 2018, the Staff of the Commission noted in a letter to the Investment Company Institute and SIFMA that it was not aware, at that time, of a single custodian providing fund custodial services for digital assets.[18] The digital assets financial ecosystem, including bitcoin, has progressed significantly in the intervening years. The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities [19] and shares in investment vehicles holding Bitcoin Futures.[20] Additionally, licensed and regulated service providers have emerged to provide fund custodial services for digital assets, among other services, including the Bitcoin Custodian. For example, in February 2023, the Commission proposed to amend Rule 206(4)–2 under the Advisers Act of 1940 (the ''custody rule'') to expand the scope beyond client funds and securities to include all crypto assets, among other assets; [21] in May 2021, the Staff of the Commission released a statement permitting open-end mutual funds to invest in cash-settled Bitcoin Futures; in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3–3 under the Exchange Act (the ''Custody Statement''); [22] in September 2020, the Staff of the Commission released a no-action letter permitting certain broker-dealers to operate a non-custodial Alternative Trading System (''ATS'') for digital asset securities, subject to specified conditions; [23] in October 2019, the Staff of the Commission granted temporary relief from the clearing agency registration requirement to an entity seeking to establish a securities clearance and settlement system based on distributed ledger technology,[24] and multiple transfer agents who provide services for digital asset securities registered with the Commission.[25]

Outside the Commission's purview, the regulatory landscape has also changed significantly since 2016, and cryptocurrency markets have grown and evolved as well. The market for bitcoin is approximately 100 times larger, having at one point reached a market capitalization of over $1 trillion.[26] According to the CME Bitcoin Futures Report, from February 13, 2023 through March 27, 2023, CFTC regulated Bitcoin Futures represented between $750 million and $3.2 billion in notional trading volume on Chicago Mercantile Exchange (''CME'') (''Bitcoin Futures'') on a daily basis.[27] Open interest was over $1.4 billion for the entirety of the period and at one point was over $2 billion.[28] ETPs that primarily hold CME Bitcoin Futures have raised over $1 billion dollars in assets. The CFTC has exercised its regulatory jurisdiction in bringing a number of enforcement actions related to bitcoin and against trading platforms that offer cryptocurrency trading.[29] As of February 14, 2023, the NYDFS has granted no fewer than thirty-four BitLicenses,[30] including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services. In addition, the Treasury's Office of Foreign Assets Control (''OFAC'') has brought enforcement actions over apparent violations of applicable sanctions laws in connection with the provision of wallet management services for digital assets.[31]

[15] *See* ''In the Matter of Coinflip, Inc.'' (''Coinflip'') (CFTC Docket 15–29 (September 17, 2015)) (order instituting proceedings pursuant to Sections 6(c) and 6(d) of the CEA, making findings and imposing remedial sanctions), in which the CFTC stated: ''Section 1a(9) of the CEA defines 'commodity' to include, among other things, 'all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.' 7 U.S.C. 1a(9). The definition of a 'commodity' is broad. *See, e.g., Board of Trade of City of Chicago* v. *SEC*, 677 F. 2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.''

[16] A list of virtual currency businesses that are entities regulated by the NYDFS is available on the NYDFS website. *See https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulated_entities*

[17] Data as of March 31, 2016 according to publicly available filings. *See* Bitcoin Investment Trust Form S–1, dated May 27, 2016, available: *https://www.sec.gov/Archives/edgar/data/1588489/000095012316017801/filename1.htm.*

[18] *See* letter from Dalia Blass, Director, Division of Investment Management, U.S. Securities and Exchange Commission to Paul Schott Stevens, President & CEO, Investment Company Institute and Timothy W. Cameron, Asset Management Group—Head, Securities Industry and Financial Markets Association (January 18, 2018), *available at https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm.*

[19] *See* Prospectus supplement filed pursuant to Rule 424(b)(1) for INX Tokens (Registration No. 333–233363), *available at: https://www.sec.gov/Archives/edgar/data/1725882/000121390020023202/ea125858-424b1_inxlimited.htm.*

[20] *See* Prospectus filed by Stone Ridge Trust VI on behalf of NYDIG Bitcoin Strategy Fund Registration, *available at: https://www.sec.gov/Archives/edgar/data/1764894/000119312519309942/d693146d497.htm.*

[21] *See* Investment Advisers Act Release No. 6240 88 FR 14672 (March 9, 2023) (Safeguarding Advisory Client Assets).

[22] *See* Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7–25–20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

[23] *See* letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), *available at: https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf.*

[24] *See* letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), *available at: https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf.*

[25] *See, e.g.,* Form TA–1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, *available at: https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xslFTA1X01/primary_doc.xml.*

[26] As of December 1, 2021, the total market capitalization of all bitcoin in circulation was approximately $1.08 trillion.

[27] Data sourced from the CME Bitcoin Futures Report: 30 March 2023, *available at: https://www.cmegroup.com/markets/cryptocurrencies/bitcoin/bitcoin.volume.htm.*

[28] *See, e.g.,* Id.

[29] The CFTC's annual report for Fiscal Year 2022 (which ended on September 30, 2022) noted that the CFTC completed the fiscal year with 18 enforcement filings related to digital assets. ''Digital asset actions included manipulation, a $1.7 billion fraudulent scheme, and a decentralized autonomous organization (DAO) failing to register as a SEF or FCM or to seek DCM designation.'' *See* CFTC FY 2022 Agency Financial Report, *available at: https://www.cftc.gov/media/7941/2022afr/download.* Additionally, the CFTC filed on March 27, 2023, a civil enforcement action against the owner/operators of the Binance centralized digital asset trading platform, which is one of the largest bitcoin derivative exchanges. *See* CFTC Release No. 8680–23 (March 27, 2023), *available at: https://www.cftc.gov/PressRoom/PressReleases/8680-23.*

[30] *See https://www.dfs.ny.gov/virtual_currency_businesses.*

[31] *See* U.S. Department of the Treasury Enforcement Release: ''OFAC Enters Into $98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions'' (December 30, 2020) *available at: https://home.treasury.gov/system/files/126/20201230_bitgo.pdf. See also* U.S. Department of the Treasury Enforcement Release: ''Treasury Announces Two Enforcement Actions for over $24M and $29M Against Virtual Currency Exchange, Bittrex, Inc.'' (October 11, 2022)

Continued

In addition to the regulatory developments laid out above, more traditional financial market participants have become more active in cryptocurrency trading and investment activity: large insurance companies, asset managers, university endowments, pension funds, and even historically bitcoin skeptical fund managers have allocated to bitcoin investments. As noted in the Financial Stability Oversight Council (''FSOC'') Report on Digital Asset Financial Stability Risks and Regulation, ''[i]ndustry surveys suggest that the scale of these investments grew quickly during the boom in crypto-asset markets through late 2021. In June 2022, PwC estimated that the number of crypto-specialist hedge funds was more than 300 globally, with $4.1 billion in assets under management. In addition, in a survey PwC found that 38 percent of surveyed traditional hedge funds were currently investing in 'digital assets,' compared to 21 percent the year prior.'' [32] The largest over-the-counter bitcoin fund previously filed a Form 10 registration statement, which the Staff of the Commission reviewed and which took effect automatically, and is now a reporting company.[33] Established U.S. exchange-traded companies like Tesla, Inc., MicroStrategy Incorporated, and Square, Inc., among others, have announced substantial investments in bitcoin in amounts as large as $1.5 billion (Tesla) and $425 million (MicroStrategy). The foregoing examples demonstrate that bitcoin has gained mainstream usage and recognition across the U.S. market.

Despite these developments, access for U.S. retail investors to gain exposure to bitcoin via a transparent and U.S. regulated, U.S. exchange-traded vehicle remains limited. Instead current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot bitcoin; (ii) over-the-counter bitcoin funds (''OTC Bitcoin Funds'') with high management fees and potentially volatile premiums and discounts; [34] (iii) purchasing shares of operating companies that they believe will provide proxy exposure to bitcoin with limited disclosure about the associated risks; [35] or (iv) purchasing Bitcoin Futures ETFs, as defined below, which represent a sub-optimal structure for long-term investors that will cost them significant amounts of money every year compared to Spot Bitcoin ETPs, as further discussed below. Meanwhile, investors in many other countries, including Canada and Brazil, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical bitcoin) to gain exposure to bitcoin. Similarly, investors in Switzerland and across Europe have access to Exchange Traded Products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting bitcoin exposure, as described above.[36]

To this point, the lack of a Spot Bitcoin ETP exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Bitcoin ETP are forced to find alternative exposure through generally riskier means. For instance, many U.S. investors that held their digital assets in accounts at FTX,[37] Celsius Network LLC,[38] BlockFi Inc.[39] and Voyager Digital Holdings, Inc.[40] have become unsecured creditors in the insolvencies of those entities. If a Spot Bitcoin ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot Bitcoin ETP. To this point, approval of a Spot Bitcoin ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. As further described below, the Fund, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including bitcoin, on centralized platforms.

available at: https://home.treasury.gov/news/press-releases/jy1006. See also U.S. Department of Treasure Enforcement Release ''OFAC Settles with Virtual Currency Exchange Kraken for $362,158.70 Related to Apparent Violations of the Iranian Transactions and Sanctions Regulations'' (November 28, 2022) *available at: https://home.treasury.gov/system/files/126/20221128_kraken.pdf.*

[32] *See* the FSOC ''Report on Digital Asset Financial Stability Risks and Regulation 2022'' (October 3, 2022) (at footnote 26) at *https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf.*

[33] *See* Letter from Division of Corporation Finance, Office of Real Estate & Construction to Barry E. Silbert, Chief Executive Officer, Grayscale Bitcoin Trust (January 31, 2020) *https://www.sec.gov/Archives/edgar/data/1588489/000000000020000953/filename1.pdf.*

[34] The premium and discount for OTC Bitcoin Funds is known to move rapidly. For example, over the period of 12/21/20 to 1/21/21, the premium for the largest OTC Bitcoin Fund went from 40.18% to 2.79%. While the price of bitcoin appreciated significantly during this period and NAV per share increased by 41.25%, the price per share increased by only 3.58%. This means that investors are buying shares of a fund that experiences significant volatility in its premium and discount outside of the fluctuations in price of the underlying asset. Even operating within the normal premium and discount range, it's possible for an investor to buy shares of an OTC Bitcoin Fund only to have those shares quickly lose 10% or more in dollar value excluding any movement of the price of bitcoin. That is to say—the price of bitcoin could have stayed exactly the same from market close on one day to market open the next, yet the value of the shares held by the investor decreased only because of the fluctuation of the premium. As more investment vehicles, including mutual funds and ETFs, seek to gain exposure to bitcoin, the easiest option for a buy and hold strategy for such vehicles is often an OTC Bitcoin Fund, meaning that even investors that do not directly buy OTC Bitcoin Funds can be disadvantaged by extreme premiums (or discounts) and premium/discount volatility.

[35] A number of operating companies engaged in unrelated businesses—such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company)—have announced investments as large as $5.3 billion in bitcoin. Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek. In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP. *See e.g.,* ''7 public companies with exposure to bitcoin'' (February 8, 2021) available at: *https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html;* and ''Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas'' (February 19, 2021) available at: *https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself-.html.*

[36] The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot Bitcoin ETPs.

[37] *See* FTX Trading Ltd., et al., Case No. 22–11068.

[38] *See* Celsius Network LLC, et al., Case No. 22–10964.

[39] *See* BlockFi Inc., Case No. 22–19361.

[40] *See* Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

Additionally, investors in other countries, specifically Canada, generally pay lower fees than U.S. retail investors that invest in OTC Bitcoin Funds due to the fee pressure that results from increased competition among available bitcoin investment options. Without an approved and regulated Spot Bitcoin ETP in the U.S. as a viable alternative, U.S. investors could seek to purchase shares of non-U.S. bitcoin vehicles in order to get access to bitcoin exposure. Given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange listed ETP. In addition to the benefits to U.S. investors articulated throughout this proposal, approving this proposal (and others like it) would provide U.S. exchange-traded funds and mutual funds with a U.S.-listed and regulated product to provide such access rather than relying on either more expensive, riskier U.S. based products or products listed and primarily regulated in other countries.

Bitcoin Futures ETFs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the ''1940 Act'') and the Bitcoin Futures Approvals that provide exposure to bitcoin primarily through CME Bitcoin Futures (''Bitcoin Futures ETFs''). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing an investment view on bitcoin. The Bitcoin Futures Approvals, however, have created a logical inconsistency in the application of the standard the Commission applies when considering bitcoin ETP proposals.

As discussed further below, the standard applicable to bitcoin ETPs is whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size in the underlying asset. Previous disapproval orders have made clear that a market that constitutes a regulated market of significant size is generally a futures and/or options market based on the underlying reference asset rather than the spot commodity markets, which are often unregulated.[41] Leaving aside the analysis of that standard until later in this proposal,[42] the Exchange believes that the following rationale the Commission applied to a Bitcoin Futures ETF should result in the Commission approving this and other Spot Bitcoin ETP proposals:

> The CME ''comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.'' Thus, the CME's surveillance can reasonably be relied upon to capture the effects on the CME Bitcoin Futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME Bitcoin Futures contracts, whether that attempt is made by directly trading on the CME Bitcoin Futures market or indirectly by trading outside of the CME Bitcoin Futures market. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.[43]

CME Bitcoin Futures pricing is based on pricing from spot bitcoin markets. The statement from the Teucrium Approval that ''CME's surveillance can reasonably be relied upon to capture the effects on the CME Bitcoin Futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME Bitcoin Futures contracts . . . indirectly by trading outside of the CME Bitcoin Futures market,'' makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures.

This was further acknowledged in the ''Grayscale lawsuit'' [44] when Judge Rao stated ''. . . the Commission in the Teucrium order recognizes that the futures prices are influenced by the spot prices, and the Commission concludes in approving futures ETPs that any fraud on the spot market can be adequately addressed by the fact that the futures market is a regulated one. . . .''. The Exchange agrees with the Commission on this point and notes that the pricing mechanism applicable to the Shares is similar to that of the CME Bitcoin Futures.

Further to this point, a Spot Bitcoin ETP that offers only in-kind creation and redemption may be less susceptible to potential manipulation than a Bitcoin Futures ETF because settlement of CME Bitcoin Futures (and thus the value of the underlying holdings of a Bitcoin Futures ETF) occurs at a single price derived from spot bitcoin pricing, while shares of a Spot Bitcoin ETP would represent an interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP (as proposed herein) would be able to source bitcoin from any exchange and create or redeem with the applicable trust/fund regardless of the price of the underlying index or reference rate. It is not logically supportable to conclude that the CME Bitcoin Futures market represents a significant market for a futures-based product, but does not represent a significant market for a spot-based product.

In addition to potentially being more susceptible to manipulation than a Spot Bitcoin ETP, the structure of Bitcoin Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Bitcoin ETP.[45] Specifically, the cost of rolling CME Bitcoin Futures contracts will cause the Bitcoin Futures ETFs to lag the performance of bitcoin itself and would cost U.S. investors significant amounts of money on an annual basis compared to Spot Bitcoin ETPs. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs could potentially hit CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs are actually holding to try to get exposure to bitcoin, which would also materially change the

[41] *See* Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that ''when the spot market is unregulated—the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.'' As noted above, the Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be ''regulated'' in order for a spot commodity ETP to be approved by the Commission, and in fact that it's been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

[42] As further outlined below, both the Exchange and the Sponsor believe that the Bitcoin Futures market represents a regulated market of significant size and that this proposal and others like it should be approved on this basis.

[43] *See* Teucrium Approval at 21679.

[44] *Grayscale Investments, LLC* v. *Securities and Exchange Commission*, et al., Case No. 22–1142.

[45] *See e.g.,* ''Bitcoin ETF's Success Could Come at Fundholders' Expense,'' Wall Street Journal (October 24, 2021), available at: *https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580;* ''Physical Bitcoin ETF Prospects Accelerate,'' ETF.com (October 25, 2021), available at: *https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&__cf_chl_jschl_tk__=pmd_JsK.fjXz9eAQW9zol0qpzhXDrrlpIVdoCloLXbLjl44-1635476946-0-gqNtZGzNApCjcnBszQql.*

risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly sub-optimal as the sole exchange traded vehicle structure for U.S. investors that are looking for long-term exposure to bitcoin and could, based on the calculations above, unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Bitcoin ETPs. The Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind.

Based on the foregoing, the Exchange and Sponsor believe that an objective review of the proposals to list Spot Bitcoin ETPs compared to and in view of the Bitcoin Futures ETFs and the Bitcoin Futures Approvals as well as limitations of existing approved product structures, would lead to the conclusion that Spot Bitcoin ETPs would benefit U.S. investors and should be available to U.S. investors. As such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. In summary, U.S. investors lose significant amounts of money from holding Bitcoin Futures ETFs as compared to Spot Bitcoin ETPs, losses which could be prevented by the Commission approving Spot Bitcoin ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. Both the Exchange and Sponsor believe that the CME Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing and approving the listing and trading of Bitcoin Futures ETFs that hold primarily CME Bitcoin Futures, however, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the CME Bitcoin Futures market is a regulated market of significant size.

Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

Bitcoin Futures

CME began offering trading in Bitcoin Futures in 2017. Each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate.[46] The contracts trade and settle like other cash-settled commodity futures contracts. Nearly every measurable metric related to Bitcoin Futures has generally trended up since launch, although certain notional volume calculations have decreased roughly in line with the decrease in the price of bitcoin. For example, there were 143,215 Bitcoin Futures contracts traded in April 2023 (approximately $20.7 billion) compared to 193,182 ($5 billion), 104,713 ($3.9 billion), 118,714 ($42.7 billion), and 111,964 ($23.2 billion) contracts traded in April 2019, April 2020, April 2021, and April 2022, respectively.[47]

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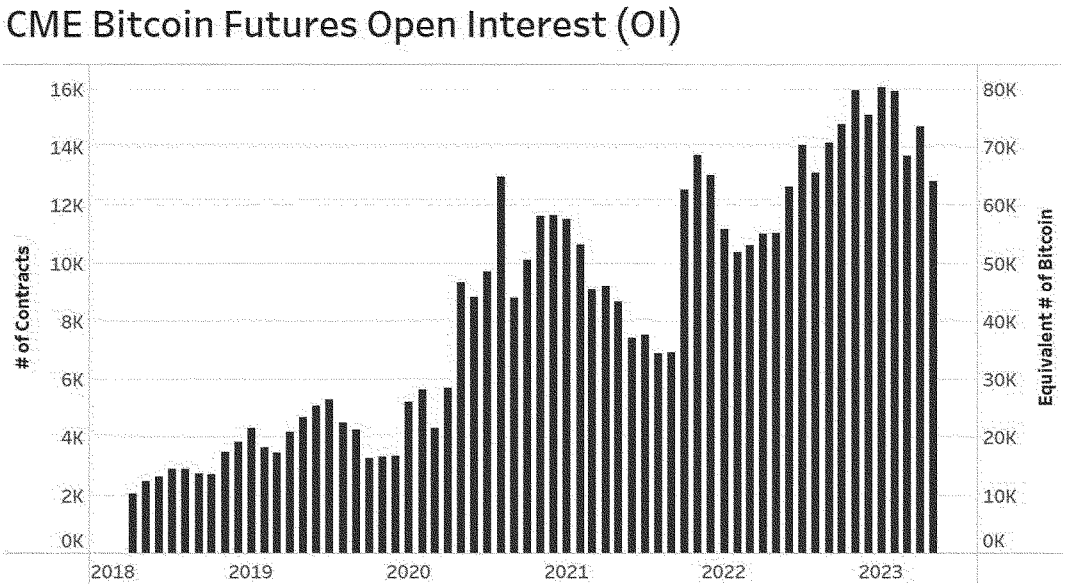
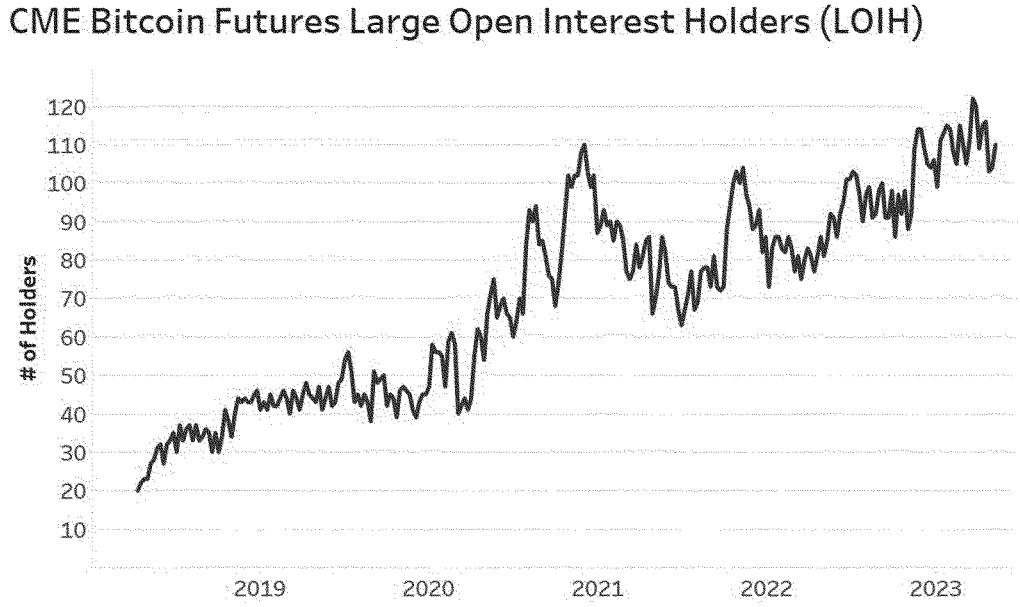
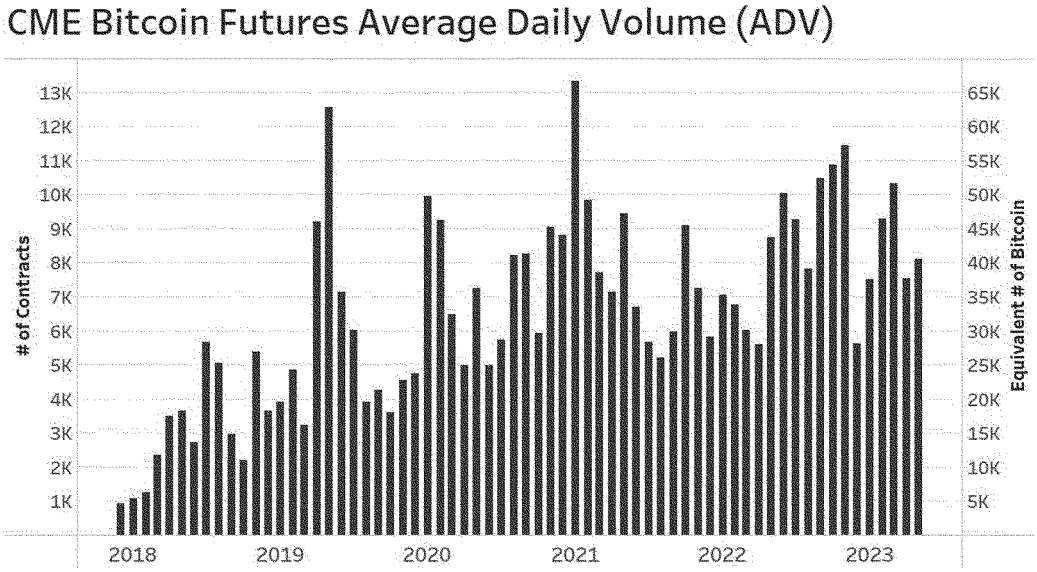


[46] The CME CF Bitcoin Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

[47] Source: CME, Yahoo Finance 4/30/23.

The number of large open interest holders [48] and unique accounts trading Bitcoin Futures have both increased, even in the face of heightened Bitcoin price volatility.





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The Sponsor further believes that publicly available research, including research done as part of rule filings proposing to list and trade shares of Spot Bitcoin ETPs, corroborates the overall trend outlined above and supports the thesis that the Bitcoin Futures pricing leads the spot market and, thus, a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP. Specifically, the Sponsor believes that such research indicates that Bitcoin Futures lead the bitcoin spot market in price formation.[49]

[48] A large open interest holder in Bitcoin Futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin. At a price of approximately $29,268.81 per bitcoin on 4/30/2023, more than 100 firms had outstanding positions of greater than $3.65 million in Bitcoin Futures.

[49] *See* Exchange Act Releases No. 94080 (January 27, 2022), 87 FR 5527 (April 12, 2022) (specifically ''Amendment No. 1 to the Proposed Rule Change To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(3)(4), Commodity-Based Trust Shares''); 94982 (May 25, 2022), 87 FR 33250 (June 1, 2022); 94844 (May 4, 2022), 87 FR 28043 (May 10, 2022); and 93445 (October 28, 2021), 86 FR 60695 (November 3, 2021). *See also* Hu, Y., Hou, Y. and Oxley, L. (2019). ''What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective'' (available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/*). This academic research paper concludes that ''There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective.''

Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued Receipts,[50] including Commodity-Based Trust Shares,[51] to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; [52] and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Bitcoin Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

[50] *See* Exchange Rule 14.11(f).

[51] Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

[52] As the Exchange has stated in a number of other public documents, it continues to believe that bitcoin is resistant to price manipulation and that ''other means to prevent fraudulent and manipulative acts and practices'' exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place [53] with a regulated market of significant size. Both the Exchange and CME are members of ISG.[54] The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[55]

The Commission has also recognized that the ''regulated market of significant size'' standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[56]

(a) Manipulation of the ETP

According to the research and analysis presented above, the Bitcoin Futures market is the leading market for bitcoin price formation. Where Bitcoin Futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the constituents of the Reference Rate) [57] would have to participate in the Bitcoin Futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the Bitcoin Futures market because the Reference Rate is based on spot prices. Further, the Fund only allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the price of the Shares through manipulation of the Reference Rate or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, which is led by the Bitcoin Futures market. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the trading of the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force influencing prices in the Bitcoin Futures market or spot market for a number of reasons, including the significant daily trading volume in the Bitcoin Futures market, the size of bitcoin's market capitalization, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. As the court found in the Grayscale Order, the Exchange and the Sponsor submit that ''[b]ecause the spot market is deeper and more liquid than the futures market,

[53] As previously articulated by the Commission, ''The standard requires such surveillance-sharing agreements since ''they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.'' The Commission has historically held that joint membership in the Intermarket Surveillance Group (''ISG'') constitutes such a surveillance sharing agreement. *See* Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR–NYSEArca–2019–39) (the ''Wilshire Phoenix Disapproval'').

[54] For a list of the current members and affiliate members of ISG, *see www.isgportal.com.*

[55] *See* Wilshire Phoenix Disapproval.

[56] *See* Winklevoss Order at 37580. The Commission has also specifically noted that it ''is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.'' *Id.* at 37582.

[57] As further described below, the ''Reference Rate'' for the Fund is the CME CF Bitcoin Reference Rate.

manipulation should be more difficult, not less.''

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

The Commission also permits a listing exchange to demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present in this case, in addition to the existence of a surveillance sharing agreement that meets the Commission's previously articulated standards. The Exchange is proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Shares. On June 21, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (''Coinbase''), an operator of a United States-based spot trading platform for Bitcoin that represents a substantial portion of US-based and USD denominated Bitcoin trading,[58] to enter into a surveillance-sharing agreement (''Spot BTC SSA'') and executed an associated term sheet. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Shares.

The Spot BTC SSA is expected to be a bilateral surveillance-sharing agreement between the Exchange and Coinbase that is intended to supplement the Exchange's market surveillance program. The Spot BTC SSA is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot Bitcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Shares.[59] This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of the Shares. In addition, the Exchange can request further information from Coinbase related to spot bitcoin trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Shares.[60]

Further, and consistent with prior points above, offering only in-kind creation and redemption will also provide unique protections against potential attempts to manipulate the price of the Shares. While the Sponsor believes that the Reference Rate which it uses to value the Fund's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Reference Rate significantly less important. Specifically, because the Fund will not accept cash to buy bitcoin in order to create new Shares or, barring extraordinary circumstances including as described in the Registration Statement, be forced to sell bitcoin to pay cash for redeemed Shares, the price that the Sponsor uses to value the Fund's bitcoin is not a particularly important tool to prevent price manipulation in the Shares.[61] When authorized participants are creating Shares with the Fund, they need to deliver a certain number of bitcoin per Share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per Share. As such, even if the price used to value the Fund's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Fund will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Reference Rate because there is little financial incentive to do so.

(ii) Designed To Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars, including through Bitcoin Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors including in connection with roll costs for Bitcoin Futures ETFs and premium/discount volatility and management fees for OTC Bitcoin Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed for this proposal to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors to access bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk and benefit U.S. investors by: (i) reducing premium and discount volatility as compared to OTC investment vehicles; (ii) increasing competitive pressure on management fees resulting in fee compression/reductions; (iii) reducing risks and costs as compared to those associated with investing in Bitcoin Futures ETFs and operating companies that represent imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodying spot bitcoin.

Franklin Templeton Digital Holdings Trust

Delaware Trust Company is the trustee (''Trustee''). Bank of New York Mellon serves as the Trust's administrator (the ''Administrator'') and transfer agent (''Transfer Agent''). The Bitcoin Custodian will be responsible for safekeeping of the Fund's bitcoin.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest and ownership in the Fund . The Fund's assets will consist of bitcoin held by the Bitcoin Custodian on behalf of the Fund and cash holdings, if any, held by the Cash Custodian.

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,[62] nor a commodity pool for purposes of the Commodity Exchange Act (''CEA''), and none of the Trust, the Fund or the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

When the Fund sells or redeems its Shares, it will do so in ''in-kind'' transactions in large blocks of Shares (a ''Creation Basket'') at the Fund's NAV.

[58] According to a Kaiko Research report dated June 26, 2023, Coinbase represented roughly 50% of exchange trading volume in USD–BTC trading on a daily basis during May 2023.

[59] For additional information regarding ISG and the hallmarks of surveillance-sharing between ISG members, see *https://isgportal.org/overview*.

[60] The Exchange also notes that it already has in place ISG-like surveillance sharing agreement with Cboe Digital Exchange, LLC and Cboe Clear Digital, LLC.

[61] While the Reference Rate will not be particularly important for the creation and redemption process, it will be used for calculating fees.

[62] 15 U.S.C. 80a–1.

Authorized participants will deliver, or facilitate the delivery of, bitcoin to the Fund's account with the Bitcoin Custodian in exchange for Shares when they purchase Shares, and the Fund, through the Bitcoin Custodian, will deliver bitcoin to such authorized participants when they redeem Shares. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Fund's assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Fund.

Investment Objective

According to the Registration Statement and as further described below, the investment objective of the Fund is to generally reflect the performance of the price of bitcoin before payment of the Fund's expenses. In seeking to achieve its investment objective, the Fund will hold bitcoin and may hold cash or cash equivalents. The Fund will value its Shares daily based on the value of bitcoin as reflected by the CME CF Bitcoin Reference Rate (the ''Reference Rate''), which is an independently calculated value based on an aggregation of executed trade flow of major bitcoin spot exchanges. Specifically, the Reference Rate is calculated based on certain transactions of all of its constituent bitcoin exchanges, which are currently Bitstamp, Coinbase, itBit, Kraken, Gemini, and LMAX Digital, and which may change from time to time. If the Reference Rate is not available or the Sponsor determines, in its sole discretion, that the Reference Rate should not be used, the Fund's holdings may be fair valued in accordance with the policy approved by the Sponsor.

The Reference Rate

As described in the Registration Statement, the Fund will use the Reference Rate to calculate the Fund's NAV. The Reference Rate was created to facilitate financial products based on bitcoin. It serves as a once-a-day benchmark rate of the U.S. dollar price of bitcoin (USD/BTC), calculated as of 4 p.m. Eastern time. The Reference Rate aggregates the trade flow of several bitcoin exchanges, during an observation window between 3:00 p.m. and 4:00 p.m. Eastern time into the U.S. dollar price of one bitcoin at 4:00 p.m. Eastern time. Specifically, the Reference Rate is calculated based on the ''Relevant Transactions'' (as defined below) of all of its constituent bitcoin exchanges, which are currently Bitstamp, Coinbase, itBit, Kraken, Gemini, and LMAX Digital (the ''Constituent Bitcoin Exchanges''), as follows:

- All Relevant Transactions are added to a joint list, recording the time of execution, trade price and size for each transaction.
- The list is partitioned by timestamp into 12 equally sized time intervals of 5 (five) minute length.
- For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions, *i.e.,* across all Constituent Bitcoin Exchanges. A volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation.
- The Reference Rate is then determined by the arithmetic mean of the volume-weighted medians of all partitions.

Availability of Information

In addition to the price transparency of the Reference Rate, the Fund will provide information regarding the Fund's bitcoin holdings as well as additional data regarding the Fund. The Fund will provide an Intraday Indicative Value (''IIV'') per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Fund's bitcoin holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Fund, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price [63] in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Fund, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Fund will also disseminate the Fund's holdings on a daily basis on the Fund's website. The price of bitcoin will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Reference Rate, including key elements of how the Reference Rate is calculated, will be publicly available at *https://www.cfbenchmarks.com.*

The NAV for the Fund will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association (''CTA'').

Quotation and last sale information for bitcoin is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Reference Rate. Information relating to trading, including price and volume information, in bitcoin is available from major market data vendors and from the exchanges on which bitcoin are traded. Depth of book information is also available from bitcoin exchanges. The normal trading hours for bitcoin exchanges are 24 hours per day, 365 days per year.

The Bitcoin Custodian

The Bitcoin Custodian carefully considers the design of the physical, operational and cryptographic systems for secure storage of the Fund's private keys in an effort to lower the risk of loss or theft. The Bitcoin Custodian utilizes a variety of security measures to ensure that private keys necessary to transfer digital assets remain uncompromised and that the Fund maintains exclusive ownership of its assets. The Bitcoin Custodian will keep a substantial portion of the private keys associated with the Trust's bitcoin in ''cold storage'' [64] or similarly secure

[63] As defined in Rule 11.23(a)(3), the term ''BZX Official Closing Price'' shall mean the price disseminated to the consolidated tape as the market center closing trade.

[64] The term ''cold storage'' refers to a safeguarding method by which the private keys corresponding to bitcoins stored on a digital wallet are removed from any computers actively connected to the internet. Cold storage of private keys may involve keeping such wallet on a non-networked computer or

technology (the ''Cold Vault Balance''). The hardware, software, systems, and procedures of the Bitcoin Custodian may not be available or cost-effective for many investors to access directly. Only specific individuals are authorized to participate in the custody process, and no individual acting alone will be able to access or use any of the private keys. In addition, no combination of the executive officers of the Sponsor, acting alone or together, will be able to access or use any of the private keys that hold the Fund's bitcoin.

Net Asset Value

NAV means the total assets of the Fund including, but not limited to, all bitcoin and cash, if any, less total liabilities of the Fund, each determined on the basis of generally accepted accounting principles. The Administrator will determine the NAV of the Fund on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. EST. The NAV of the Fund is the aggregate value of the Fund's assets less its estimated accrued but unpaid liabilities (which include accrued expenses). In determining the Fund's NAV, the Administrator values the bitcoin held by the Fund based on the price set by the Reference Rate as of 4:00 p.m. EST. The Administrator also determines the NAV per Share.

Creation and Redemption of Shares

According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of bitcoin required is an amount of bitcoin that is in the same proportion to the total assets of the Fund, net of accrued expenses and other liabilities, on the date the order to purchase is properly received, as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the date the order is received. Each night, the Sponsor will publish the amount of bitcoin that will be required in exchange for each creation order. The Administrator determines the required deposit for a given day by dividing the number of bitcoin held by the Fund as of the opening of business on that business day, adjusted for the amount of bitcoin constituting estimated accrued but unpaid fees and expenses of the Fund as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by the number of Shares in a Creation Unit. The procedures by which an authorized participant can redeem one or more Creation Units mirror the procedures for the creation of Creation Units.

Rule 14.11(e)(4)—Commodity-Based Trust Shares

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Fund's NAV will be calculated daily and that these values and information about the assets of the Fund will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds a specified commodity [65] deposited with the trust; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity.

Upon termination of the Fund, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Fund in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker (''Market Maker'') in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, *e.g.,* Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the bitcoin underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly

electronic device or storing the public key and private keys relating to the digital wallet on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus or paper) and deleting the digital wallet from all computers.

[65] For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act. As noted above, the CFTC has opined that Bitcoin is a commodity as defined in Section 1a(9) of the Commodity Exchange Act. *See* Coinflip.

market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is $0.01 where the price is greater than $1.00 per share or $0.0001 where the price is less than $1.00 per share.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and Bitcoin Futures via ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.[66]

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Creation Units (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Fund's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours[67] when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act[68] in general and Section 6(b)(5) of the Act[69] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts, including Commodity-Based Trust Shares, to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;[70] and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing, in conjunction with precedent filings, sufficiently demonstrates that the CME Bitcoin Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place[71] with a regulated

[66] For a list of the current members and affiliate members of ISG, *see www.isgportal.com.*

[67] Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern time.

[68] 15 U.S.C. 78f.

[69] 15 U.S.C. 78f(b)(5).

[70] As the Exchange has stated in a number of other public documents, it continues to believe that bitcoin is resistant to price manipulation and that ''other means to prevent fraudulent and manipulative acts and practices'' exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging and impractical. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

[71] As previously articulated by the Commission, ''The standard requires such surveillance-sharing agreements since ''they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance- sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and

market of significant size. Both the Exchange and CME are members of ISG. The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[72]

The Commission has also recognized that the ''regulated market of significant size'' standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[73]

(a) Manipulation of the ETP

According to the research and analysis presented above, the Bitcoin Futures market is the leading market for bitcoin price formation. Where Bitcoin Futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the constituents of the Reference Rate) would have to participate in the Bitcoin Futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the Bitcoin Futures market because the Reference Rate is based on spot prices. Further, the Fund only allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Reference Rate or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the bitcoin spot market, which is led by the Bitcoin Futures market. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant influence on prices in the Bitcoin Futures market or spot market for a number of reasons, including the significant daily trading volume in the Bitcoin Futures market, the size of bitcoin's market capitalization, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. As the court found in the Grayscale Order, the Exchange and the Sponsor submit that ''[b]ecause the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.''

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present in this case, in addition to the existence of a surveillance sharing agreement that meets the Commission's previously articulated standards. The Exchange is further proposing to take additional steps beyond those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Shares. On June 21, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (''Coinbase''), an operator of a United States-based spot trading platform for Bitcoin that represents a substantial portion of US-based and USD denominated Bitcoin trading,[74] to enter into a surveillance-sharing agreement (''Spot BTC SSA'') and executed an associated term sheet. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Shares.

The Spot BTC SSA is expected to be a bilateral surveillance-sharing agreement between the Exchange and Coinbase that is intended to supplement the Exchange's market surveillance program. The Spot BTC SSA is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot Bitcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Shares.[75] This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of the Shares. In addition, the Exchange can request further information from Coinbase related to spot bitcoin trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Shares.[76]

Further, and consistent with prior points above, offering only in-kind creation and redemption will also provide unique protections against potential attempts to manipulate the price of the Shares. While the Sponsor believes that the Reference Rate which it uses to value the Fund's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Reference Rate significantly less important. Specifically, because the Fund will not accept cash to buy bitcoin in order to create new Shares or, barring extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed Shares, the price that the Sponsor uses to value the Fund's bitcoin is not particularly important. When authorized participants are creating

market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.'' The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. *See* Wilshire Phoenix Disapproval).

[72] *Id.*

[73] *See* Winklevoss Order at 37580. The Commission has also specifically noted that it ''is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.'' *Id.* at 37582.

[74] According to a Kaiko Research report dated June 26, 2023, Coinbase represented roughly 50% of exchange trading volume in USD–BTC trading on a daily basis during May 2023.

[75] For additional information regarding ISG and the hallmarks of surveillance-sharing between ISG members, see *https://isgportal.org/overview.*

[76] The Exchange also notes that it already has in place ISG-like surveillance sharing agreement with Cboe Digital Exchange, LLC and Cboe Clear Digital, LLC.

Shares, they need to deliver a certain number of bitcoin per Share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per Share. As such, even if the price used to value the Fund's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Fund will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Reference Rate because there is little financial incentive to do so.

(ii) Designed To Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars, including through Bitcoin Futures ETFs. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors including in connection with roll costs for Bitcoin Futures ETFs and premium/discount volatility and management fees for OTC Bitcoin Funds. The Exchange believes that the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed for this proposal to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors to access bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk and benefit U.S. investors by: (i) reducing premium and discount volatility as compared to OTC investment vehicles; (ii) increasing competitive pressure on management fees resulting in fee compression/reductions; (iii) reducing risks and costs as compared to those associated with investing in Bitcoin Futures ETFs and operating companies that represent imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodying spot bitcoin.

Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed bitcoin derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about bitcoin and will be available regarding the Fund and the Shares. In addition to the price transparency of the Reference Rate, the Fund will provide information regarding the Fund's bitcoin holdings as well as additional data regarding the Fund. The Fund will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Fund's bitcoin holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Fund, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Fund, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Fund will also disseminate the Fund's holdings on a daily basis on the Fund's website. The price of bitcoin will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Reference Rate, including key elements of how the Reference Rate is calculated, will be publicly available at *www.cfbenchmarks.com.*

The NAV for the Fund will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

Quotation and last sale information for bitcoin is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Reference Rate. Information relating to trading, including price and volume information, in bitcoin is available from major market data vendors and from the exchanges on which bitcoin are traded. Depth of book information is also available from bitcoin exchanges. The normal trading hours for bitcoin exchanges are 24 hours per day, 365 days per year.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Bitcoin Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. The investor protection issues for U.S. investors has grown significantly over the last several years, through roll costs for Bitcoin Futures ETFs and premium/discount volatility and management fees for OTC Bitcoin Funds. As discussed herein, this growth investor protection concerns need to be reevaluated and rebalanced with the prevention of fraudulent and manipulative acts and practices concerns that previous disapproval orders have relied upon. Finally, the Exchange notes that in addition to all of the arguments herein which it believes sufficiently establish the CME Bitcoin Futures market as a regulated market of significant size, it is logically inconsistent to find that the CME Bitcoin Futures market is a significant market as it relates to the CME Bitcoin Futures market, but not a significant market as it relates to the bitcoin spot market for the numerous reasons laid out above.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–072 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–2023–072. 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–2023–072 and should be submitted on or before October 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[77]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21787 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98570; File No. SR–ICEEU–2023–019]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change Relating to Amendments to the Model Risk Policy

September 27, 2023.

I. Introduction

On August 4, 2023, ICE Clear Europe Limited (''ICE Clear Europe'' or ''the Clearing House'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4,[2] a proposed rule change to amend its Model Risk Policy (the ''Policy''). The proposed rule change was published for comment in the **Federal Register** on August 21, 2023.[3] 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

A. Background

ICE Clear Europe is registered with the Commission as a clearing agency for the purpose of clearing security-based swaps. In its role as a clearing agency for security-based swaps, ICE Clear Europe maintains the Policy. The purpose of the Policy is to establish standards and principles for managing and mitigating the impact to ICE Clear Europe's business caused by model error, model failure or inappropriate model use.

The proposed rule change would make updates and amendments to the Policy. ICE Clear Europe is making these changes to implement the results of internal and external reviews of the Policy. The Policy has five sections that

[77] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change Relating to Amendments to the Model Risk Policy, Exchange Act Release No. 98138 (August 15, 2023); 88 FR 56901 (August 21, 2023) (SR–ICEEU–2023–019) (''Notice'').

address (1) the Purpose of the Policy, (2) Definitions, (3) Model Risk Governance, (4) Document Governance and Exception Handling, and (5) Version History. ICE Clear Europe proposes amendments to all five sections except for Document Governance and Exception Handling. ICE Clear Europe also proposes to update the Version History section to reflect these changes.

B. Purpose of the Policy

Section 1, ''Purpose,'' addresses the purpose, scope, and architecture of the Policy. In this section and throughout the Policy, ICE Clear Europe proposes to replace references to ''Framework'' with ''Policy'' and to include new language to expand the scope of the Policy to include risk frameworks used to quantify, aggregate, and manage the risks of the Clearing House. The amendments would further add language to clarify that references to ''model'' in the rest of the document would refer to both models and risk frameworks.

Section 1 also lists certain components that support the Policy. For example, ICE Clear Europe's model inventory, schedule for model validations, and schedule for remediation of validation findings all support the Policy. The amendments would further add language to include on this list of supporting components guidelines for remediation of validation findings.

C. Definitions

Section 2, ''Definitions,'' describes in detail certain concepts that are used throughout the Policy, such as the meaning of the terms model and model risk, as well as the materiality of models, and significance of model changes. ICE Clear Europe proposes to amend the discussion of significance of model changes. The Policy currently states that only model changes are categorized into significant and not significant. ICE Clear Europe proposes to modify the Policy so that changes to both models and parameters, not just models, would be categorized as significant and not significant.

With respect to changes in parameters, ICE Clear Europe would further categorize these changes as Business as Usual (''BAU'') or non-BAU. Changes considered BAU would be defined as changes in the parameters resulting from the application of existing methodologies as part of a regular review or calibration exercise. Non-BAU changes would refer to all other changes. The amendments would clarify that the definition of BAU would be in accordance with existing regulatory guidelines.

Finally, the amendments would also update a footnote to remove a reference to a specific European Securities and Markets Authority opinion as providing the criteria defining model change significance. This footnote would be revised to state more generally that the criteria will be in accordance with prevailing regulatory opinions, guidelines, or requirements.

D. Model Risk Governance

Within Section 3, ''Model Risk Governance,'' ICE Clear Europe proposes to make amendments to the governance and responsibilities and model risk management subsections. In the governance and responsibilities subsection, the amendments would update the responsibilities of the Board of Directors (''Board''). Currently, the Board has several responsibilities, such as reviewing actions of the Model Oversight Committee and approving new material models and significant model changes for material models. The amendments would add to those responsibilities a new requirement for the Board to approve significant non-BAU changes to risk parameters.

The amendments would also add a footnote explaining the reasoning for the new responsibility. The footnote would state that the Auto Pilot versus Production deviations [4] beyond BAU thresholds will generally follow a similar governance process to that for changes in parameters, but given that these deviations are usually time-sensitive and driven by stressed market conditions, the ability to act quickly to help ensure market stability is critical. This footnote only applies to specific margin updates for certain futures and options contracts and does not apply to any parameter updates for credit default swaps. Thus, for these situations, the governance process will involve Board notification rather than Board pre-approval, and Risk Oversight Department review rather than full independent pre-validation.

ICE Clear Europe proposes to add new responsibilities for the Model Oversight Committee as well. Under the proposed rule change, the Model Oversight Committee would be responsible for establishing and maintaining a model inventory and assigning a specific owner to each model (a function currently performed by the First Line of Defense).[5] This function is currently performed by the First Line. The Model Oversight Committee would also would be responsible for approving non-significant non-BAU changes to risk parameters, reviewing significant non-BAU changes to risk parameters for recommendation to the Board, and approving changes to model documentation. This is a new function currently not performed and is part of ICE Clear Europe's Policy expansion to distinguish between BAU and non-BAU parameter changes. ICE Clear Europe also proposes to modify the responsibilities of the First and Second Lines of Defense.[6] The First Line would no longer be responsible for establishing and maintaining a model inventory and assigning a specific owner to each model, as that responsibility would be moved to the Model Oversight Committee. The amendments would include new responsibilities for the First Line, specifically, proposing and seeking approval for non-BAU changes to risk parameters (as it currently does for models, model changes, and model retirements) and proposing significance levels for non-BAU changes to risk parameters . Under the amendments, the Second Line would be responsible for performing independent validation exercises for non-BAU changes to risk parameters (as it currently does for models).

Finally, within the model risk management subsection, a new subsection would be added addressing non-BAU parameter changes. The section would provide that significant non-BAU changes to risk parameters must be validated before they are implemented in production.[7] Non-significant non-BAU changes must be validated in accordance with the validation pipeline.

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 given below, the Commission finds that the proposed rule change is

[4] Production deviations are categorized under significant non-BAU changes to risk parameters.

[5] The business First Line includes models developed internally, third-party models, and models shared with other group entities, as well as risk frameworks used to quantify, aggregate, and manage the risks of the Clearing House.

[6] The second line includes the Risk Oversight Department.

[7] As discussed above, in certain situations for certain futures and options contracts, Board notification rather than Board pre-approval is required.

[8] 15 U.S.C. 78s(b)(2)(C).

consistent with Section 17A(b)(3)(F) of the Act[9] and Rules 17Ad–22(e)(2)(i) and (v), and (e)(3) 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, contracts, and transactions.[11]

As discussed above, the proposed rule change would modify the Policy. The Policy establishes standards and principles for managing and mitigating model risk for all product categories that ICE Clear Europe clears. The Commission believes that these changes, taken as a whole, would help ICE Clear Europe establish and maintain effective and functioning models. For example, by requiring parameters to be categorized as significant or not significant, the Commission believes that the proposed rule change would help ICE Clear Europe to identify and remediate possible errors in parameter changes before such changes are put into effect by allowing for more scrutiny for parameter changes. Because parameter changes can affect the function of ICE Clear Europe's models, the Commission further believes that doing so may help avoid the potential harm that could result from models that do not function properly, such as margin requirements that are not effective at mitigating risk. Similarly, the Commission believes that the proposed rule change, in making the Second Line responsible for independent validation of non-BAU changes to risk parameters, would help ensure that validations are completed objectively and competently because it brings additional scrutiny to model changes by adding additional levels of review. Biased or ineffective validations could miss potential errors in models and model changes. The Commission believes that this change may also help ICE Clear Europe avoid the potential harm that could result from models that do not function properly.

Given that ICE Clear Europe uses its margin and other models to manage and mitigate ICE Clear Europe's credit exposures to its Clearing Members and the risks associated with clearing security-based swap-related portfolios, the Commission believes that the proposed rule change would enhance ICE Clear Europe's ability to avoid losses that could result from the mismanagement of such credit exposures and risks. Because such losses could disrupt ICE Clear Europe's ability to promptly and accurately clear security-based swap transactions, the Commission believes that the proposed rule change would enhance ICE Clear Europe's ability to promote the prompt and accurate clearance and settlement of securities transactions.

Therefore, the Commission finds that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, consistent with the Section 17A(b)(3)(F) of the Act.[12]

B. Consistency With Rules 17Ad–22(e)(2)(i) and (v)

Rules 17Ad–22(e)(2)(i) and (v) require that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility.[13]

As discussed above, the proposed rule change would add a new requirement for the Board where it would be responsible for the approval of significant non-BAU changes to risk parameters. In doing so, the Commission believes that the Policy would clearly and transparently define who is responsible for this aspect of oversight of the Policy. The proposed rule change would also assign new responsibilities to the First and Second Lines. For example, the Second Line would be responsible for performing independent validation exercises for non-BAU changes to risk parameters, while the First Line would now be responsible for proposing and seeking approval for non-BAU changes to risk parameters.

The Commission believes the proposed rule change would improve the transparency of the governance related to the Policy by improving the relevant responsibilities for the development and validation of models and the review of the overall effectiveness of the Policy. The Commission believes these aspects of the Policy would also clearly define the responsibilities of the First and Second Lines.

Therefore, for the above reasons the Commission finds that the proposed rule change is consistent with Rules 17Ad–22(e)(2)(i) and (v).[14]

C. Consistency With Rule 17Ad–22(e)(3)

Rule 17Ad–22(e)(3) requires that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to 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. This 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 the board of directors annually.[15]

As discussed above, the proposed rule change would add new requirements for the Model Oversight Committee so that it would be responsible for establishing and maintaining a model inventory and assigning a specific owner to each model. Additionally, the proposed rule change would add a requirement for significant non-BAU changes to risk parameters to be validated before they are implemented in production. In this way, the Commission believes the proposed rule change would help reduce model risk at ICE Clear Europe. Moreover, the Commission believes the proposed rule change would help ensure the objectivity and competence of validations by establishing a specific owner for each model. The Commission believes that competent and objective validations would, in turn, help to reduce model risk. Thus, the Commission believes that the proposed rule change would enable ICE Clear Europe to maintain a sound risk management framework for comprehensively managing its model risk.

Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(3).[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)(i) and (v), and (e)(3) thereunder.[18]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[19] that the

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 17 CFR 240.17Ad–22(e)(2)(i) and (v), and (e)(3).

[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)(i) and (v).

[14] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[15] 17 CFR 240.17Ad–22(e)(3).

[16] 17 CFR 240.17Ad–22(e)(3).

[17] 15 U.S.C. 78q–1(b)(3)(F).

[18] 17 CFR 240.17Ad–22(e)(2)(i) and (v), and (e)(3).

[19] 15 U.S.C. 78s(b)(2).

proposed rule change (SR–ICEEU–2023–019), 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. 2023–21794 Filed 10–2–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98560; File No. SR–FINRA–2023–012]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend Temporary Supplementary Material .17 (Temporary Relief To Allow Remote Inspections for Calendar Years 2020, 2021, 2022, and 2023) Under FINRA Rule 3110 (Supervision) To Include Calendar Year 2024

September 27, 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 22, 2023, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by 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 Substance of the Proposed Rule Change

FINRA is proposing to extend temporary Supplementary Material .17 (Temporary Relief to Allow Remote Inspections for Calendar Years 2020, 2021, 2022, and 2023) under FINRA Rule 3110 (Supervision) to include calendar year 2024 inspection obligations through the earlier of the effective date of the remote inspections pilot program proposed in File No. SR–FINRA–2023–007, if approved, or June 30, 2024 within the scope of the supplementary material.[4] FINRA is proposing to extend Rule 3110.17 to provide member firms continuity related to conducting inspections as part of satisfying the obligations of Rule 3110(c) (Internal Inspections) at offices and locations requiring inspection during the first half of calendar year 2024.[5] By statute, the Commission has until the end of December 2023 to approve or disapprove the Remote Inspections Pilot Program Proposal.[6] Given the uncertainty as to whether the Commission will approve or disapprove the Remote Inspections Pilot Program Proposal by the end of calendar year 2023, FINRA believes that the proposed extension is necessary to provide firms the time to prepare for either the resumption of on-site inspections if the Commission disapproves the Remote Inspections Pilot Program Proposal, or alternatively, the implementation of the proposed remote inspections pilot program (''Pilot Program'') if the Commission approves the Remote Inspections Pilot Program Proposal.

Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are bracketed.

* * * * *

3000. SUPERVISION AND RESPONSIBILITES RELATING TO ASSOCIATED PERSONS

3100. SUPERVISORY RESPONSIBILITIES

3110. Supervision

(a) through (f) No Change.

• • • Supplementary Material:

.01 through .16 No Change.

.17 Temporary Relief to Allow Remote Inspections for Calendar Years 2020, 2021, 2022, [and] 2023, *and Through the Earlier of the Effective Date of the Remote Inspections Pilot Program, if Approved, or June 30, 2024.*

(a) Use of Remote Inspections. Each member obligated to conduct an inspection of an office of supervisory jurisdiction, branch office or non-branch location in the calendar years specified in this supplementary material pursuant to, as applicable, paragraphs (c)(1)(A), (B) and (C) under Rule 3110 may, subject to the requirements of this Rule 3110.17, satisfy such obligation by conducting the applicable inspection remotely, without an on-site visit to the office or location. In accordance with Rule 3110.16, inspections for calendar year 2020 must [be]*have been* completed on or before March 31, 2021. Inspections for calendar year 2021 must [be]*have been* completed on or before December 31, 2021, [and inspections] for calendar year 2022, [must be completed] on or before December 31, 2022, *and for calendar year 2023, on or before December 31, 2023.* With respect to a member's obligation to conduct an inspection of an office or location in calendar year [2023]*2024,* a member has the option to conduct those inspections remotely through the earlier of the effective date of the *Remote Inspections* [p]*P*ilot [p]*P*rogram proposed in File No. [SR–FINRA–2022–021]*SR–FINRA–2023–007,* if approved, or [December 31, 2023]*June 30, 2024.* Notwithstanding Rule 3110.17, a member shall remain subject to the other requirements of Rule 3110(c).

(b) No Change.

(c) Effective Supervisory System. The requirement to conduct inspections of offices and locations is one part of the member's overall obligation to have an effective supervisory system and therefore, the member must continue with its ongoing review of the activities and functions occurring at all offices and locations, whether or not the member conducts inspections remotely. A member's use of a remote inspection of an office or location will be held to the same standards for review as set forth under Rule 3110.12. Where a

[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] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 97398 (April 28, 2023), 88 FR 28620 (May 4, 2023) (Notice of Filing of File No. SR–FINRA–2023–007) and Securities Exchange Act Release No. 98046 (August 2, 2023), 88 FR 53569 (August 8, 2023) (Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove File No. SR–FINRA–2023–007) (''Remote Inspections Pilot Program Proposal'').

[5] SEC staff and FINRA have stated in guidance that inspections must include a physical, on-site review component. *See* SEC National Examination Risk Alert, Volume I, Issue 2 (November 30, 2011) and *Regulatory Notice* 11–54 (November 2011) (joint SEC and FINRA guidance stating, a ''broker-dealer must conduct on-site inspections of each of its office locations; [OSJs] and non-OSJ branches that supervise non-branch locations at least annually, all non-supervising branch offices at least every three years; and non-branch offices periodically.'') (footnote defining an OSJ omitted). *See also* SEC Division of Market Regulation, Staff Legal Bulletin No. 17: Remote Office Supervision (March 19, 2004) (stating, in part, that broker-dealers that conduct business through geographically dispersed offices have not adequately discharged their supervisory obligations where there are no on-site routine or ''for cause'' inspections of those offices).

[6] 15 U.S.C. 78s(b)(2); *see also* note 4, *supra.*

member's remote inspection of an office or location identifies any indicators of irregularities or misconduct (*i.e.,* ''red flags''), the member may need to impose additional supervisory procedures for that office or location or may need to provide for more frequent monitoring of that office or location, including potentially a subsequent physical, on-site visit on an announced or unannounced basis [when the member's operational difficulties associated with COVID–19 abate, nationally or locally as relevant, and the challenges a member is facing in light of the public health and safety concerns make such on-site visits feasible using reasonable best efforts]. The temporary relief provided by this Rule 3110.17 does not extend to a member's inspection requirements beyond the earlier of the effective date of the *Remote Inspections* [p]*P*ilot [p]*P*rogram proposed in File No. [SR–FINRA–2022–021]*SR–FINRA–2023–007,* if approved, or [December 31, 2023]*June 30, 2024,* and such inspections must be conducted in compliance with Rule 3110(c).

(d) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In response to the COVID–19 global health crisis and the corresponding need to restrict in-person activities, FINRA provided temporary relief to member firms from certain regulatory requirements, including those set forth under Rule 3110. To help alleviate the attendant logistical challenges member firms were encountering to satisfy the inspection component of their Rule 3110(c) requirements, FINRA adopted Rule 3110.16 (Temporary Extension of Time to Complete Office Inspections) to extend the time by which member firms were required to complete their calendar year 2020 inspection obligations under Rule 3110(c) to March 31, 2021 with the expectation that the extension did not relieve firms from the on-site portion of the inspections of their offices and locations,[7] and subsequently adopted Rule 3110.17 to provide member firms the option, subject to specified requirements under the supplementary material, to complete remotely specified calendar year inspection obligations without an on-site visit to the office or location.[8] Rule 3110.17 has been extended and is currently set to end on December 31, 2023.[9]

The pandemic accelerated the industry's adoption of a broad remote work environment and FINRA recognizes that the pandemic has profoundly changed attitudes on where work can occur. As a result of this change many firms have adopted, in varying scale, hybrid work models involving personnel who are working at least part time from alternative work locations (*e.g.,* private residences). As part of FINRA's overall efforts to modernize FINRA rules to reflect evolving technologies and business models, in April 2023, FINRA filed the Remote Inspections Pilot Program Proposal with the Commission to establish a voluntary, three-year remote inspections pilot program that would allow eligible firms to conduct inspections of all or some offices or locations, remotely, subject to the specified terms therein.[10]

If the Commission approves the Remote Inspections Pilot Proposal, the proposed extension of Rule 3110.17 would allow both FINRA and the firms that are planning to participate in the proposed Pilot Program additional time to develop the technology and processes that will be essential to operationalize compliance with the Pilot Program's requirements. For example, firms will need to conduct an eligibility review, and conduct and document a risk assessment for each office and location that they elect to inspect remotely, and implement technology to collect and report the required data and information to FINRA. Further, FINRA guidance will be needed to guide implementation in various circumstances.[11] Firms that do not elect to participate or would be excluded from participating in the proposed Pilot Program will also be impacted and would need additional time to staff, schedule, and resume on-site inspections of offices or locations [12] within the context of some lingering health concerns and fluid work locations.[13]. If the Commission disapproves the Remote Inspections Pilot Program Proposal, all firms would be impacted and would need additional time to staff, schedule and resume conducting on-site inspections of offices or locations.[14]

In sum, as calendar year 2024 is approaching its fourth quarter, the proposed extension of Rule 3110.17 would provide firms continuity in meeting their inspection obligations after the end of the Commission's statutory deadline to approve or disapprove the Remote Inspections Pilot Proposal. If the Commission approves the Remote Inspections Pilot Proposal, the proposed additional time would allow FINRA to operationalize the Pilot Program. Relatedly, the proposed

[7] *See* Securities Exchange Act Release No. 89188 (June 30, 2020), 85 FR 40713 (July 7, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–019).

[8] *See* Securities Exchange Act Release No. 90454 (November 18, 2020), 85 FR 75097 (November 24, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–040).

[9] *See* Securities Exchange Act Release No. 96241 (November 4, 2022), 87 FR 67969 (November 10, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2022–030) (extending the relief through December 31, 2023); *see also* Securities Exchange Act Release No. 94018 (January 20, 2022), 87 FR 4072 (January 26, 2022) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2022–001) (extending the relief through December 31, 2022) and Securities Exchange Act Release No. 93002 (September 15, 2021), 86 FR 52508 (September 21, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2021–023) (extending the relief through June 30, 2022).

[10] *See* note 4, *supra.*

[11] As part of the implementation process, FINRA intends to publish a *Regulatory Notice* or other guidance about the operational aspects of the proposed Pilot Program.

[12] *See* note 5, *supra.*

[13] While the World Health Organization declared an end to COVID–19 as a public health emergency, COVID–19 remains an ongoing public health problem. *See* WHO Director-General, Opening Remarks at the Media Briefing on COVID–19 (May 5, 2023) (stating, in part, that the ''virus is here to stay. It is still killing, and it's still changing. The risk remains of new variants emerging that cause new surges in cases and deaths.''), *https://www.who.int/news-room/speeches/item/who-director-general-s-opening-remarks-at-the-media-briefing-5-may-2023; see also* Benjamin J. Silk, et al., COVID–19 Surveillance After Expiration of the Public Health Emergency Declaration—United States, May 11, 2023 (stating, among other things, that ''[a]lthough COVID–19 no longer poses the societal emergency that it did when it first emerged in late 2019, COVID–19 remains an ongoing public health challenge. By April 26, 2023, more than 104 million U.S. COVID–19 cases, 6 million related hospitalizations, and 1.1 million COVID–19–associated deaths were reported to CDC[.]''), 72 MMWR Morb Mortal Wkly Rep, 523–528 (2023), *https://www.cdc.gov/mmwr/volumes/72/wr/pdfs/mm7219e1-H.pdf.* Recent data on hospitalizations from the CDC indicate that the number of hospitalizations is up 7.7% (as of September 3 to September 9, 2023). *See* Centers for Disease Control and Prevents (''CDC''), COVID Data Tracker, Data Update for the United States, *https://covid.cdc.gov/covid-data-tracker/#datatracker-home* (last visited September 22, 2023).

[14] *See* note 5, *supra.*

extension would give time for: (1) firms that are planning to participate in the proposed Pilot Program to implement the processes needed to comply with the proposed terms therein; and (2) firms that are not planning to participate or are excluded from participating in the proposed Pilot Program, to prepare to resume conducting on-site inspections of their offices and locations as part of satisfying the obligations of Rule 3110(c).

FINRA is not proposing to amend the other conditions of the temporary rule. The current conditions of the supplementary material for firms that elect to conduct remote inspections would remain unchanged: such firms must amend or supplement their written supervisory procedures for remote inspections, use remote inspections as part of an effective supervisory system, and maintain the required documentation. FINRA continues to believe this temporary remote inspection option is a reasonable alternative for firms to fulfill their Rule 3110(c) obligations under the current circumstances described above. This proposed extension is designed to maintain the investor protection objectives of the inspection requirements under these circumstances. As part of those objectives, firms should consider whether, under their particular operating conditions, continued reliance on Rule 3110.17 to conduct remote inspections would be reasonable under the circumstances. For example, firms with offices that are open to the public or that are otherwise doing business as usual should consider whether some in-person inspections would be feasible and add value to the firms' supervisory program. FINRA emphasizes that the inspection requirement is one aspect of a firm's overall supervisory system, and that the inspection, whether done remotely under Rule 3110.17 or in accordance with the proposed Pilot Program, or on-site, would be held to the existing standards of review under Rule 3110.12 (Standards for Reasonable Review).[15]

FINRA has filed the proposed rule change for immediate effectiveness. FINRA is proposing to make the proposed rule change operative on January 1, 2024.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[16] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change is intended to provide firms certainty now as they plan their upcoming calendar year 2024 inspection program. This temporary proposed supplementary material does not relieve firms from meeting the core regulatory obligation to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules that directly serve investor protection. In light of the planning associated with firms resuming on-site visits to offices and locations to satisfy Rule 3110(c)(1), if the Commission disapproves the Remote Inspections Pilot Program Proposal, and the significant planning requirements that the proposed Pilot Program, if approved, would entail for FINRA and the firms that elect to participate, FINRA believes that the proposed rule change provides sensibly tailored relief, while continuing to serve and promote the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The potential economic impacts of Rule 3110.17 as described in File No. SR–FINRA–2020–040 continue to have applicability to the proposed rule change herein. The proposed rule change would extend the temporary relief that provides firms with the option to fulfill their inspection obligations remotely. The proposed extension would include calendar year 2024 inspection obligations through the earlier of the effective date of the Remote Inspections Pilot Program Proposal, if approved, or June 30, 2024 within the scope of the supplementary material without making substantive changes to the other aspects of the provision. In addition, the proposed extension would provide firms certainty for the reasons stated above. FINRA believes that this limited extension in temporary relief, together with the requirements for using the temporary relief in Rule 3110.17, would not diminish investor protection.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[17] and Rule 19b–4(f)(6) thereunder.[18]

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 (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2023–012 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–FINRA–2023–012. 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

[15] Those standards provide, in part, that based on the factors set forth under that supplementary material, members ''may need to provide for more frequent review of certain locations.''

[16] 15 U.S.C. 78*o*–3(b)(6).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6).

only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2023–012 and should be submitted on or before October 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–21785 Filed 10–2–23; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18205 and #18206; TENNESSEE Disaster Number TN–00151]

Administrative Declaration of a Disaster for the State of Tennessee

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Tennessee dated 09/27/2023.

Incident: Severe Storms and Flooding.

Incident Period: 08/14/2023 through 08/15/2023.

DATES: Issued on 09/27/2023.

Physical Loan Application Deadline Date: 11/27/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 06/27/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Monroe.

Contiguous Counties:

Tennessee: Blount, Loudon, McMinn, Polk.

North Carolina: Cherokee, Graham.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.000
Homeowners Without Credit Available Elsewhere	2.500
Businesses With Credit Available Elsewhere	8.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	2.375
Non-Profit Organizations Without Credit Available Elsewhere	2.375
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 18205 6 and for economic injury is 18206 0.

The States which received an EIDL Declaration # are North Carolina, Tennessee.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2023–21748 Filed 10–2–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 12196]

Diversity Visa Instructions for DV–2025

ACTION: Notice of Diversity Visa Program for fiscal year 2025.

SUMMARY: This public notice provides information on how to apply for the DV–2025 Program and is issued pursuant to the Immigration and Nationality Act.

SUPPLEMENTARY INFORMATION:

Program Overview

The Department of State annually administers the statutorily created Diversity Immigrant Visa Program. Section 203(c) of the Immigration and Nationality Act (INA) provides for a class of immigrants known as ''diversity immigrants'' from countries with historically low rates of immigration to the United States. For fiscal year 2025, up to 55,000 Diversity Visas (DVs) will be available. There is no cost to register for the DV program, but selectees who are scheduled for an interview will be required to pay a visa application fee prior to making their formal visa application where a consular officer will determine whether they qualify for the visa.

Applicants who are selected in the program (selectees) must meet simple but strict eligibility requirements to qualify for aDV. The Department of State determines selectees through a randomized computer drawing. The Department of State distributes diversity visas among six geographic regions, and no single country may receive more than seven percent of the available DVs in any one year.

For DV–2025, natives of the following countries and areas are not eligible to apply, because more than 50,000 natives of these countries immigrated to the United States in the previous five years: Bangladesh, Brazil, Canada, The People's Republic of China (including mainland and Hong Kong born), Colombia, Dominican Republic, El Salvador, Haiti, Honduras, India, Jamaica, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea (South Korea), Venezuela, and Vietnam.

Natives of Macau SAR and Taiwan are eligible.

With the exception of the United Kingdom and its dependent territories, which are now eligible for DV–2025, there were no changes in eligibility from the previous fiscal year.

Eligibility

Requirement One: Natives of countries with historically low rates of

[19] 17 CFR 200.30–3(a)(12).

immigration to the United States may be eligible to enter.

If you are not a native of a country with historically low rates of immigration to the United States, there are two other ways you might be able to qualify.

• Is your spouse a native of a country with historically low rates of immigration to the United States? If yes, you can claim your spouse's country of birth—provided that you and your spouse are named on the selected entry, are found eligible and issued diversity visas, and enter the United States at the same time.

• Are you a native of a country that does not have historically low rates of immigration to the United States, but in which neither of your parents was born or legally resident at the time of your birth? If yes, you may claim the country of birth of one of your parents if it is a country whose natives are eligible for the DV–2025 program. For more details on what this means, see the Frequently Asked Questions.

Requirement Two: Each DV applicant must meet the education/work experience requirement of the DV program by having either:

• at least a high school education or its equivalent, defined as successful completion of a 12-year course of formal elementary and secondary education;

OR

• two years of work experience within the past five years in an occupation that requires at least two years of training or experience to perform. The Department of State will use the U.S. Department of Labor's O*Net Online database to determine qualifying work experience. For more information about qualifying work experience, see the Frequently Asked Questions.

You should not submit an entry to the DV program unless you meet both of these requirements.

Entry Period

Applicants must submit entries for the DV–2025 program electronically at *dvprogram.state.gov* between 12 p.m. (noon), eastern daylight time (EDT) (GMT–4), Wednesday, October 4, 2023, and 12 p.m. (noon), eastern standard time (EST) (GMT–5), Tuesday, November 7, 2023. Do not wait until the last week of the registration period to enter as heavy demand may result in website delays. No late entries or paper entries will be accepted. The law allows only one entry per person during each entry period. The Department of State uses sophisticated technology to detect multiple entries. Submission of more than one entry for a person will disqualify all entries for that person.

Completing Your Electronic Entry for the DV–2025 Program

Submit your Electronic Diversity Visa Entry Form (E–DV Entry Form or DS–5501), online at *dvprogram.state.gov.* We will not accept incomplete entries or entries sent by any other means. There is no cost to submit the online entry form. Please use an updated browser when submitting your application; older browsers (internet Explorer 8, for example) will likely encounter problems with the online DV system.

We strongly encourage you to complete the entry form yourself, without a ''visa consultant,'' ''visa agent,'' or other person who offers to help. If someone helps you, you should be present when your entry is prepared so that you can provide the correct answers to the questions and keep your unique confirmation number and a printout of your confirmation screen. It is extremely important that you have the printout of your confirmation page and unique confirmation number. Unscrupulous visa facilitators have been known to assist entrants with their entries, keep the confirmation page printout, and then demand more money or illegal activities in exchange for the confirmation number. Without this information, you will not be able to access the online system that informs you of your entry status. Be wary if someone offers to keep this information for you. You also should have access to the email account listed in your E–DV entry. See the Frequently Asked Questions for more information about DV program scams.

After you submit a complete entry, you will see a confirmation screen containing your name and a unique confirmation number. Print this confirmation screen for your records. Starting May 4, 2024, you will be able to check the status of your entry by returning to *dvprogram.state.gov,* clicking on Entrant Status Check, and entering your unique confirmation number and personal information.You must use Entrant Status Check to check if you have been selected for DV–2025 and, if selected, to view instructions on how to proceed with your application. The U.S. Government will not inform you directly. Entrant Status Check is the sole source for instructions on how to proceed with your application. If you are selected and submit a visa application and required documents, you must use Entrant Status Check to check your immigrant visa interview appointment date. Please review the Frequently Asked Questions for more information about the selection process.

You must provide all of the following information to complete your entry. Failure to accurately include all the required information may make you ineligible for a DV.

1. Name—last/family name, first name, middle name—exactly as it appears on your passport, if you have a passport (for example, if your passport shows only your first and last/family name, please list your last/family name and then first name; do not include a middle name unless it is included on your passport. If your passport includes a first, middle and last/family name, please list them in the following order: last/family name, first name, middle name). If you have only one name, it must be entered in the last/family name field.

2. Gender—male or female.

3. Birth date—day, month, year.

4. City where you were born.

5. Country where you were born—Use the name of the country currently used for the place where you were born.

6. Country of eligibility for the DV program—Your country of eligibility will normally be the same as your country of birth. Your country of eligibility is not related to where you live or your nationality if it is different from your country of birth.

If you were born in a country that is not eligible, please review the Frequently Asked Questions to see if there is another way you may be eligible.

7. Entrant photograph(s)—Recent photographs (taken within the last six months) of yourself, your spouse, and all your derivative children included on your entry. See Submitting a Digital Photograph for compositional and technical specifications. You do not need to include a photograph for a spouse or child who is already a U.S. citizen or a Lawful Permanent Resident, but you will not be penalized if you do. DV entry photographs must meet the same standards as U.S. visa photos. You may be ineligible for a DV if the entry photographs for you and your family members do not fully meet these specifications or have been manipulated in any way. Submitting the same photograph that was submitted with a prior year's entry will make you ineligible for a DV. See Submitting a Digital Photograph (below) for more information.

8. Mailing Address—In Care of

Address Line 1
Address Line 2
City/Town
District/Country/Province/State

Postal Code/Zip Code Country

9. Country where you live today.

10. Phone number (optional).

11. Email address—An email address to which you have direct access and will continue to have direct access through May of the next year. If you check the Entrant Status Check in May and learn you have been selected, you will later receive follow-up email communication from the Department of State with details if an immigrant visa interview becomes available. The Department of State will never send you an email telling you that you have been selected for the DV program. See the Frequently Asked Questions for more information about the selection process.

12. Highest level of education you have achieved, as of today: (1) Primary school only, (2) Some high school, no diploma, (3) High school diploma, (4) Vocational school, (5) Some university courses, (6) University degree, (7) Some graduate-level courses, (8) Master's degree, (9) Some doctoral-level courses, or (10) Doctorate. See the Frequently Asked Questions for more information about educational requirements.

13. *Current marital status:* (1) unmarried, (2) married and my spouse is NOT a U.S. citizen or U.S. Lawful Permanent Resident (LPR), (3) married and my spouse IS a U.S. citizen or U.S. LPR, (4) divorced, (5) widowed, or (6) legally separated. Enter the name, date of birth, gender, city/town of birth, and country of birth of your spouse, and a photograph of your spouse meeting the same technical specifications as your photo.

Failure to list your eligible spouse or, listing someone who is not your spouse, may make you ineligible as the DV principal applicant and your spouse and children ineligible as DV derivative applicants. You must list your spouse even if you currently are separated from them unless you are legally separated. Legal separation is an arrangement when a couple remain married but live apart, following a court order. If you and your spouse are legally separated, your spouse will not be able to immigrate with you through the DV program. You will not be penalized if you choose to enter the name of a spouse from whom you are legally separated. If you are not legally separated by a court order, you must include your spouse even if you plan to be divorced before you apply for the Diversity Visa, or your spouse does not intend to immigrate.

If your spouse is a U.S. citizen or Lawful Permanent Resident, do not list them in your entry. A spouse who is already a U.S. citizen or LPR will not require or be issued a visa. Therefore, if you select ''married and my spouse IS a U.S. citizen or U.S. LPR'' on your entry, you will not be prompted to include further information on your spouse. See the Frequently Asked Questions for more information about family members.

14. Number of children—List the name, date of birth, gender, city/town of birth, and country of birth for all living, unmarried children under 21 years of age, regardless of whether they are living with you or intend to accompany or follow to join you, should you immigrate to the United States. Submit individual photographs of each of your children using the same technical specifications as your own photograph.

Be sure to include:

- all living natural children;
- all living children legally adopted by you; and
- all living stepchildren who are unmarried and under the age of 21 on the date of your electronic entry, even if you are no longer legally married to the child's parent, and even if the child does not currently reside with you and/or will not immigrate with you.

Married children and children who are already aged 21 or older when you submit your entry are not eligible for the DV program. However, the Child Status Protection Act protects children from ''aging out'' in certain circumstances: if you submit your DV entry before your unmarried child turns 21, and the child turns 21 before visa issuance, it is possible that he or she may be treated as though he or she were under 21 for visa processing purposes.

A child who is already a U.S. citizen or LPR when you submit your DV entry will not require or be issued a Diversity Visa; you will not be penalized for either including or omitting such family members from your entry.

Failure to list all children who are eligible or listing someone who is not your child may make you ineligible for a DV, in which case your spouse and children will also be ineligible as Diversity Visa derivative applicants. See the Frequently Asked Questions for more information about family members.

See the Frequently Asked Questions for more information about completing your Electronic Entry for the DV–2025 Program.

Selection of Entries

Based on the allocations of available visas in each region and country, the Department of State will randomly select individuals by computer from among qualified entries. All DV–2025 entrants must go to the Entrant Status Check using the unique confirmation number saved from their DV–2025 online entry registration to find out whether their entry has been selected in the DV program. Entrant Status Check will be available on the E–DV website at *dvprogram.state.gov* from May4, 2024, through at least September 30, 2025.

If your entry is selected, you will be directed to a confirmation page providing further instructions, including information about fees connected with immigration to the United States. Entrant Status Check will be the ONLY means by which the Department of State notifies selectees of their selection for DV–2025. The Department of State will not mail notification letters or notify selectees by email. U.S. embassies and consulates will not provide a list of selectees. Individuals who have not been selected also ONLY will be notified through Entrant Status Check. You are strongly encouraged to access Entrant Status Check yourself. Do not rely on someone else to check and inform you.

In order to immigrate, DV selectees must be admissible to the United States. The DS–260, Online Immigrant Visa and Alien Registration Application, electronically, and the consular officer, in person, will ask you questions about your eligibility to immigrate under U.S. law. These questions include criminal and security-related topics.

All selectees, including family members, must be issued visas by September 30, 2025, or prior to issuance of the approximately 55,000 visas available each year—whichever is earlier. Under no circumstances can the Department of State issue DVs nor can USCIS approve adjustments after this date, nor can family members obtain DVs to follow-to-join the principal applicant in the United States after this date. The U.S. Government only authorizes issuance of approximately 55,000 diversity visas each year. Given the limited number of visas available, selectees should act promptly in submitting their materials and pursuing their application.

See the Frequently Asked Questions for more information about the selection process.

Submitting a Digital Photograph

You can take a new digital photograph or scan a recent (taken within the last six months) photograph with a digital scanner if it meets all of the standards below. DV entry photos must be of the same quality and composition as U.S. visa photos. You can see examples of acceptable photos at the following link: *https://travel.state.gov/content/travel/en/us-*

visas/visa-information-resources/photos/photo-examples.html. Do not submit a photograph older than six months or a photograph that does not meet all the standards described below. Submitting the same photograph that you submitted with a prior year's entry, a photograph that has been manipulated, or a photograph that does not meet the specifications below may make you ineligible for a DV.

Your photos or digital images must be:

- In color
- In focus
- Sized such that the head is between 1 inch and 1⅜ inches (22 mm and 35 mm) or 50 percent and 69 percent of the image's total height from the bottom of the chin to the top of the head. View the Photo Composition Template for more size requirement details.
- Taken within the last six months to reflect your current appearance.
- Taken in front of a plain white or off-white background.
- Taken in full-face view directly facing the camera.
- With a neutral facial expression and both eyes open.
- Taken in clothing that you normally wear on a daily basis.
- Uniforms should not be worn in your photo, except religious clothing that is worn daily.
- Do not wear a hat or head covering that obscures the hair or hairline, unless worn daily for a religious purpose. Your full face must be visible, and the head covering must not cast any shadows on your face.
- Headphones, wireless hands-free devices, or similar items are not acceptable in your photo.
- Do not wear eyeglasses.
- If you normally wear a hearing device or similar articles, they may be worn in your photo.

Review the Photo Examples at this link: *https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/photos/photo-examples.html* to see examples of acceptable and unacceptable photos. Photos copied or digitally scanned from driver's licenses or other official documents are not acceptable. In addition, snapshots, magazine photos, low quality vending machine, and full-length photographs are not acceptable.

You must upload your digital image as part of your entry. Your digital image must be:

- In JPEG (.jpg) file format
- Equal to or less than 240 kB (kilobytes) in file size
- In a square aspect ratio (height must equal width)
- 600 x 600 pixels in dimension

Do you want to scan an existing photo? In addition to the digital image requirements, your existing photo must be:

- 2 x 2 inches (51 x 51 mm)
- Scanned at a resolution of 300 pixels per inch (12 pixels per millimeter)

Taking photos of your baby or toddler—When taking a photo of your baby or toddler, no other person should be in the photo, and your child should be looking at the camera with his or her eyes open. Tip 1: Lay your baby on his or her back on a plain white or off-white sheet. This will ensure your baby's head is supported and provide a plain background for the photo. Make certain there are no shadows on your baby's face, especially if you take a picture from above with the baby lying down. Tip 2: Cover a car seat with a plain white or off-white sheet and take a picture of your child in the car seat. This will also ensure your baby's head is supported.

Frequently Asked Questions (FAQs)

Eligibility

1. What do the terms ''native'', and ''chargeability'' mean?

Native ordinarily means someone born in a particular country, regardless of the individual's current country of residence or nationality. Native can also mean someone who is entitled to be charged to a country other than the one in which he/she was born under the provisions of section 202(b) of the Immigration and Nationality Act.

Because there is a numerical limitation on immigrants who enter from a country or geographic region, each individual is charged to a country. Your chargeability refers to the country towards which limitation you count. Your country of eligibility will normally be the same as your country of birth. However, you may choose your country of eligibility as the country of birth of your spouse, or the country of birth of either of your parents if you were born in a country in which neither parent was born and in which your parents were not resident at the time of your birth. These are the only three ways to select your country of chargeability.

Listing an incorrect country of eligibility or chargeability (*i.e.,* one to which you cannot establish a valid claim) may make you ineligible for DV–2025.

2. Can I still apply if I was not born in a qualifying country?

There are two circumstances in which you still might be eligible to apply. First, if your derivative spouse was born in an eligible country, you may claim chargeability to that country. As your eligibility is based on your spouse, you will only be issued an immigrant visa if your spouse is also eligible for and issued an immigrant visa. Both of you must enter the United States together, using your DVs. Similarly, your minor dependent child can be ''charged'' to a parent's country of birth.

Second, you can be ''charged'' to the country of birth of either of your parents as long as neither of your parents was born in or a resident of your country of birth at the time of your birth. People are not generally considered residents of a country in which they were not born or legally naturalized. For example, persons simply visiting, studying, or temporarily working in a country are not generally considered residents.

If you claim alternate chargeability through either of the above, you must provide an explanation on the E–DV Entry Form, in question #6.

Listing an incorrect country of eligibility or chargeability (*i.e.,* one to which you cannot establish a valid claim) will make you ineligible for a DV.

3. Why do natives of certain countries not qualify for the DV program?

DVs are intended to provide an immigration opportunity for persons who are not from ''high admission'' countries. U.S. law defines ''high admission countries'' as those from which a total of 50,000 persons in the Family-Sponsored and Employment-Based visa categories immigrated to the United States during the previous five years. Each year, the Department of Homeland Security (DHS) counts the family and employment immigrant admission and adjustment of status numbers for the previous five years to identify the countries that are considered ''high admission'' and whose natives will therefore be ineligible for the annual Diversity Visa program. Since DHS makes this calculation annually, the list of countries whose natives are eligible or not eligible may change from one year to the next.

4. How many DV–2025 visas will go to natives of each region and eligible country?

The Department of Homeland Security (DHS) determines the regional DV limits for each year according to a formula specified in Section 203(c) of the Immigration and Nationality Act (INA). The number of visas the Department of State eventually will issue to natives of each country will depend on the regional limits

established, how many entrants come from each country, and how many of the selected entrants are found eligible for the visa. No more than seven percent of the total visas available can go to natives of any one country.

5. What are the requirements for education or work experience?

U.S. immigration law and regulations require that every DV entrant must have at least a high school education or its equivalent or have two years of work experience within the past five years in an occupation that requires at least two years of training or experience. A ''high school education or equivalent'' is defined as successful completion of a 12-year course of elementary and secondary education in the United States OR the successful completion in another country of a formal course of elementary and secondary education comparable to a high school education in the United States. Only formal courses of study meet this requirement; correspondence programs or equivalency certificates (such as the General Equivalency Diploma [G.E.D.]) are not acceptable. You must present documentary proof of education or work experience to the consular officer at the time of the visa interview.

If you do not meet the requirements for education or work experience you will be ineligible for a DV, and your spouse and children will be ineligible for derivative DVs.

6. What occupations qualify for the DV program?

The Department of State will use the U.S. Department of Labor's (DOL) O*Net OnLine database to determine qualifying work experience. The O*Net OnLine database categorizes job experience into five ''job zones.'' While the DOL website lists many occupations, not all occupations qualify for the DV program. To qualify for a DV on the basis of your work experience, you must have, within the past five years, two years of experience in an occupation classified in a Specific Vocational Preparation (SVP) range of 7.0 or higher.

If you do not meet the requirements for education or work experience, you will be ineligible for a DV, and your spouse and children will be ineligible for derivative DVs.

7. How can I find the qualifying DV occupations in the Department of Labor's O*Net OnLine database?

When you are in O*Net OnLine, follow these steps to determine if your occupation qualifies:

- Under ''Find Occupations,'' select ''Job Family'' from the pull down menu;
- Browse by ''Job Family,'' make your selection, and click ''GO''.
- Click on the link for your specific occupation; and
- Select the tab ''Job Zone'' to find the designated Job Zone number and Specific Vocational Preparation (SVP) rating range.

As an example, select Aerospace Engineers. At the bottom of the Summary Report for Aerospace Engineers, under the Job Zone section, you will find the designated Job Zone 4, SVP Range, 7.0 to <8.0. Using this example, Aerospace Engineering is a qualifying occupation.

For additional information, see the Diversity Visa—List of Occupations web page: *https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/diversity-visa-if-you-are-selected/diversity-visa-confirm-your-qualifications.html.*

8. Is there a minimum age to apply for the E–DV Program?

There is no minimum age to apply, but the requirement of a high school education or work experience for each principal applicant at the time of application will effectively disqualify most persons who are under age 18.

Completing Your Electronic Entry for the DV–2025 Program

9. When can I submit my entry?

The DV–2025 entry period will run from 12 p.m. (noon), eastern daylight time (EDT) (GMT–4), Wednesday, October 4, 2023, until 12 p.m. (noon), eastern standard time (EST) (GMT–5), Tuesday, November 7, 2023. Each year, millions of people submit entries. Restricting the entry period to these dates ensures selectees receive notification in a timely manner and gives both the visa applicants and our embassies and consulates time to prepare and complete cases for visa issuance.

We strongly encourage you to enter early during the registration period. Excessive demand at end of the registration period may slow the processing system. We cannot accept entries after noon EST on Tuesday, November 7, 2023.

10. I am in the United States. Can I enter the DV program?

Yes, an entrant may apply while in the United States or another country. An entrant may submit an entry from any location.

11. Can I only enter once during the registration period?

Yes, the law allows only one entry per person during each registration period. The Department of State uses sophisticated technology to detect multiple entries. Individuals with more than one entry will be ineligible for a DV.

12. May my spouse and I each submit a separate entry?

Yes, each spouse may each submit one entry if each meets the eligibility requirements. If either spouse is selected, the other is entitled to apply as a derivative dependent.

13. Which family members must I include in my DV entry?

Spouse: If you are legally married, you must list your spouse regardless of whether they live with you or intend to immigrate to the United States. You must list your spouse even if you currently are separated from them unless you are legally separated. Legal separation is an arrangement when a couple remains married but lives apart, following a court order. If you and your spouse are legally separated, your spouse will not be able to immigrate with you through the Diversity Visa program. You will not be penalized if you choose to enter the name of a spouse from whom you are legally separated. If you are not legally separated by a court order, you must include your spouse even if you plan to be divorced before you apply for the Diversity Visa, or your spouse does not intend to immigrate. Failure to list your eligible spouse or listing someone who is not your spouse will make you ineligible for a DV. If you are not married at the time of entry but plan on getting married in the future, do not list a spouse on your entry form, as this would make you ineligible for a DV.

If you are divorced or your spouse is deceased, you do not have to list your former spouse.

The only exception to this requirement is if your spouse is already a U.S. citizen or U.S. Lawful Permanent Resident. If your spouse is a U.S. citizen or Lawful Permanent Resident, do not list them in your entry. A spouse who is already a U.S. citizen or a Lawful Permanent Resident will not require or be issued a DV. Therefore, if you select ''married and my spouse IS a U.S. citizen or U.S. LPR'' on your entry, you will not be able to include further information on your spouse.

Children: You must list ALL your living children who are unmarried and under 21 years of age at the time of your

initial DV entry, whether they are your natural children, your stepchildren (even if you are now divorced from that child's parent), your spouse's children, or children you have formally adopted in accordance with the applicable laws. List all children under 21 years of age at the time of your electronic entry, even if they no longer reside with you or you do not intend for them to immigrate under the DV program.You are not required to list children who are already U.S. citizens or Lawful Permanent Residents, though you will not be penalized if you do include them.

Parents and siblings of the entrant are ineligible to receive DV visas as dependents, and you should not include them in your entry.

If you list family members on your entry, they are not required to apply for a visa or to immigrate or travel with you. However, if you fail to include an eligible dependent on your original entry or list someone who is not your dependent, you may be ineligible for a DV, in which case your spouse and children will be ineligible for derivative DVs. This only applies to those who were family members at the time the entry was submitted, not those acquired at a later date. Your spouse, if eligible to enter, may still submit a separate entry even though they are listed on your entry, and both entries must include details about all dependents in your family (see FAQ #13 above).

14. Must I submit my own entry, or can someone else do it for me?

We encourage you to prepare and submit your own entry, but you may have someone submit the entry for you. Regardless of whether you submit your own entry, or an attorney, friend, relative, or someone else submits it on your behalf, only one entry may be submitted in your name. You, as the entrant, are responsible for ensuring that information in the entry is correct and complete; entries that are not correct or complete may be disqualified. Entrants should keep their confirmation number, so they are able to check the status of their entry independently, using Entrant Status Check at *dvprogram.state.gov.* Entrants should retain access to the email account used in the E–DV submission.

15. I'm already registered for an immigrant visa in another category. Can I still apply for the DV program?

Yes.

16. Can I download and save the E–DV entry form into a word processing program and finish it later?

No, you will not be able to save the form into another program for completion and submission later. The E–DV Entry Form is a web-form only. You must fill in the information and submit it while online.

17. Can I save the form online and finish it later?

No. The E–DV Entry Form is designed to be completed and submitted at one time. You will have 60 minutes, starting from when you download the form, to complete and submit your entry through the E–DV website. If you exceed the 60-minute limit and have not submitted your complete entry electronically, the system discards any information already entered. The system deletes any partial entries so that they are not accidentally identified as duplicates of a later, complete entry. Read the DV instructions completely before you start to complete the form online so that you know exactly what information you will need.

18. I don't have a scanner. Can I send photographs to someone else to scan them, save them, and email them back to me so I can use them in my entry?

Yes, as long as the photograph meets the requirements in the instructions and is electronically submitted with, and at the same time as, the E–DV online entry. You must already have the scanned photograph file when you submit the entry online; it cannot be submitted separately from the online application. The entire entry (photograph and application together) can be submitted electronically from the United States or from overseas.

19. If the E–DV system rejects my entry, canI resubmit my entry?

Yes, you can resubmit your entry as long as your submission is completed by 12 p.m. (noon) eastern standard time (EST) (GMT–5) on Tuesday, November 7, 2023. You will not be penalized for submitting a duplicate entry if the E–DV system rejects your initial entry. Given the unpredictable nature of the internet, you may not receive the rejection notice immediately. You can try to submit an application as many times as is necessary until a complete application is received and the confirmation notice sent. Once you receive a confirmation notice, your entry is complete, and you should NOT submit any additional entries.

20. How soon after I submit my entry will I receive the electronic confirmation notice?

You should receive the confirmation notice immediately, including a confirmation number that you must record and keep. However, the unpredictable nature of the internet can result in delays. You can hit the ''Submit'' button as many times as is necessary until a complete application is sent and you receive the confirmation notice. However, once you receive a confirmation notice, do not resubmit your information.

21. I hit the ''Submit'' button but did not receive a confirmation number. If I submit another entry, will I be disqualified?

If you did not receive a confirmation number, your entry was not recorded. You must submit another entry. It will not be counted as a duplicate. Once you receive a confirmation number, do not resubmit your information.

Selection

22. How do I know if I am selected?

You must use your confirmation number to access the Entrant Status Check available on the E–DV website at *dvprogram.state.gov* from May 4, 2024, through September 30, 2025. Entrant Status Check is the sole means by which the Department of State will notify you if you are selected, provide further instructions on your visa application, and notify you of your immigrant visa interview appointment date and time. To ensure the use of all available visas, the Department of State may use Entrant Status Check to notify additional selectees after May 4, 2024. Retain your confirmation number until September 30, 2025, in case of any updates. The only authorized Department of State website for official online entry in the Diversity Visa Program and Entrant Status Check is *dvprogram.state.gov.*

The Department of State will NOT contact you to tell you that you have been selected (see FAQ #25).

23. How will I know if I am not selected? Will I be notified?

The Department of State will NOT notify you directly if your entry is not selected. You must use the Entrant Status Check to learn whether you were selected. You may check the status of your DV–2025 entry through the Entrant Status Check on the E–DV website from May 4, 2024, until September 30, 2025. Keep your confirmation number until at least September 30, 2025. (Status information for the previous year's DV

program, DV–2024, is available online through September 30, 2024.)

24. What if I lose my confirmation number?

You must have your confirmation number to access Entrant Status Check. A tool is now available in Entrant Status Check on the E–DV website that will allow you to retrieve your confirmation number via the email address with which you registered by entering certain personal information to confirm your identity.

U.S. embassies and consulates and the Kentucky Consular Center are unable to check your selection status for you or provide your confirmation number to you directly (other than through the Entrant Status Check retrieval tool). The Department of State is NOT able to provide a list of those selected to continue the visa process.

25. Will I receive information from the Department of State by email or by postal mail?

The Department of State will not send you a notification letter. The U.S. Government has never sent emails to notify individuals that they have been selected, and there are no plans to use email for this purpose for the DV–2025 program. If you are a selectee, you will only receive email communications regarding your visa appointment after you have responded to the notification instructions on Entrant Status Check, if an immigrant visa interview becomes available. These emails will not contain information on the actual appointment date and time; they will simply tell you to go to the Entrant Status Check website for details. The Department of State may send emails reminding DV program applicants to check the Entrant Status Check for their status. However, such emails will never indicate whether the DV program applicant was selected or not.

Only internet sites that end with the ''.gov'' domain suffix are official U.S. Government websites. Many other websites (*e.g.,* with the suffixes ''.com,'' ''.org,'' or ''.net'') provide immigration and visa-related information and services. The Department of State does not endorse, recommend, or sponsor any information or material on these other websites.

Warning: You may receive emails from websites that try to trick you into sending money or providing your personal information. You may be asked to pay for forms and information about immigration procedures, all of which are available free on the Department of State website, *travel.state.gov,* or through U.S. embassy or consulate websites. Additionally, organizations or websites may try to steal your money by charging fees for DV-related services. If you send money to one of these non-government organizations or websites, you will likely never see it again. Also, do not send personal information to these websites, as it may be used for identity fraud/theft.

Deceptive emails may come from people pretending to be affiliated with the Kentucky Consular Center or the Department of State. Remember that the U.S. Government has never sent emails to notify individuals they have been selected, and there are no plans to use email for this purpose for the DV–2025 program. The Department of State will never ask you to send money by mail or by services such as Western Union, although applications to USCIS for adjustments of status do require mailing a fee. Visit this site for more details on adjusting status.

26. How many individuals will be selected for DV–2025?

For DV–2025, 55,000 DiversityVisas are available. The Department of State selects more than 55,000 selectees to account for selectees who will not qualify for visas and those who will not pursue their cases to completion. This means there will not be a sufficient number of visas for all those selected. The Department does this to try to use as many of the 55,000 DVs as we can.

You can check the E–DV website's Entrant Status Check to see if you have been selected for further processing and later to see the status of your case. Interviews for the DV–2025 program will begin in October 2024 for selectees who have submitted all pre-interview paperwork and other information as requested in the notification instructions. Selectees whose applications have been fully processed and have been scheduled for a visa interview appointment will receive a notification to obtain details through the E–DV website's Entrant Status Check four to six weeks before the scheduled interviews with U.S. consular officers overseas.

Each month, visas may be issued to those applicants who are eligible for issuance during that month, as long as visas are available. Once all the 55,000 diversity visas have been issued, the program will end. Visa numbers could be finished before September 2025. Selected applicants who wish to apply for visas must be prepared to act promptly on their cases. Being randomly chosen as a selectee does not guarantee that you will receive a visa or even the chance to make a visa application or to schedule a visa interview. Selection merely means that you may be eligible to apply for a Diversity Visa. If your rank number becomes eligible for final processing, you may have the chance to make an application and potentially may be issued a Diversity Visa. A maximum of 55,000 visas may be issued to such applicants.

27. How will successful entrants be selected?

Official notifications of selection will be made through Entrant Status Check, available May 4, 2024, through September 30, 2025, on the E–DV website, *dvprogram.state.gov.* The Department of State does not send selectee notifications or letters by regular postal mail or by email. Any email notification or mailed letter stating that you have been selected to receive a DV that does not come from the Department of State is not legitimate. Any email communication you receive from the Department of State will direct you to review Entrant Status Check for new information about your application. The Department of State will never ask you to send money by mail or by services such as Western Union unless you are adjusting status. See this site for more information on adjusting status.

All entries received from each region are individually numbered; at the end of the entry period, a computer will randomly select entries from among all the entries received for each geographic region. Within each region, the first entry randomly selected will be the first case registered; the second entry selected will be the second case registered, etc. All entries received within each region during the entry period will have an equal chance of being selected. When an entry has been selected, the entrant will receive notification of his or her selection through the Entrant Status Check available starting May 4, 2024, on the E–DV website, *dvprogram.state.gov.* For individuals who are selected and who respond to the instructions provided online via Entrant Status Check, the Department of State's Kentucky Consular Center (KCC) will process the case until those selected are instructed to appear for visa interviews at a U.S. embassy or consulate or until those in the United States who are applying to adjust status apply with USCIS in the United States.

28. I am already in the United States. If selected, may I adjust my status with USCIS?

Yes, provided you are otherwise eligible to adjust status under the terms

of section 245 of the Immigration and Nationality Act (INA), you may apply to USCIS for adjustment of status to permanent resident. You must ensure that USCIS can complete action on your case, including processing of any overseas applications for a spouse or for children under 21 years of age, before September 30, 2025, since on that date your eligibility for the DV–2025 program expires. The Department of State will not approve any visa numbers or adjustments of status for the DV–2025 program after midnight EDT on September 30, 2025.

29. If I am selected, for how long am I entitled to apply for a Diversity Visa?

If you are selected in the DV–2025 program, you may apply for visa issuance only during U.S. Government fiscal year 2025, which is from October 1, 2024, through September 30, 2025. We encourage selectees to apply for visas as early as possible once their program rank numbers become eligible. As noted above, once all the 55,000 diversity visas have been issued, the program will end.

Without exception, all selected and eligible applicants must obtain their visa or adjust status by the end of the fiscal year. There is no carry-over of DV benefits into the next year for persons who are selected but who do not obtain visas by September 30, 2025 (the end of the fiscal year). Also, spouses and children who derive status from a DV–2025 registration can only obtain visas in the DV category between October 1, 2024, and September 30, 2025. Individuals who apply overseas will receive an appointment notification from the Department of State through Entrant Status Check on the E–DV website four to six weeks before the scheduled appointment.

30. If a DV selectee dies, what happens to the case?

If a DV selectee dies at any point before he or she has traveled to the United States or adjusted status, the DV case is automatically closed. Any derivative spouse and/or children of the deceased selectee will no longer be entitled to apply for a DV visa. Any visas issued to them will be revoked.

Fees

31. How much does it cost to enter the Diversity Visa program?

There is no fee charged to submit an electronic entry. However, if you are selected and apply for a Diversity Visa, you must pay all required visa application fees at the time of visa application and interview directly to the consular cashier at the U.S. embassy or consulate. If you are a selectee already in the United States and you apply to USCIS to adjust status, you will pay all required fees directly to USCIS. If you are selected, you will receive details of required fees with the instructions provided through the E–DV website at *dvprogram.state.gov.*

32. How and where do I pay DV and immigrant visa fees if I am selected?

If you are a randomly selected entrant, you will receive instructions for the DV application process through Entrant Status Check at *dvprogram.state.gov.* You will pay all fees in person only at the U.S. embassy or consulate at the time of the visa application and interview. The consular cashier will immediately give you a U.S. Government receipt for payment. Do not send money for DV fees to anyone through the mail, Western Union, or any other delivery service if you are applying for an immigrant visa at a U.S. embassy or consulate.

If you are selected and are already present in the United States and plan to file for adjustment of status with USCIS, the instructions page accessible through Entrant Status Check at *dvprogram.state.gov* contains separate instructions on how to mail adjustment of status application fees to a U.S. bank.

33. If I apply for a DV, but don't qualify to receive one, can I get a refund of the visa fees I paid?

No. Visa application fees cannot be refunded. You must meet all qualifications for the visa as detailed in these instructions. If a consular officer determines you do not meet requirements for the visa, or you are otherwise ineligible for the DV under U.S. law, the officer cannot issue a visa and you will forfeit all fees paid.

Ineligibilities

34. As a DV applicant, can I receive a waiver of any grounds of visa ineligibility? Does my waiver application receive any special processing?

DV applicants are subject to all grounds of ineligibility for immigrant visas specified in the Immigration and Nationality Act (INA). There are no special provisions for the waiver of any ground of visa ineligibility aside from those ordinarily provided in the INA, nor is there special processing for waiver requests. Some general waiver provisions for people with close relatives who are U.S. citizens or Lawful Permanent Resident aliens may be available to DV applicants in some cases, but the time constraints in the DV program may make it difficult for applicants to benefit from such provisions.

Fraud Warning and Scams

35. How can I report internet fraud or unsolicited emails?

Please visit the *econsumer.gov* website, hosted by the Federal Trade Commission in cooperation with consumer-protection agencies from 36 nations. You also may report fraud to the Federal Bureau of Investigation (FBI) internet Crime Complaint Center. To file a complaint about unsolicited email, use the ''Telemarking and Spam'' complaint tool on the *econsumer.gov* website or visit the Department of Justice Unsolicited Commercial Email (''Spam'') web page for additional information and contacts.

Statistics

36. How many visas will be issued in DV–2025?

By law, a maximum of 55,000 visas are available each year to eligible persons.

Miscellaneous

37. If I receive a visa through the DV program, will the U.S. Government pay for my airfare to the United States, help me find housing and employment, and/or provide healthcare or any subsidies until I am fully settled?

No. The U.S. Government will not provide any of these services to you if you receive a visa through the DV program. If you are selected to apply for a DV, before being issued a visa you must demonstrate that you will not become a public charge in the United States. If you are selected and submit a diversity visa application, you should familiarize yourself with the Department of State's public guidance on how the likelihood of becoming a public charge is assessed and what evidence can be provided to demonstrate that you are not likely to become a public charge.

List of Countries/Areas by Region Whose Natives Are Eligible for DV–2025

The list below shows the countries and areas whose natives are eligible for DV–2025, grouped by geographic region. Dependent areas overseas are included within the region of the governing country. DHS identified the countries whose natives are not eligible for the DV–2025 program according to the formula in Section 203(c) of the INA. The countries whose natives are not eligible for the DV program (because

they are the principal source countries of Family-Sponsored and Employment-Based immigration or ''high-admission'' countries) are noted after the respective regional lists.

Africa

Algeria
Angola
Benin
Botswana
Burkina Faso
Burundi
Cameroon
Cabo Verde
Central African Republic
Chad
Comoros
Congo
Congo, Democratic Republic of the
Cote D'Ivoire (Ivory Coast)
Djibouti
Egypt *
Equatorial Guinea
Eritrea
Eswatini
Ethiopia
Gabon
Gambia, The
Ghana
Guinea
Guinea-Bissau
Kenya
Lesotho
Liberia
Libya
Madagascar
Malawi
Mali
Mauritania
Mauritius
Morocco
Mozambique
Namibia
Niger
Rwanda
Sao Tome and Principe
Senegal
Seychelles
Sierra Leone
Somalia
South Africa
South Sudan
Sudan
Tanzania
Togo
Tunisia
Uganda
Zambia
Zimbabwe

In Africa, natives of Nigeria are not eligible for this year's Diversity Visa program.

Asia

Afghanistan
Bahrain
Bhutan
Brunei
Burma
Cambodia
Indonesia
Iran
Iraq
Israel *
Japan ***
Jordan *
Kuwait
Laos
Lebanon
Malaysia
Maldives
Mongolia
Nepal
North Korea
Oman
Qatar
Saudi Arabia
Singapore
Sri Lanka
Syria *
Taiwan **
Thailand
Timor-Leste
United Arab Emirates
Yemen

* Persons born in the areas administered prior to June 1967 by Israel, Jordan, Syria, and Egypt are chargeable, respectively, to Israel, Jordan, Syria, and Egypt. Persons born in the Gaza Strip are chargeable to Egypt; persons born in the West Bank are chargeable to Jordan; persons born in the Golan Heights are chargeable to Syria.

** Macau S.A.R. (Europe region, chargeable to Portugal) and Taiwan (Asia region) do qualify and are listed. For the purposes of the diversity program only, persons born in Macau S.A.R. derive eligibility from Portugal.

*** Persons born in the Habomai Islands, Shikotan, Kunashiri, and Etorofuare chargeable to Japan. Persons born in Southern Sakhalin are chargeable to Russia.

Natives of the following Asia Region countries are not eligible for this year's Diversity Visa program: Bangladesh, China (including Hong Kong), India, Pakistan, South Korea, Philippines, and Vietnam.

Europe

Albania
Andorra
Armenia
Austria
Azerbaijan
Belarus
Belgium
Bosnia and Herzegovina
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark (including components and dependent areas overseas)
Estonia
Finland
France (including components and dependent areas overseas)
Georgia
Germany
Greece
Hungary
Iceland
Ireland
Italy
Kazakhstan
Kosovo
Kyrgyzstan
Latvia
Liechtenstein
Lithuania
Luxembourg
Macau Special Administrative Region **
NorthMacedonia
Malta
Moldova
Monaco
Montenegro
Netherlands (including components and dependent areas overseas)
Northern Ireland ***
Norway (including components and dependent areas overseas)
Poland
Portugal (including components and dependent areas overseas)
Romania
Russia ****
San Marino
Serbia
Slovakia
Slovenia
Spain
Sweden
Switzerland
Tajikistan
Turkey
Turkmenistan
Ukraine
United Kingdom (including dependent areas)
Uzbekistan
Vatican City

** Macau S.A.R. does qualify and is listed above and for the purposes of the diversity program only; persons born in Macau S.A.R. derive eligibility from Portugal.

*** For purposes of the diversity program only, Northern Ireland is treated separately. Northern Ireland does qualify and is listed among the qualifying areas.

**** Persons born in the Habomai Islands, Shikotan, Kunashiri, and Etorofu are chargeable to Japan. Persons born in Southern Sakhalin are chargeable to Russia. Great Britain (United Kingdom) and its dependent areas do qualify for DV–2025. Great

Britain (United Kingdom) includes the following dependent areas: Anguilla, Bermuda, British Virgin Islands, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, South Georgia and the South Sandwich Islands, St. Helena, and Turks and Caicos Islands.

North America

Bahamas, The

In North America, natives of Canada and Mexico are not eligible for this year's DV program.

Oceania

Australia (including components and dependent areas overseas)
Fiji
Kiribati
Marshall Islands
Micronesia, Federated States of
Nauru
New Zealand (including components and dependent areas overseas)
Palau
Papua New Guinea
Samoa
Solomon Islands
Tonga
Tuvalu
Vanuatu

South American, Central America, and the Caribbean

Antigua and Barbuda
Argentina
Barbados
Belize
Bolivia
Chile
Costa Rica
Cuba
Dominica
Ecuador
Grenada
Guatemala
Guyana
Nicaragua
Panama
Paraguay
Peru
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Suriname
Trinidad and Tobago
Uruguay

Countries in this region whose natives are not eligible for this year's DV program: Brazil, Colombia, Dominican Republic, El Salvador, Haiti, Honduras, Jamaica, Mexico, and Venezuela.

Hugo F. Rodriguez,

Principal Deputy Assistant Secretary, Consular Affairs, Department of State.

[FR Doc. 2023–21807 Filed 10–2–23; 8:45 am]

BILLING CODE 4710–06–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket Number USTR–2023–0008]

Cancellation of Public Hearing Concerning China's Compliance With World Trade Organization (WTO) Commitments

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice; cancellation of public hearing.

SUMMARY: The interagency Trade Policy Staff Committee (TPSC) sought public comments to assist USTR in the preparation of its annual report to Congress on China's compliance with its obligations as a Member of the World Trade Organization (WTO). USTR is canceling the public hearing that was scheduled to take place on October 4, 2023.

DATES: The public hearing scheduled for October 4, 2023 is cancelled.

FOR FURTHER INFORMATION CONTACT: Alex Martin, Deputy Director for China Affairs at *Thomas.A.Martin@ustr.eop.gov* or (202) 395–9625.

SUPPLEMENTARY INFORMATION: On August 17, 2023, the TPSC sought public comments to assist USTR in the preparation of its annual report to Congress on China's compliance with its obligations as a Member of the WTO. *See* 88 FR 56117 (Aug 17, 2023). The notice included a September 20, 2023 deadline for the submission of written comments and requests to testify at a public hearing that was scheduled to take place on October 4, 2023. In response to the request for comments, USTR received 22 submissions. USTR also received three requests to participate in the public hearing, which subsequently were withdrawn. Therefore, USTR is canceling the October 4, 2023 public hearing.

Laura Buffo,

Chair of the Trade Policy Staff Committee, Office of the United States Trade Representative.

[FR Doc. 2023–21841 Filed 10–2–23; 8:45 am]

BILLING CODE 3390–F3–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket Number USTR–2023–0007]

Cancellation of Public Hearing Concerning Russia's Implementation of Its World Trade Organization (WTO) Commitments

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice; cancelation of public hearing.

SUMMARY: The interagency Trade Policy Staff Committee (TPSC) sought public comments to assist USTR in the preparation of its annual report to Congress on Russia's implementation of its obligations as a Member of the World Trade Organization (WTO). USTR is cancelling the public hearing that was scheduled to take place on October 12, 2023.

DATES: The public hearing scheduled for October 12, 2023 is cancelled.

FOR FURTHER INFORMATION CONTACT: Silvia Savich, Deputy Assistant U.S. Trade Representative for Russia and Eurasia, at *Silvia.Savich@ustr.eop.gov* or (202) 395–2256.

SUPPLEMENTARY INFORMATION: On August 8, 2023, the TPSC sought public comments to assist USTR in the preparation of its annual report to Congress on Russia's implementation of its obligations as a Member of the WTO. *See* 88 FR 53576 (Aug 8, 2023). The notice included a September 20, 2023 deadline for the submission of written comments and requests to testify at a public hearing that was scheduled to take place on October 12, 2023. In response to the request for comments, USTR received two submissions. USTR also received one request to participate in the public hearing, which subsequently was withdrawn. Therefore, USTR is cancelling the October 12, 2023 public hearing.

Laura Buffo,

Chair of the Trade Policy Staff Committee, Office of the United States Trade Representative.

[FR Doc. 2023–21831 Filed 10–2–23; 8:45 am]

BILLING CODE 3290–F3–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No.: FAA–2018–0835; Summary Notice No. 2023–38]

Petition for Exemption; Summary of Petition Received; Wing Aviation

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

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither

publication of this notice nor the inclusion nor omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before October 23, 2023.

ADDRESSES: Send comments identified by docket number FAA–2018–0835 using any of the following methods:

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

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

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kara White, 202–267–9677, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on 28 September, 2023.

Brandon Roberts,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2018–0835.

Petitioner: Wing Aviation LLC.

Sections of 14 CFR Affected: 91.113(b) and 91.155(a).

Description of Relief Sought: Wing Aviation LLC (Wing) seeks an amendment of its Exemption No. 18163D to change certain conditions and limitations from prescriptive requirements to a performance-based approach. Also, Wing requests to use ADS–B for primary detect and avoid during beyond visual line-of-sight operations without visual observers. Finally, Wing requests to modify current conditions and limitations for weather requirements, and instead, comply with existing weather minimums in § 91.155.

[FR Doc. 2023–21810 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–2061]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Commercial Air Tour Operator Reports

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection involves information from commercial air tour operators on the numbers and types of air tours over national park units. The information to be collected will be used by the FAA and the National Park Service to track air tour operations over national parks and as background information in the development of air tour management plans and voluntary agreements for purposes of addressing any potential significant impacts from commercial air tour operations on the natural or cultural resources or visitor experience at the parks.

DATES: Written comments should be submitted by December 4, 2023.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Sandra Fox, FAA Office of Environment and Energy, 800 Independence Ave SW, Suite 900W, Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Sandra Fox by email at: *sandra.y.fox@faa.gov;* phone: 202–267–0928.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized 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.

OMB Control Number: 2120–0750.

Title: Commercial Air Tour Operator Reports.

Form Numbers: There are no FAA forms associated with this collection of information.

Type of Review: Renewal of an information collection.

Background: The FAA Modernization and Reform Act of 2012 included amendments to the National Parks Air Tour Management Act (NPATMA) of 2000, which applies to commercial air tour operators who conduct tours over or within a half mile of a national park unit. One of these amendments requires commercial air tour operators conducting tours over national park units to provide the FAA and National Park Service with certain information on these operations. The information collected includes the date and time of day of the tour operation, the make and model of aircraft the tour was taken in, and the name of tour route flown. The information allows the agencies to track air tour activity over national park units and provides background information that the agencies can utilize when developing an air tour management plan or voluntary agreement for a national park unit. Respondents are the commercial air tour operators currently authorized to conduct tours over national parks. Operators provide the information on a reporting template and either email it or mail it in to the agencies.

Respondents: 48 commercial air tour operators nationwide.

Frequency: Information is collected semi-annually (twice a year), or annually for park units with 50 or fewer tours per year.

Estimated Average Burden per Response: 11.83 hours.

Estimated Total Annual Burden: 1,136 hours.

Issued in Washington, DC, on September 28, 2023.

Sandra Fox,

Environmental Protection Specialist, FAA Office of Environment and Energy.

[FR Doc. 2023–21881 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Request for Nominations for the Federal System Funding Alternative Advisory Board to the Federal Highway Administration

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

ACTION: Notice to solicit members for the Federal System Funding Alternative Advisory Board.

SUMMARY: The FHWA announces a solicitation of Membership to the Federal System Funding Alternative Advisory Board (Advisory Board). Advisory Board members will serve for 2 years after the date on which the Advisory Board is established, with the potential for reappointment. The Advisory Board will assist with providing the Secretary of Transportation (Secretary) with recommendations related to the structure, scope, and methodology for developing and implementing the national motor vehicle per-mile user fee pilot program; assist with carrying out a public awareness campaign; assist with developing reports to Congress analyzing the national motor vehicle per-mile user fee pilot program; and coordinate in the development of the recommendations and a report to Congress required under the Strategic Innovation for Revenue Collection Pilot Program.

DATES: The deadline for nominations for Advisory Board membership is November 17, 2023.

ADDRESSES: All nomination materials should be emailed to *NVPMF@dot.gov* or mailed attention to Ms. Angela Fogle, Federal Highway Administration, Office of Operations, Room E86–204, 1200 New Jersey Avenue SE, Washington, DC 20590. Any person needing accessibility accommodations should contact Angela Fogle at (202) 366–0076.

FOR FURTHER INFORMATION CONTACT: Ms. Angela Fogle, Office of Operations, (202) 366–0076 or *NVPMF@dot.gov;* 1200 New Jersey Avenue SE, Washington, DC 20590; or Ms. Alissa Dolan, Office of the Chief Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 631–3393 or via email at *Alissa.Dolan@dot.gov.*

SUPPLEMENTARY INFORMATION: Section 13002(g)(1) of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117–58) requires the establishment of the Advisory Board. Under this section, the Advisory Board will assist with providing the Secretary with recommendations related to the structure, scope, and methodology for developing and implementing the national motor vehicle per-mile user fee pilot program under section 13002(b); carrying out the public awareness campaign detailed in section 13002(h); and developing the report to Congress required by section 13002(n). In addition, section 13001(d) of the BIL requires the Secretary, in coordination with the Secretary of the Treasury and the Advisory Board, to submit to Congress a report that: (1) summarizes the results of the Strategic Innovation for Revenue Collection pilot projects and the national motor vehicle per-mile user fee pilot program; and (2) provides recommendations, if applicable, to enable potential implementation of a nationwide user-based alternative revenue mechanism.

Pursuant to section 9 of the Federal Advisory Committee Act (FACA), and in accordance BIL section 13002(g)(1), the Secretary has established the Advisory Board. This document gives notice of this process to potential participants and affords them the opportunity to request representation on the Advisory Board. The procedure for requesting such representation is set out below. The FHWA is aware that there are many more potential organizations and participants than there are membership slots on the Advisory Board. Organizations and participants should be prepared to support their participation on the Advisory Board.

Members serve at the pleasure of the Secretary. Advisory Board members will be appointed for a 2-year term with the potential for reappointment. The Secretary may extend appointments and may appoint replacements for members who have resigned outside of a stated term, as necessary. Advisory Board members may continue to serve until their replacements have been appointed.

The FHWA is hereby soliciting nominations for members of the Advisory Board. The Secretary will appoint, at a minimum, the following representatives and entities:

(1) State departments of transportation;

(2) Any public or nonprofit entity that led a surface transportation system funding alternatives pilot project under section 6020 of the Fixing America's Surface Transportation Act (23 U.S.C. 503 note; Public Law 114–94);

(3) Representatives of the trucking industry, including owner-operator independent drivers;

(4) Data security experts with expertise in personal privacy;

(5) Academic experts on surface transportation systems;

(6) Consumer advocates, including privacy experts;

(7) Advocacy groups focused on equity;

(8) Owners of motor vehicle fleets;

(9) Owners and operators of toll facilities;

(10) Representatives of the transit industry, including agencies and entities engaged in mobility on demand or accessible multimodal transportation;

(11) Tribal groups or representatives; and

(12) Any other representatives or entities, as determined appropriate by the Secretary.

Process and Deadline for Submitting Nominations: Qualified individuals can self-nominate or be nominated by any individual or organization. To be considered for the Advisory Board, nominators should submit the following information:

(1) Name, title, and relevant contact information (including phone, and email address) of the nominee;

(2) A letter of support containing a brief description of why the nominee should be considered for membership;

(3) A short biography of the nominee, including any relevant professional and academic credentials and any prior experience with mileage-based user fees;

(4) For nominees seeking to serve in their individual capacity (and not seeking appointment to represent the interests of a nongovernmental entity; a recognizable group of persons or nongovernmental entities such as an industry sector or labor union; or State or local governments), an affirmative statement that the nominee is not a federally registered lobbyist, and that the nominee understands that if appointed, the nominee will not be allowed to continue to serve as an Advisory Board member if the nominee becomes a federally registered lobbyist;

(5) An affirmative statement from the nominee of their availability and willingness to serve on the Advisory Board. It is anticipated that board members will serve a 2-year term with the potential for reappointment. Initially, board members will be expected to participate in quarterly meetings. Additional meetings may be required.

(6) An affirmative statement from the nominee of their willingness and ability to serve as the chairperson for the Advisory Board, which will require additional time commitment beyond simple membership. Chairperson duties are described in DOT Order 1120.3 D, ''Committee Management Policy and Procedures.''

Please do not send company, trade association, or organization brochures or any other information. Materials submitted should total three pages or less, not including any letter(s) of support. Should more information be needed, DOT staff will contact the nominee, obtain information from the nominee's past affiliations, or obtain information from publicly available sources, such as the internet.

It is important to recognize that interested parties who are not selected to membership on the Advisory Board can make valuable contributions to the work of the Advisory Board in any of several ways. Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the FHWA Administrator may prescribe.

Any member of the public is welcome to attend Advisory Board meetings, and, as provided in FACA, speak to the Advisory Board. Time will be set aside during each meeting for this purpose, consistent with the Advisory Board's need for sufficient time to complete its deliberations.

All nomination materials should be emailed to *NVPMF@dot.gov,* faxed to the attention of Angela Fogle at (202) 366–0076, or mailed to Angela Fogle, Federal Highway Administration, Office of Operations Transportation Management, Room E86–204, 1200 New Jersey Avenue SE, Washington, DC 20590. Nominations must be received by November 17, 2023. Nominees selected for appointment to the Advisory Board will be notified by return email and by a letter of appointment.

A selection team comprising representatives from several DOT offices and, potentially, members of the U.S. Department of the Treasury will review the nomination packages. The selection team will make recommendations regarding membership to the Secretary through the FHWA Administrator based on evaluation criteria including: (1) professional or academic expertise, experience, and knowledge; (2) stakeholder representation; and (3) demonstrated skills working in committees and advisory panels. Some members may have qualifications permitting them to fill multiple member representation positions. The FHWA Administrator will submit a list of recommended candidates to the Secretary for review and selection of Advisory Board members.

Nominations are open to all individuals without regard to race, color, religion, sex, national origin, age, mental or physical handicap, marital status, or sexual orientation. To ensure that recommendations to the Secretary consider the needs of the diverse groups served by DOT, membership shall include, to the extent practicable, individuals with demonstrated ability to represent disadvantaged and under-represented groups.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

[FR Doc. 2023–21745 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0178]

Agency Information Collection Activities; Renewal of an Approved Information Collection: Financial Responsibility for Motor Carriers of Passengers and Motor Carriers of Property

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. FMCSA requests approval to renew an ICR titled, ''Financial Responsibility for Motor Carriers of Passengers and Motor Carriers of Property.'' The information collected will be used to help ensure that motor carriers of passengers and property maintain the statutorily mandated levels of financial responsibility to operate on public highways.

DATES: Comments on this notice must be received on or before December 4, 2023.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2023–0178 using any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC, 20590–0001 between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey Secrist, Office of Registration, Chief, Registration, Licensing and Insurance Division, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590; (202) 385–2367; *jeff.secrist@dot.gov.*

SUPPLEMENTARY INFORMATION:

Instructions

All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Public Participation and Request for Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2023–0178), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so FMCSA can contact you if there are questions regarding your submission. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online.

To submit your comment online, go to *https://www.regulations.gov/docket/FMCSA-2023-0178/document,* click on this notice, click ''Comment,'' and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing.

Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

Privacy Act

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

Background

The Secretary of Transportation is responsible for implementing regulations which establish minimum levels of financial responsibility for: (1) for-hire motor carriers of property to cover public liability, property damage, and environmental restoration, and (2) for-hire motor carriers of passengers to cover public liability and property damage. The Endorsement for Motor Carrier Policies of Insurance for Public Liability (Forms MCS–90/90B) and the Motor Carrier Public Liability Surety Bond (Forms MCS–82/82B) contain the minimum amount of information necessary to document that a motor carrier of property or passengers has obtained, and has in effect, the minimum levels of financial responsibility as set forth in applicable regulations (49 CFR 387.9 (motor carriers of property) and 49 CFR 387.33T (motor carriers of passengers)). FMCSA and the public can verify that a motor carrier of property or passengers has obtained, and has in effect, the required minimum levels of financial responsibility by reviewing the information enclosed within these documents.

Title: Financial Responsibility for Motor Carrier of Passengers and Motor Carriers of Property.

OMB Control Number: 2126–0008.

Type of Request: Renewal of a currently approved ICR.

Respondents: Insurance underwriters for insurance companies and financial specialists for surety companies of motor carriers of property (Forms MCS–90 and MCS–82) and passengers (Forms MCS–90B and MCS–82B), and motor carrier compliance officers employed by motor carriers to store and maintain insurance and/or surety bond documentation in motor carrier vehicles.

Estimated Number of Respondents: 413,948.

Estimated Time per Response: FMCSA estimates that it takes 2 minutes to complete the Endorsement for Motor Carrier Policies of Insurance for Public Liability (Forms MCS–90 for property carriers and MCS–90B for passenger carriers) or the Motor Carrier Public Liability Surety Bond (Forms MCS–82 for property carriers and MCS–82B for passenger carriers); 1 minute to store/maintain documents at the motor carrier's principal place of business (49 CFR 387.7(d); 49 CFR 387.31(d)); and 1 minute per vehicle to place the respective document on board the vehicle as required for non-U.S.-domiciled carriers (49 CFR 387.7(f); 49 CFR 387.31(f)).

Expiration Date: May 31, 2024.

Frequency of Response: Upon creation, change, or replacement of an insurance policy or surety bond. Approximately one time per year.

Estimated Total Annual Burden: 12,249.

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 performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized 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 ICR.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2023–21766 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Positive Train Control Regulations About Emergency Rerouting

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public about FRA's regulations permitting railroads to temporarily reroute a train equipped with a positive train control (PTC) system onto a track not equipped with a PTC system, in the event an emergency prevents usage of the regularly used track. This notice contains information about the process a railroad must follow to notify FRA and/or obtain FRA's approval, depending on the duration of the rerouting.

FOR FURTHER INFORMATION CONTACT: For technical questions, please contact Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: *Gabe.Neal@dot.gov.* For legal questions, please contact Stephanie Anderson, Attorney Adviser, telephone: 202–834–0609, email: *Stephanie.Anderson@dot.gov.*

SUPPLEMENTARY INFORMATION: By law, PTC systems must govern operations on PTC-mandated main lines, which currently encompass approximately 58,000 route miles, and include Class I railroads' main lines over which poison- or toxic-by-inhalation hazardous materials are transported and any railroads' main lines over which intercity or commuter rail passenger transportation is regularly provided.[1]

FRA's PTC regulations recognize, however, that certain emergencies—including events such as a derailment, flood, fire, tornado, hurricane, earthquake, or other similar circumstance outside of the railroad's control—may occur and prevent usage of the regularly used track. Specifically, 49 CFR 236.1005(g)(1) enables railroads to temporarily reroute PTC-equipped trains onto track not equipped with a PTC system, in the event an emergency prevents usage of the regularly used track.

Pursuant to 49 CFR 236.1005(g)(1)(ii) and 236.1005(i), a railroad must provide written or telephonic notification to FRA of the following information within one business day of the beginning of the emergency rerouting:

(1) The dates that such temporary rerouting will occur;

(2) The number and types of trains that will be rerouted;

[1] Title 49 United States Code (U.S.C.) 20157; title 49 Code of Federal Regulations (CFR) 236.1005(b), 236.1006(a). This requirement does not apply, however, to a railroad's controlling locomotives that are subject to either a temporary or permanent exception under 49 U.S.C. 20157(j)–(k) or 49 CFR 236.1006(b).

(3) The location of the affected tracks; and

(4) A description of the necessity for the temporary rerouting.

FRA's PTC regulations specify that a railroad may reroute traffic only until the emergency condition ceases to exist and for no more than 14 consecutive calendar days, unless otherwise extended by approval from FRA's Associate Administrator for Railroad Safety (Associate Administrator).

In 2023, multiple railroads have requested FRA's approval to continue the emergency rerouting beyond 14 consecutive calendar days. FRA reminds railroads to submit their extension requests as soon as possible, well before the initial 14-day period of emergency rerouting lapses, to ensure FRA has sufficient time to evaluate the railroad's request and issue its decision to the railroad.

During all phases of emergency rerouting, including during the initial 14 consecutive calendar days and beyond, a railroad must comply with the rerouting conditions under 49 CFR 236.1005(j), as § 236.1005(g)(1)(iii) requires. For example, § 236.1005(j) specifies that an unequipped train must be ''operated in accordance with § 236.1029'' (including the applicable speed restrictions) if the train is rerouted to a PTC-equipped track. If any train is rerouted to a track not equipped with a PTC system, the train must be ''operated in accordance with the operating rules applicable to the line on which the train is rerouted.'' 49 CFR 236.1005(j).

FRA remains available to provide technical assistance to railroads about the emergency rerouting provisions in FRA's regulations, at 49 CFR 236.1005(g)(1), (i), and (j) and summarized above. FRA appreciates railroads' commitment to operating their FRA-certified, interoperable PTC systems on PTC-mandated main lines, as generally required by law, outside the special, limited circumstances outlined in FRA's regulations.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2023–21855 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0190]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Sand Seaker 9 (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 2, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0190 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0190 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0190, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Sand Seaker 9 is:

Intended Commercial Use of Vessel: ''Luxury Charter Day trips.''

Geographic Region Including Base of Operations: ''Florida (Base of Operations: Sarasota, FL).''

Vessel Length and Type: 35′ 1″ Catamaran.

The complete application is available for review identified in the DOT docket as MARAD 2023–0190 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0190 or visit the Docket Management Facility (see **ADDRESSES** for

hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–21872 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0186]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Hot Potato V (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 2, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0186 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0186 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0186, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, D.C. 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Hot Potato V is:

Intended Commercial Use of Vessel: ''Fishing Charter.''

Geographic Region Including Base of Operations: ''Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida (Base of Operations: Shinnecock, NY)''

Vessel Length and Type: 66′4″ Sportfish.

The complete application is available for review identified in the DOT docket as MARAD 2023–0186 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled ADDRESSES. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0186 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–21871 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0189]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Winds of Change (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 2, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0189 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0189 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0189, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Winds of Change is:

Intended Commercial Use of Vessel: ''6 pack Charter.''

Geographic Region Including Base of Operations: ''California (Base of Operations: Marina Del Rey, CA).''

Vessel Length and Type: 37′9″ Sail.

The complete application is available for review identified in the DOT docket as MARAD 2023–0189 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0189 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you

claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–21875 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0188]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Whiskey Bent (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 2, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0188 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0188 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0188, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Whiskey Bent is:

Intended Commercial Use of Vessel: ''Sport Fishing Charter.''

Geographic Region Including Base of Operations: ''Florida (Base of Operations: Port Saint Joe, FL).''

Vessel Length and Type: 47′ Sportfish.

The complete application is available for review identified in the DOT docket as MARAD 2023–0188 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0188 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–21874 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0187]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Sol Shine (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 2, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0187 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0187 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2023–0187, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Sol Shine is:

Intended Commercial Use of Vessel: ''Coastwise Charter.''

Geographic Region Including Base of Operations: ''Florida, Alabama, Mississippi, Louisiana, Texas, Georgia, South Carolina, North Carolina, Virginia, Delaware, Maryland, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Maine (Base of Operations: Fort Lauderdale, FL).''

Vessel Length and Type: 78′ Motor.

The complete application is available for review identified in the DOT docket as MARAD 2023–0187 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0187 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential

under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(*Authority:* 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–21873 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2023–0078 (Notice No. 2023–11)]

Hazardous Materials: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on two information collections pertaining to hazardous materials transportation for which PHMSA intends to request renewal from the Office of Management and Budget.

DATES: Interested persons are invited to submit comments on or before December 4, 2023.

ADDRESSES: You may submit comments identified by the Docket Number PHMSA–2023–0078 (Notice No. 2023–11) by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System; U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* To the Docket Management System; Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and Docket Number (PHMSA–2023–0078) for this notice at the beginning of the comment. To avoid duplication, please use only one of these four methods. All comments received will be posted without change to the Federal Docket Management System (FDMS) and will include any personal information you provide.

Requests for a copy of an information collection should be directed to Steven Andrews or Nina Vore, Standards and Rulemaking Division, (202) 366–8553, *ohmspra@dot.gov,* Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

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

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Steven Andrews or Nina Vore, Standards and Rulemaking Division and addressed to the Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 or *ohmspra@dot.gov.* Any commentary that PHMSA receives which is not specifically designated as CBI will be placed in the public docket for this notice.

FOR FURTHER INFORMATION CONTACT: Steven Andrews or Nina Vore, Standards and Rulemaking Division, (202) 366–8553, *ohmspra@dot.gov,* Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Section 1320.8(d), title 5, Code of Federal Regulations (CFR) requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collection requests that PHMSA will be submitting to the Office of Management and Budget (OMB) for renewal and extension. These information collections are contained in 49 CFR 171.6 of the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180). PHMSA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) title of the information collection, including former title if a change is being made; (2) OMB control number; (3) summary of the information collection activity; (4) description of affected public; (5) estimate of total annual reporting and recordkeeping burden; and (6) frequency of collection. PHMSA will request a 3-year term of approval for each information collection activity and will publish a notice in the **Federal Register** upon OMB's approval.

PHMSA requests comments on the following information collections:

Title: Hazardous Materials Security Plans.

OMB Control Number: 2137–0612.

Summary: To assure public safety, shippers and carriers must take reasonable measures to plan and implement procedures to prevent unauthorized persons from taking control of, or attacking, hazardous materials shipments. Part 172 of the HMR requires persons who offer or transport certain hazardous materials to develop and implement written plans to enhance the security of hazardous materials shipments. The security plan requirements as prescribed in § 172.800(b) apply to specific types of shipments. Such shipments include but

are not limited to: shipments greater than 3,000 kg (6,614 pounds) for solids or 3,000 liters (792 gallons) for certain liquids and gases in a single packaging such as a cargo tank motor vehicle, portable tank, tank car, or other bulk container; any quantity of a Division 1.1, 1.2, or 1.3 material; a large bulk quantity of a Division 2.1 material; or any quantity of a poison-by-inhalation material. A security plan will enable shippers and carriers to reduce the possibility that a hazardous materials shipment will be used as a weapon of opportunity by a terrorist or criminal.

The following is a list of the information collections and burden estimates associated with this OMB Control Number:

Information collection	Annual respondents	Total annual responses	Hours per response	Total annual burden hours
New Security Plan—Large Companies	30	90	50	4,500
New Security Plan—Small Companies	170	170	25	4,250
Updating Security Plan—Large Companies	6,300	18,900	10	189,000
New Security Plan—Small Companies	35,700	35,700	5	178,499
Compilation of Commodity Data—Class I Railroads	7	7	40	280
Compilation of Commodity Data—Class II Railroads	32	32	40	1,280
Compilation of Commodity Data—Class III Railroads	100	100	40	4,000
Primary Route Analysis—Class I Railroads	7	60	80	4,800
Primary Route Analysis—Class II Railroads	32	128	80	10,240
Primary Route Analysis—Class III Railroads	100	200	40	8,000
Alternate Route Analysis—Class I Railroads	7	60	120	7,200
Alternate Route Analysis—Class II Railroads	32	96	120	11,520
Alternate Route Analysis—Class III Railroads	100	50	40	2,000
Route Selection and Completion of Route Analysis—Class I Railroads	7	7	16	112
Route Selection and Completion of Route Analysis—Class II Railroads	32	32	16	512
Route Selection and Completion of Route Analysis—Class III Railroads	100	100	8	800
Storage, Delays in Transit, and Notification—Class I Railroads	7	7	8	56
Storage, Delays in Transit, and Notification—Class II Railroads	32	32	8	256
Storage, Delays in Transit, and Notification—Class III Railroads	100	100	4	400
Notifying a Consignee in the Event of a Significant Delay—Class I Railroads	7	12	.50	6
Notifying a Consignee in the Event of a Significant Delay—Class II Railroads	32	12	.50	6
Notifying a Consignee in the Event of a Significant Delay—Class III Railroads	100	2	.50	1
Inspection—Large Companies	100	100	.008	1

Affected Public: Shippers and carriers of hazardous materials in commerce.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 43,134.

Total Annual Responses: 55,997.

Total Annual Burden Hours: 427,719.

Frequency of Collection: On occasion.

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Control Number: 2137–0640.

Summary: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Department's commitment to improving service delivery. Qualitative feedback is information that provides useful insights on perceptions and opinions, not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insight into customer or stakeholder perceptions, opinions, experiences and expectations, as well as an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between PHMSA and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management. Feedback or information collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population.

The Department will submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary.
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government.
- The collections are non-controversial and do not raise issues of concern to other Federal agencies.
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future.
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained.
- Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the Department (if released, the Department must indicate the qualitative nature of the information).

This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely

to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

Affected Public: Individuals and households, businesses and organizations, State, local or Tribal governments.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 6,000.

Total Annual Responses: 6,000.

Total Annual Burden Hours: 3,000.

Frequency of Collection: One-time requirement.

Issued in Washington, DC, on September 28, 2023, under authority delegated in 49 CFR 1.97.

T. Glenn Foster,

Chief, Regulatory Review and Reinvention Branch, Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2023–21870 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[PHMSA–2019–0098]

Lithium Battery Air Safety Advisory Committee; Notice of Public Meeting

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: This notice announces a meeting of the Lithium Battery Air Safety Advisory Committee (Committee).

DATES: The meeting will be held on November 2, 2023, from 9:00 a.m. to 5:30 p.m. EDT. Requests to attend the meeting must be sent by October 18, 2023, to the point of contact identified in the **FOR FURTHER INFORMATION CONTACT** section. Persons requesting to speak during the meeting must submit a written copy of their remarks to DOT by October 18, 2023. Requests to submit written materials to be reviewed during the meeting must be received no later than October 18, 2023.

ADDRESSES: The meeting will be held at DOT Headquarters, West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. A remote participation option will also be available and the meeting will be webcast. Specific details on location and access to this meeting will be posted on the Committee website at *https://www.phmsa.dot.gov/hazmat/rulemakings/lithium-battery-safety-advisory-committee.* The E-Gov website is located at *https://www.regulations.gov.* Mailed written comments intended for the Committee should be sent to Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Steven Webb or Aaron Wiener, PHMSA, U.S. Department of Transportation. Telephone: 202–366–8553. Email: *lithiumbatteryFACA@dot.gov.* Any Committee-related request should be sent to the email address listed in this section.

SUPPLEMENTARY INFORMATION:

I. Background

The Lithium Battery Air Safety Advisory Committee was created under the Federal Advisory Committee Act (FACA, Pub. L. 92–463), in accordance with section 333(d) of the FAA Reauthorization Act of 2018 (Pub. L. 115–254).

II. Agenda

The meeting agenda will address the following duties of the Committee as specifically outlined in section 333(d) of the FAA Reauthorization Act of 2018:

(a) Facilitate communication among manufacturers of lithium batteries and products containing lithium batteries, air carriers, and the federal government.

(b) Discuss the effectiveness and the economic and social impacts of lithium battery transportation regulations.

(c) Provide the Secretary with information regarding new technologies and transportation safety practices.

(d) Provide a forum to discuss departmental activities related to lithium battery transportation safety.

(e) Advise and recommend activities to improve the global enforcement of U.S. regulations and the International Civil Aviation Organization (ICAO) Technical Instructions relevant to air transportation of lithium batteries, and the effectiveness of those regulations.

(f) Provide a forum for feedback on potential positions to be taken by the United States at international forums.

(g) Guide activities to increase awareness of relevant requirements.

(h) Review methods to decrease risks posed by undeclared hazardous materials.

A final agenda will be posted on the Lithium Battery Air Safety Advisory Committee website at least 15 days in advance of the meeting.

III. Public Participation

The meeting will be open to the public. DOT is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than October 18, 2023. To accommodate as many speakers as possible, time for each commenter may be limited. There will be five minutes allotted for oral comments from members of the public joining the meeting. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name, address, and organizational affiliation of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, PHMSA may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks for inclusion in the meeting records and for circulation to Committee members. All prepared remarks submitted on time will be accepted and considered as part of the record. Any member of the public may present a written statement to the Committee at any time. Copies of the meeting minutes and Committee presentations will be available on the Lithium Battery Air Safety Advisory Committee website. Presentations will also be posted on the E-Gov website in docket number [PHMSA–2019–0098] within 30 days following the meeting.

Written comments: Persons who wish to submit written comments on the meetings may submit them to docket [PHMSA–2019–0098] in the following ways:

1. E-Gov Website: This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

2. Mail: Dockets Management System; U.S. Department of Transportation, Dockets Operations, M–30, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Instructions: Identify the docket number [PHMSA–2019–0098] at the beginning of your comments. Note that all comments received will be posted without change to the E-Gov website, including any personal information provided. Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the

comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Consider reviewing DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (65 FR 19477), or view the Privacy Notice on the E-Gov website before submitting comments.

Docket: For docket access or to read background documents or comments, go to the E-Gov website at any time or visit the DOT dockets facility listed in the **ADDRESSES** category, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on [PHMSA–2019–0098].'' The docket clerk will date stamp the postcard prior to returning it to you via U.S. mail.

Privacy Act Statement: DOT may solicit comments from the public regarding certain general notices. DOT posts these comments, without edit, including any personal information the commenter provides, to the E-Gov website, as described in the system of records notice (DOT/ALL–14 FDMS).

Issued in Washington, DC, on September 28, 2023.

William S. Schoonover,

Associate Administrator for Hazardous Materials Safety Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2023–21883 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

[DOT–OST–2023–0118]

Commercial eLoran Capability

AGENCY: Office of the Assistant Secretary for Research and Technology (OST–R), U.S. Department of Transportation (DOT).

ACTION: Request for Information (RFI).

SUMMARY: The U.S. Department of Transportation (DOT) is issuing this Request for Information (RFI) to determine if there is interest from private entities in offering a U.S. commercial enhanced Long Range Navigation (eLoran) service to the general public in the United States on a fee-for-service basis without any Federal investment, subsidy, procurement commitment or other commitment of credit or budgetary resources. If respondent has an interest in offering a U.S.-based commercial eLoran service on a fee-for-service basis, identify what impediments stand in the way of respondent offering a U.S. commercial eLoran service. If lack of access to any federally-controlled assets and non-budgetary assistance related to utilizing such federally-controlled assets are identified as impediments to offering such a service, a subsequent Request for Information may be issued to obtain additional data.

DATES: Responses should be filed by November 2, 2023. All questions concerning this RFI shall be emailed to *PNT_RFI@dot.gov* within 7 days of publication of this RFI. Questions and comments are highly encouraged, but DOT cannot commit to answering any question(s) received by DOT more than 7 calendar-days after the date on which this RFI is published.

ADDRESSES: You may file responses identified by the docket number DOT–OST–2023–0118 by any of the following methods:

- *Federal Rulemaking 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 Ave., SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

When submitting questions and comments, please refer to the specific relevant text of this RFI. Each question submitted to DOT should be stated in such a way that there would be no objection to DOT's publishing that precise question (and its answer) in a formal Amendment to the RFI. That is, each question should be worded in such a way that the publication of that question (and its answer) would not divulge any information that would be considered proprietary or confidential. Further, any question concerning any apparent error, omission, or ambiguity in this RFI shall include the questioner's supporting rationale as well as a description of the remedies that the questioner is asking DOT to consider. All questions that DOT decides to answer will be collectively answered in writing.

Instructions: You must include the agency name and docket number DOT–OST–2023–0118 at the beginning of your submission. All submissions received will be posted without change to *http://www.regulations.gov,* including any personal information provided, unless proprietary and other sensitive information is so marked with requested disposition instructions.

Privacy Act: Anyone is able to search the electronic form of all submissions received in any of our dockets by the name of the individual submitting the document (or signing the submission, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

Docket: For access to the docket and comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

SUPPLEMENTARY INFORMATION:

1. Overview

The primary and most recognizable Positioning, Navigation, and Timing (PNT) service supporting critical infrastructure is the United States' Global Positioning System (GPS). However, because GPS relies on signals broadcast from satellites in Medium Earth Orbit (MEO), signal strength at the receiver is low and thus vulnerable to intentional and unintentional disruptions. In 2020, the U.S. Department of Transportation's Volpe National Transportation Systems Center (Volpe Center) conducted field demonstrations of candidate PNT technologies that could offer complementary service in the event of GPS disruptions. The purpose of the demonstrations was to gather information on PNT technologies at a high Technology Readiness Level (TRL) that can work in the absence of GPS.

Such PNT technologies complement GPS and increase PNT robustness to enhance national and homeland security by making critical infrastructure more resilient, and to improve efficiency of U.S. commercial transportation, telecommunications, energy, financial and industrial systems. The culmination of the Demonstration was the 2021 Report to Congress on Complementary PNT and GPS Backup Technologies Demonstration Report to Congress: *https://rosap.ntl.bts.gov/view/dot/55765.*

As a result of the 2021 DOT Report to Congress, DOT finds that:

(1) No single solution for the provision of Complementary PNT services can meet the diversity of critical infrastructure application requirements, and

(2) It would be inefficient and anti-competitive for the Federal Government to procure or otherwise fund a specific

Complementary PNT solution for non-Federal users.

Rather than building or otherwise procuring a new system, DOT in partnership with the Department of Homeland Security, in support of Executive Order 13905, *Strengthening National Resilience Through Responsible Use of Positioning, Navigation, and Timing Services,* is better positioned to enable and encourage the owners and operators of critical infrastructure to be responsible users of PNT by leveraging commercially available PNT technologies to secure access to Complementary PNT services. The private sector is then encouraged to design critical infrastructure systems in a manner that recognizes the risk associated with the use of, and potential dependence on, external PNT services.

2. Responses

Responses are limited to ten (10) 8.5″ x 11″ pages with 1″ margins, and 12-point font (Arial or Times New Roman), not including financial tables, appendices and other supporting materials which shall have no limitation. Pages must be numbered and submitted electronically via email as Microsoft Word or Adobe Acrobat files. Please send responses to the contact information provided in the **FOR FURTHER INFORMATION CONTACT** section of the notice.

Abbreviations should be defined either on first use or in a glossary. Charts and graphics should have quantitative data clearly labeled. Assumptions should be clearly identified. Proprietary and other sensitive information should be so marked with requested disposition instructions. Submitted responses shall be UNCLASSIFIED unless prior arrangements are made with the Contracting Office. Submitted materials will not be returned.

This is an RFI *only.* This request is for information purposes, and shall not be construed as a solicitation announcement, invitation for bids, request for proposals or quotes, or an indication that the Government will contract for the items contained in this notice.

Additionally, responses will be treated only as information for the Government to consider. Respondents will not be entitled to payment for direct or indirect costs that are incurred in responding to this RFI. Further, this request does not constitute a solicitation for proposals or the authority to enter into negotiations to award a contract. Interested parties are responsible for adequately marking proprietary, restricted or competition sensitive information contained in their responses.

Issued In Washington, DC.

Robert C. Hampshire,

Deputy Assistant Secretary for Research and Technology, U.S. Department of Transportation.

[FR Doc. 2023–21767 Filed 10–2–23; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons (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.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for 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://ofac.treasury.gov*).

Notice of OFAC Action(s)

On September 27, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individuals

1. FAN, Yang (a.k.a. "CATHY"), Zhuhai, China; Hong Kong, China; DOB 23 Oct 1985; POB China; nationality China; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Female; Passport EA5661672 (China) issued 02 Jul 2017 expires 02 Jul 2027; National ID No. 421002198510231027 (China) (individual) [NPWMD] [IFSR] (Linked To: HONGKONG HIMARK ELECTRON MODEL LIMITED).

   Designated pursuant to section 1(a)(iv) of Executive Order 13382 of June 28, 2005, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters," 70 FR 38567, 3 CFR, 2005 Comp., p. 170 ("E.O. 13382"), for acting or purporting to act for or on behalf of, directly or indirectly, HONGKONG HIMARK ELECTRON MODEL LIMITED, a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. JANGHORBANI, Hamid Reza (Arabic: حمید رضا جانقربانی), Isfahan, Iran; DOB 01 Aug 1973; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 5129883047 (Iran) (individual) [NPWMD] [IFSR] (Linked To: PISHGAM ELECTRONIC SAFEH COMPANY).

   Designated pursuant to section 1(a)(iv) of E.O. 13382 for acting or purporting to act for or on behalf of, directly or indirectly, PISHGAM ELECTRONIC SAFEH COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

Entities

1. ANKA PORT IC VE DIS TICARET INSAAT LOJISTIK SANAYI LIMITED SIRKETI, Mahmutbey Tasocagi Yolu No: 19/34, Istanbul, Turkey; website *www.ankaport-tr.com;* Additional Sanctions Information—Subject to Secondary Sanctions; Target Type Private Company [NPWMD] [IFSR] (Linked To: PISHGAM ELECTRONIC SAFEH COMPANY).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, PISHGAM ELECTRONIC SAFEH COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. DAL ENERJI MADENCILIK TURIZM SANAYI VE TICARET ANONIM SIRKETI (a.k.a. ''DAL ENERJI A.S.''), Saadet Ishani Blok, No: 28/102 Hobyar Mahallesi, Istanbul, Turkey; website *www.daltrd.com;* Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 22 Jul 2022; Tax ID No. 2670668338 (Turkey); Chamber of Commerce Number 1387299 (Turkey); Business Registration Number 394431 (Turkey); Central Registration System Number 0267–0668–3380–0010 (Turkey) [NPWMD] [IFSR] (Linked To: PISHGAM ELECTRONIC SAFEH COMPANY).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, PISHGAM ELECTRONIC SAFEH COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

3. FARHAD GHAEDI WHOLESALERS LLC, 902 Al Maktoum Building, Al Buteen, Al Maktoum Road, Deira, Dubai, United Arab Emirates; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 21 Jun 2020; Chamber of Commerce Number 1498735 (United Arab Emirates); Business Registration Number 892067 (United Arab Emirates) [NPWMD] [IFSR] (Linked To: PISHGAM ELECTRONIC SAFEH COMPANY).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, PISHGAM ELECTRONIC SAFEH COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

4. HONGKONG HIMARK ELECTRON MODEL LIMITED, Rm D 10/F Tower A Billion CTR 1 Wang Kwong Rd, Kowloon Bay, Kowloon, Hong Kong, China; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 13 Sep 2017; Commercial Registry Number 2578406 (Hong Kong) [NPWMD] [IFSR] (Linked To: PISHGAM ELECTRONIC SAFEH COMPANY).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, PISHGAM ELECTRONIC SAFEH COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

5. PISHGAM ELECTRONIC SAFEH COMPANY (a.k.a. PISHGAM ELECTRONIC SOFEH COMPANY), Number 58, Khoram Alley, North Sheikh Sadogh Street, Isfahan, Isfahan Province 8163839973, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 31 May 2010; National ID No. 10260583624 (Iran); Registration Number 40674 (Iran) [NPWMD] [IFSR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION, a person whose property and interests in property are blocked pursuant to E.O. 13382.

Dated: September 27, 2023.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–21756 Filed 10–2–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 211

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning Form 211, Application for Reward for Original Information.

DATES: Written comments should be received on or before December 4, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Include 1545–0409 or Form 211.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to LaNita Van Dyke, at (202) 317–6009, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form 211, Application for Reward for Original Information.

OMB Number: 1545–0409.

Form Number: Form 211.

Abstract: Form 211 is the official application form used by persons requesting rewards for submitting information concerning alleged violations of the tax laws by other persons. Such rewards are authorized by Internal Revenue Code section 7623. The data is used to determine and pay rewards to those persons who voluntarily submit information.

Current Actions: There are no changes being made to form 211 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Responses: 20,000.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 15,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 26, 2023.

Moly J. Stasko,

Senior Tax Analyst.

[FR Doc. 2023–21533 Filed 10–2–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

[TREAS–DO–2022–0011]

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Coronavirus Capital Projects Fund

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed or continuing information collections, in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments should be received on or before December 4, 2023 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, by either of the following methods:

- Electronically through *https://www.regulations.gov* (preferred method): Search for Docket ID# TREAS–DO–2022–0011 and follow the instructions for submitting comments. Comments submitted electronically, including attachments will be posted to the docket unchanged.
- *Email: PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

Departmental Offices (DO)

Title: Coronavirus Capital Projects Fund.

OMB Control Number: 1505–0277.

Type of Review: Revision of a currently approved collection.

Description: Section 604 of the Social Security Act (the ''Act''), as added by section 9901 of the American Rescue Plan Act of 2021, Public Law 117–2 (Mar. 11, 2021) established the Coronavirus Capital Projects Fund (''CPF''). The CPF provides $10 billion in funding for the U.S. Department of the Treasury (''Treasury'') to make payments according to a statutory formula to States (defined to include each of the 50 States, the District of Columbia, and Puerto Rico), seven Territories and freely associated states (the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau), and Tribal governments [1] to carry out critical capital projects directly enabling work, education, and health monitoring, including remote options, in response to

[1] An eligible Tribal government is 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 most recently as of the date of enactment of this Act pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131). The State of Hawaii, for exclusive use of the Department of Hawaiian Home Lands and the Native Hawaiian Education Programs to assist Native Hawaiians, is also eligible to apply for funding under this funding category.

the public health emergency with respect to the Coronavirus Disease (COVID–19).

The current information collection is being used to solicit information related to:

- Annual performance reports submitted by CPF recipients that are States, Territories, or freely associated states. This report is being renewed without changes;
- Quarterly project and expenditure reports submitted by CPF recipients that are States, Territories, or freely associated states. The requirements for this report are being amended as described below; and
- Annual project and expenditure reports submitted by CPF recipients that are Tribal governments. The requirements for this report are being amended as described below.

The Compliance and Reporting Guidance for States, Territories, and Freely Associated States, and the Compliance and Reporting Guidance for Tribal Governments provide recipients with information needed to fulfill their reporting requirements and compliance obligations. Data is submitted to Treasury using a web-based portal and in accordance with specific data requirements.

Project and expenditure reports must be submitted quarterly for the duration of the period of performance for States, Territories, and freely associated states, and annually for the duration of the period of performance for Tribal governments. The project and expenditure report contains a set of standardized questions to ascertain the recipient's use of funds received as of the date of reporting, as well as the status of individual projects. Treasury will make the data submitted by recipients publicly available.

Performance reports must be submitted annually for recipients that are States, Territories, and freely associated states for the duration of the period of performance. These performance reports contain detailed performance data corresponding to the ''Programs'' specified previously in a recipient's Grant Plan. This will include information on efforts to improve equity and engage communities. The performance report is largely freely written text, and while there are certain data and topics that recipients must cover in the performance report, it is mostly free-form written content. Recipients are required to publish the performance report on their website and provide the reports to Treasury.

Proposed Changes: On June 2, 2023, Treasury received approval for a revision to this information collection on an emergency processing basis. Treasury presently seeks non-emergency approval for the same revision in accordance with normal PRA clearance procedures. The revision is to add two new fields for recipients to report on Federal Communications Commission (FCC) identifiers in order to uniquely identify the precise location of CPF funded broadband projects. The revision is the same for States, Territories, Freely Associated States, and Tribal recipients. Treasury expects that recipients have these FCC identifiers on-hand, and the estimated burden remains unchanged.

1. Provider ID. The Provider ID is the identifier that the FCC assigns to every internet Service Provider (ISP). Any entity undertaking a broadband infrastructure project already has this number.

2. Fabric ID. The Fabric ID is assigned to every ''broadband serviceable location'' in the ''fabric'', a database of all serviceable locations. For example, an apartment building which is broadband serviceable will have a unique Fabric ID assigned by the FCC. CPF recipients who are completing broadband projects are required to provide the Fabric IDs for the locations that they are serving.

Background Justifying the Changes. Section 60105 of the Infrastructure Investment and Jobs Act (Pub. L. 117–58) required the FCC to establish an online mapping tool with broadband locations funded by Federal agencies. As a result, CPF reporting guidance has been updated.

Form: Compliance and Reporting Guidance for States, Territories, and Freely Associated States; Compliance and Reporting Guidance for Tribal Governments.

Affected Public: State, Territorial, Freely Associated State, and Tribal governments receiving CPF grant funds.

Estimated Number of Respondents: 609.

Frequency of Response: States, Territories, and freely associated states: 4 times per year for project and expenditure reports, and 1 time per year for performance reports; Tribal governments: 1 time per year.

Estimated Total Number of Annual Responses: 845.

Estimated Time per Response: 62 hours for State project and expenditure reports. 80 hours for State performance reports. 50 hours for Tribal annual reports.

Estimated Total Annual Burden Hours: 30,352.

Request for Comments: Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Authority: 44 U.S.C. 3501 *et seq.*

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2023–21864 Filed 10–2–23; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Agency Information Collection Activity: Servicemembers' Group Life Insurance—Spouse Coverage (FSGLI) Election and Certificate Form

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed new collection of information and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 4, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov* Please refer to

''OMB Control No. 2900–NEW'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

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.* Please refer to ''OMB Control No. 2900–NEW'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Service Members' Group Life Insurance—Spouse Coverage (FSGLI) Election and Certification Form SGLV 8286A.

OMB Control Number: 2900–NEW.

Type of Review: New collection.

Abstract: Family Servicemembers' Group Life Insurance (FSGLI) provides insurance coverage to spouses of Servicemember's Group Life Insurance (SGLI) insured individuals. SGLI and all associated insurance programs are VA benefits. The SGLV 8286A form is used by Service Members and their spouses when the Service Member is unable to access their Servicemembers Group Life Insurance Online Enrollment System (SOES) account to electronically elect, increase, decrease or decline coverage. If the member is increasing or electing coverage on their spouse after prior declination or reduction and the spouse has health issues, the member's uniformed service reviews the request and sends to the primary insurer for the SGLI program, The Prudential Insurance Company of America (Prudential), through its' Office of Servicemembers' Group Life Insurance (OSGLI), to underwrite and make a decision on coverage. This form ensures members, and their spouses can continue to use the form to manage their FSGLI spousal benefits.

Affected Public: Individuals and households.

Estimated Annual Burden: 267 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 1,600.

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. 2023–21800 Filed 10–2–23; 8:45 am]

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Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 218

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training and Testing Activities in the Hawaii-Southern California Training and Testing Study Area; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

[Docket No. 230817–0197]

RIN 0648–BL72

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training and Testing Activities in the Hawaii-Southern California Training and Testing Study Area

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

ACTION: Proposed rule; request for comments and information.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) to modify the regulations and Letters of Authorization (LOAs) authorizing the take of marine mammals incidental to Navy training and testing activities conducted in the Hawaii-Southern California Training and Testing (HSTT) Study Area between 2018 and 2025. In 2021, two separate U.S. Navy vessels struck unidentified large whales on two separate occasions, one whale in June 2021 and one whale in July 2021, in waters off Southern California. The takes by vessel strike of the two whales by the U.S. Navy were covered by the existing regulations and LOAs, which authorize the U.S. Navy to take up to three large whales by serious injury or mortality by vessel strike between 2018 and 2025. The Navy reanalyzed the potential of vessel strike in the HSTT Study Area, including the recent strikes and as a result, requested two additional takes of large whales by serious injury or mortality by vessel strike for the remainder of the current regulatory period. In May 2023, a U.S. Navy vessel struck a large whale in waters off Southern California. NMFS reanalyzed the potential for vessel strike following the May 2023 strike and proposes to authorize two additional takes of large whales by serious injury or mortality by vessel strike for the remainder of the current regulatory period (two takes in addition to the three takes authorized in the current regulations). Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on the proposed promulgation of modified regulations and associated LOAs for the Navy governing this additional incidental taking of marine mammals. NMFS will consider public comments prior to issuing any final rule and making final decisions on the issuance of the requested LOAs. Agency responses to public comments will be provided in the notice of the final decision. The Navy's activities qualify as military readiness activities pursuant to the MMPA, as amended by the National Defense Authorization Act for Fiscal Year 2004 (2004 NDAA).

DATES: Comments and information must be received no later than November 17, 2023.

ADDRESSES: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0102 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

A copy of the Navy's applications, NMFS' proposed and final rules and subsequent LOAs for the existing (2020) and previous (2018) regulations, and other supporting documents and documents cited herein may be obtained online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.* In case of problems accessing these documents, please use the contact listed here (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Leah Davis, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose of Regulatory Action

These proposed regulations, issued under the authority of the MMPA (16 U.S.C. 1361 *et seq.*), would modify the current regulations, which allow for the authorization of take of marine mammals incidental to the Navy's training and testing activities (which qualify as military readiness activities) from the use of sonar and other transducers, in-water detonations, air guns, impact pile driving/vibratory extraction, and the movement of vessels throughout the HSTT Study Area (50 CFR part 218, subpart H; hereafter ''2020 HSTT regulations'').

NMFS received a request from the Navy to modify the existing regulations and LOAs to authorize two additional takes of large whales by serious injury or mortality by vessel strike over the remainder of the HSTT regulatory period. The current HSTT regulations and LOAs authorize the incidental take, by serious injury or mortality, of three large whales by vessel strike. Here, in consideration of the best available science, including updated information related to vessel strikes, NMFS analyzes and proposes to authorize the incidental serious injury or mortality by vessel strike of five large whales over the effective period of the regulations (December 2018–December 2025). The effective period remains unchanged from the existing regulations. Further, the Navy's proposed activities remain unchanged; however, this proposed rule includes two additional mitigation measures and revision of two existing mitigation measures to further reduce the probability of vessel strike. With the exception of these new mitigation measures and revisions to two existing mitigation measures, the required mitigation and monitoring measures remain unchanged.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, the public is provided with notice of the proposed incidental take authorization and the opportunity to review and submit comments.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of

similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in this rulemaking as ''mitigation measures''); and requirements pertaining to the monitoring and reporting of such takings. The MMPA defines ''take'' to mean to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. The Preliminary Analysis and Negligible Impact Determination section below discusses the definition of ''negligible impact.''

The 2004 NDAA (Pub. L. 108–136) amended section 101(a)(5) of the MMPA to remove the ''small numbers'' and ''specified geographical region'' provisions indicated above and amended the definition of ''harassment'' as applied to a ''military readiness activity.'' The definition of harassment for military readiness activities (section 3(18)(B) of the MMPA) is (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B harassment). In addition, the 2004 NDAA amended the MMPA as it relates to military readiness activities such that the least practicable adverse impact analysis shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The NDAA for Fiscal Year 2019 (2019 NDAA) (Pub. L. 115–232), amended the MMPA to allow incidental take rules for military readiness activities under section 101(a)(5)(A) to be issued for up to 7 years. Prior to this amendment, all incidental take rules under section 101(a)(5)(A) were limited to 5 years.

Under the MMPA implementing regulations, incidental take regulations may be modified, in whole or in part, as new information is developed and after notice and opportunity for public comment (50 CFR 216.105). An LOA must be withdrawn or suspended if, after notice and opportunity for public comment, NMFS determines that the regulations are not being substantially complied with, or the taking is having, or may have, more than a negligible impact on species or stock. *Id.* at 216.106(e). Note, in its application, Navy relied on §§ 218.76, and 218.77. These sections outline the process for modification of an LOA without modifying the applicable incidental take regulation. These sections do not apply here because the Navy requested modification of the 2020 HSTT regulations.

Summary of Request

On December 27, 2018, NMFS issued a 5-year final rule governing the taking of marine mammals incidental to Navy training and testing activities conducted in the HSTT Study Area (83 FR 66846; hereafter ''2018 HSTT final rule''). Previously, on August 13, 2018, and towards the end of the time period in which NMFS was processing the Navy's request for the 2018 regulations, the 2019 NDAA amended the MMPA for military readiness activities to allow incidental take regulations to be issued for up to 7 years instead of the previous 5 years. The Navy's training and testing activities conducted in the HSTT Study Area qualify as military readiness activities pursuant to the MMPA, as amended by the 2004 NDAA. On March 11, 2019, the Navy submitted an application requesting that NMFS extend the 2018 HSTT regulations and associated LOAs such that they would cover take incidental to 7 years of training and testing activities instead of 5, extending the expiration date from December 20, 2023 to December 20, 2025. On July 10, 2020, NOAA Fisheries issued regulations to govern the taking of marine mammals incidental to the training and testing activities conducted in the HSTT Study Area over the course of 7 years, effectively extending the effective period from December 20, 2023 to December 20, 2025.

On March 31, 2022, NMFS received an adequate and complete application (2022 Navy application) from the Navy requesting that NMFS modify the existing regulations and LOAs to authorize two additional takes of large whales by serious injury or mortality by vessel strike over the remainder of the HSTT authorization period. The 2020 HSTT regulations (50 CFR part 218, subpart H) and LOAs authorize the take of marine mammals from the Navy's training and testing activities in the HSTT Study Area through December 20, 2025. These regulations and LOAs authorize the take of three large whales by serious injury or mortality by vessel strike.

The Navy's 2022 request is based upon new information regarding U.S. Navy vessel strikes off the coast of Southern California. As described in the 2022 Navy application, in 2021, two separate U.S. Navy vessels struck unidentified large whales off the coast of Southern California on two separate occasions, one whale in June 2021 and one whale in July 2021. Separately, a foreign naval vessel struck two fin whales off the coast of Southern California in May 2021.

In the 2022 Navy application, the Navy proposes no changes to the nature of the specified activities covered by the 2020 HSTT final rule. The Navy states that the level of activity within and between years would be consistent with that previously analyzed in the 2020 HSTT final rule, and all activities would be conducted within the same boundaries of the HSTT Study Area identified in the 2020 HSTT final rule. The training and testing activities (*e.g.,* equipment and sources used, exercises conducted) are identical to those described and analyzed in the 2020 HSTT final rule, and the mitigation, monitoring, and reporting measures are similar to those described and analyzed in the 2020 HSTT final rule. The only changes included in the Navy's request are for additional take by serious injury or mortality by vessel strike.

The Navy's mission is to organize, train, equip, and maintain combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. This mission is mandated by Federal law (10 U.S.C. 8062), which ensures the readiness of the naval forces of the United States. The Navy executes this responsibility by establishing and executing training programs, including at-sea training and exercises, and ensuring naval forces have access to the ranges, operating areas (OPAREAs), and airspace needed to develop and maintain skills for conducting naval activities.

For a summary of the training and testing activities within the HSTT Study Area, see the Navy's previous rulemaking and LOA applications submitted for HSTT Phase III activities (October 13, 2017 initial rulemaking and LOA application (hereafter ''2017 Navy application'') and March 11, 2019 extension rulemaking and LOA application (hereafter ''2019 Navy application'')) and the 2020 HSTT regulations that were subsequently promulgated, which can be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.* These activities are deemed by the Navy necessary to accomplish military readiness requirements and are anticipated to continue into the reasonably foreseeable future. The 2022 Navy application and this proposed rule cover training and testing activities that would occur over the remainder of the effective period of the current regulations, valid from the

publication date of the final rule, if issued, through December 20, 2025.

Summary of the Proposed Regulations

NMFS is proposing to modify the incidental take regulations and associated LOAs to cover the same Navy activities covered by the 2020 HSTT regulations but authorize five takes of large whales by serious injury or mortality by vessel strike (two takes in addition to the three takes authorized in the current regulations). In its 2022 application, the Navy proposes no additional changes and explains that its training and testing activities, including the level of vessel use, remain unchanged. Nearly all mitigation, monitoring, and reporting measures remain unchanged with the exception of two additional mitigation measures, revision of two existing mitigation measures, and an additional reporting measure resulting from discussions between the Navy and NMFS.

In response to the Navy's request, we focus our analysis on the new information related to vessel strike. We also review any new information that may be pertinent to our analysis of the impacts from all other activities that comprise Navy's specified activity, and our analysis of mitigation, monitoring, and reporting. Where there is any new information pertinent to the descriptions, analyses, or findings required to authorize the incidental take for military readiness activities under MMPA section 101(a)(5)(A), that information is provided in the appropriate sections below. Where there is no new information or any new information does not change our previous analysis or findings, we indicate as such and refer the reader to the original analysis in the 2018 HSTT proposed and final rule, 2020 HSTT final rule or the 2019 HSTT Final Environmental Impact Statement (FEIS)/Overseas Environmental Impact Statement (OEIS).

After reviewing all new information and as discussed below, we largely find that our previous analyses and findings remain current and applicable. For vessel strike, we provide a new analysis and propose authorizing two additional takes of large whales, for a total of five takes by serious injury or mortality by vessel strike over the 7-year period. We consider authorizing these additional takes after analyzing the best available information and after considering the effects of the entire specified activity and the total taking as required by MMPA section 101(a)(5)(A). When setting forth the permissible methods of taking pursuant to the activity and other means of effecting the least practicable adverse impact on the species or stock, we propose requiring new and modified mitigation and also consider whether to require any new or modified mitigation for the entire specified activity.

The proposed regulatory language included at the end of this proposed rule, which would be published at 50 CFR part 218, subpart H, remains largely the same as that under the HSTT 2020 regulations, except for a small number of technical changes related to the Navy's 2022 request, new and revised mitigation measures, and a new reporting measure. Therefore, in this proposed rule, we refer the reader to complete analyses described in the 2018 HSTT final rule or an updated analysis in the 2020 HSTT final rule, where appropriate.

Below is a list of the regulatory documents referenced in this proposed rule. The list indicates the short name by which the document is referenced in this proposed rule as well as the full titles of the cited documents. All of the documents can be found at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities* and *http://www.hstteis.com/.*

- NMFS June 26, 2018, Hawaii-Southern California Training and Testing (HSTT) proposed rule (83 FR 29872; 2018 HSTT proposed rule);
- NMFS December 27, 2018, Hawaii-Southern California Training and Testing (HSTT) final rule (83 FR 66846; 2018 HSTT final rule);
- NMFS September 13, 2019, Hawaii-Southern California Training and Testing (HSTT) proposed rule (84 FR 48388; 2019 HSTT proposed rule);
- NMFS July 10, 2020, Hawaii-Southern California Training and Testing (HSTT) final rule (85 FR 41780; 2020 HSTT final rule);
- Navy October 13, 2017, MMPA rulemaking and LOA application (2017 Navy application);
- Navy March 11, 2019, MMPA rulemaking and LOA extension application (2019 Navy application);
- Navy March 31, 2022, MMPA rulemaking and LOA revision application (2022 Navy application); and
- October 26, 2018, Hawaii-Southern California Training and Testing (HSTT) Final Environmental Impact Statement/Overseas Environmental Impact Statement (FEIS/OEIS) (2018 HSTT FEIS/OEIS).

Description of the Specified Activity

The Navy requests authorization to take marine mammals incidental to conducting training and testing activities. The Navy has determined that acoustic and explosives stressors are most likely to result in impacts on marine mammals that could rise to the level of harassment. In addition to take by harassment, the Navy has determined that vessel movement may result in serious injury or mortality to marine mammals. Detailed descriptions of these activities are provided in chapter 2 of the 2018 HSTT FEIS/OEIS and in the 2017 Navy application.

Overview of Training and Testing Activities

The Navy routinely trains in the HSTT Study Area in preparation for national defense missions. Training and testing activities and components covered in the 2022 Navy application are described in detail in the *Overview of Training and Testing Activities* sections of the 2018 HSTT proposed rule, the 2018 HSTT final rule, and chapter 2 (*Description of Proposed Action and Alternatives*) of the 2018 HSTT FEIS/OEIS (*http://www.hstteis.com/*). Each military training and testing activity described meets mandated Fleet requirements to deploy ready forces. The Navy proposes no changes to the specified activities described and analyzed in the 2018 HSTT final rule and subsequent 2020 HSTT final rule. The boundaries of the HSTT Study Area (see figure 2–1 of the 2019 Navy application); the dates and duration of the activities; and the training and testing activities (*e.g.,* equipment and sources used, exercises conducted) analyzed in this proposed rule are identical to those described and analyzed in the 2020 HSTT final rule and therefore, are not repeated herein. Please see the 2020 HSTT final rule for more information. The manner of vessel movement presented in this proposed rule is also identical to that analyzed in the 2020 HSTT final rule.

Vessel Strike

Vessel strikes are not specific to any particular training or testing activity but rather, a limited, sporadic, and incidental result of Navy vessel movement within the HSTT Study Area. Vessel strikes from commercial, recreational, and military vessels are known to seriously injure and occasionally kill cetaceans (Abramson *et al.* 2011; Berman-Kowalewski *et al.* 2010; Calambokidis, 2012; Douglas *et al.* 2008; Laggner, 2009; Lammers *et al.* 2003; Van der Hoop *et al.* 2012; Van der Hoop *et al.* 2013; Crum *et al.* 2019), although reviews of the literature on vessel strikes mainly involve collisions between commercial vessels and whales (Jensen and Silber, 2003; Laist *et al.* 2001). Vessel speed, size, and mass are

all important factors in determining both the potential likelihood and impacts of a vessel strike to marine mammals (Conn and Silber, 2013; Gende *et al.* 2011; Silber *et al.* 2010; Vanderlaan and Taggart, 2007; Wiley *et al.* 2016). For large vessels, speed and angle of approach can influence the severity of a strike.

Navy vessels transit at speeds that are optimal for fuel conservation or to meet training and testing requirements. Small craft (for purposes of this analysis, less than 18 m in length) have much more variable speeds (0–50+ knots (kn; 0–92.6 kilometers (km) per hour), dependent on the activity). Submarines generally operate at speeds in the range of 8–13 kn (14.8–24.1 km per hour), and the average speed of large Navy ships range between 10 and 15 kn (18.5 and 27.8 km per hour). While these speeds are considered averages and representative of most events, some vessels need to operate outside of these parameters for certain times or during certain activities. For example, to produce the required relative wind speed over the flight deck, an aircraft carrier engaged in flight operations must adjust its speed through the water accordingly. Also, there are other instances such as launch and recovery of a small rigid hull inflatable boat; vessel boarding, search, and seizure training events; or retrieval of a target when vessels would be dead in the water or moving slowly ahead to maintain steerage. There are a few specific events, including high-speed tests of newly constructed vessels, where vessels would operate at higher speeds. By comparison, this is slower than most commercial vessels where full speed for a container ship is typically 24 kn (44.4 km per hour; Bonney and Leach, 2010).

Large Navy vessels (greater than 18 m in length) within the offshore areas of range complexes and testing ranges operate differently from commercial vessels in ways that may reduce the probability of whale collisions. Surface ships operated by or for the Navy have multiple personnel assigned to stand watch at all times when a ship or surfaced submarine is moving through the water (underway). A primary duty of personnel standing watch on surface ships is to detect and report all objects and disturbances sighted in the water that may indicate a threat to the vessel and its crew, such as debris, a periscope, surfaced submarine, or surface disturbance. Per vessel safety requirements, personnel standing watch also report any marine mammals sighted in the path of the vessel as a standard collision avoidance procedure. All vessels proceed at a safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance and can be stopped within a distance appropriate to the prevailing circumstances and conditions. As described in the *Standard Operating Procedures* section, the Navy utilizes Lookouts to avoid collisions, and Lookouts are also trained to spot marine mammals so that vessels may change course or take other appropriate action to avoid collisions. Should a vessel strike occur, we consider that it would likely result in incidental take in the form of serious injury and/or mortality and, accordingly, for the purposes of the analysis, we assume that any vessel strike would result in serious injury or mortality.

The Navy proposes no changes to the nature of the specified activities, the training and testing activities, the manner of vessel movement, the speeds at which vessels operate, the number of vessels that would be used during various activities, or the locations in which Navy vessel activity would be concentrated within the HSTT Study Area described in the 2018 HSTT final rule and referenced in the 2020 HSTT final rule.

Vessel Movement

Vessels used as part of the planned activities include ships, submarines, unmanned vessels, and boats ranging in size from small, 22 ft (7 m) rigid hull inflatable boats to aircraft carriers with lengths up to 1,092 ft (333 m). The average speed of large Navy ships ranges between 10 and 15 kn (18.5 and 27.8 km per hour) and submarines generally operate at speeds in the range of 8–13 kn (14.8–24.1 km per hour) while a few specialized vessels can travel at faster speeds. Small craft (for purposes of this analysis, less than 18 m in length) have much more variable speeds (0–50+ kn (0–92.6 km per hour), dependent on the activity) but generally range from 10 to 14 kn (18.5 to 25.9 km per hour). From unpublished Navy data, average median speed for large Navy ships in the HSTT Study Area from 2011–2015 varied from 5–10 kn (9.2–18.5 km per hour) with variations by ship class and location (*i.e.,* slower speeds close to the coast). While these speeds for large and small craft are representative of most events, some vessels need to temporarily operate outside of these parameters. Typical speed of Navy vessels in HSTT core high use areas from 2014–2018 were between 10 and 15 kn (18.5 and 27.8 km per hour; Starcovic and Mintz 2021). This core area is a region including the approaches to San Diego, and immediate offshore areas west of San Diego, centered north and south of San Clemente Island. A full description of Navy vessels that are used during training and testing activities can be found in the 2017 Navy application and chapter 2 (*Description of Proposed Action and Alternatives*) of the 2018 HSTT FEIS/OEIS.

The number of Navy vessels used in the HSTT Study Area varies based on military training and testing requirements, deployment schedules, annual budgets, and other dynamic factors. Most training and testing activities involve the use of vessels. These activities could be widely dispersed throughout the HSTT Study Area but would typically be conducted near naval ports, piers, and range areas. Navy vessel traffic would be especially concentrated near San Diego, California and Pearl Harbor, Hawaii. Based on historical data, we anticipate the annual number of at-sea hours by U.S. Navy vessels in the HSTT action area will be around 26,800 hours per year (Starcovic and Mintz 2021). We expect that about 25 percent of this vessel activity would occur within the Hawaii Range Complex (HRC) and 75 percent within the Southern California Range Complex (SOCAL; Mintz 2016). There is no seasonal differentiation in Navy vessel use because of continual operational requirements from Combatant Commanders. The majority of large vessel traffic occurs between the installations and the OPAREAs. The transit corridor, notionally defined by the great circle route (*e.g.,* shortest distance) from San Diego to the center of the HRC, as depicted in the 2018 HSTT FEIS/OEIS, is generally used by ships transiting between SOCAL and HRC. While in transit, ships and aircraft would, at times, conduct basic and routine unit-level activities such as gunnery, bombing, and sonar training and maintenance. Of note, support craft would be more concentrated in the coastal waters in the areas of naval installations, ports, and ranges. Activities involving vessel movements occur intermittently and are variable in duration, ranging from a few hours up to weeks. More information on Navy and non-Navy vessel traffic patterns in the HSTT Study Area may be found in several studies prepared by the Navy (Starcovic and Mintz 2021; Mintz, 2016; Mintz and Filadelfo, 2011; Mintz, 2012; Mintz and Parker, 2006).

Foreign Navies

In addition, we note that in some cases, foreign militaries may participate in U.S. Navy training or testing activities in the HSTT Study Area. The Navy does not consider these foreign

military activities as part of the ''specified activity'' under the MMPA, and NMFS defers to the applicant to describe the scope of its request for an authorization.

The participation of foreign navies varies from year to year, but overall is infrequent compared with Navy's total training and testing activities. The most significant joint training event is the Rim of the Pacific (RIMPAC), a multi-national training exercise held every-other-year primarily in the HRC. The participation level of foreign military vessels in U.S. Navy-led training or testing events within the HRC and within SOCAL differs greatly between RIMPAC and non-RIMPAC years. For example, in 2019 (a non-RIMPAC year), there were 0.1 foreign navy at-sea days (*i.e.,* 1 day = 24 hours) within HRC and 20 foreign navy at-sea days within SOCAL (Navy 2021). Out of 56 U.S.-led training events in 2019, 4 involved foreign navy vessels, with an average time per event of 8.7 hours. In 2020, a RIMPAC year, foreign vessels participating in U.S. Navy-led events accounted for 32 at-sea days in the HRC from August through September (some of this activity occurred after the RIMPAC exercise). During RIMPAC 2022, foreign vessels operated and/or transited through the HRC for 576 hours (24 days). Even in a RIMPAC year, the days at sea for foreign militaries engaged in a Navy-led training or testing activity accounts for a very small percentage compared to the U.S. Navy activities. For instance, the 2020 foreign military participation (a RIMPAC-year) was 1.5 percent of the U.S. Navy's average days at sea (32 days out of an estimated 2,056 days at sea).

According to the U.S. Navy, consistent with customary international law, when a foreign military vessel participates in a U.S. Navy exercise within the U.S. territorial sea (*i.e.,* 0 to 12 nmi (0 to 22.2 km) from shore), the U.S. Navy will request that the foreign vessel follow the U.S. Navy's mitigation measures for that particular event. When a foreign military vessel participates in a U.S. Navy exercise beyond the U.S. territorial sea but within the U.S. Exclusive Economic Zone, the U.S. Navy will encourage the foreign vessel to follow the U.S. Navy's mitigation measures for that particular event (Navy 2022a; Navy 2022b). In either scenario (*i.e.,* both within and beyond the territorial sea), U.S. Navy personnel will provide the foreign vessels participating with a description of the mitigation measures to follow. If a foreign military is not participating in a U.S. Navy training or testing exercise, foreign military vessels operating within the HSTT Study Area are expected to adhere to their own standard operating procedures and environmental mitigation measures.

According to the U.S. Navy, the May 2021 vessel strike of two fin whales by an Australian navy vessel did not occur while that vessel was participating in a U.S. Navy-led training exercise. The Royal Australian Navy vessel was adhering to its standard operating procedures at the time of the strike. The Royal Australian Navy provided a report of the incident, which is discussed below to inform our analysis.

NMFS analyzes the effects of these foreign military activities in two ways. First, effects of all past foreign military activities are captured in the baseline for the analysis, through marine mammal abundance estimates and population trends found in the SARs. Second, NMFS considers foreign military activities, including recent strikes, qualitatively in this proposed rule. For instance, in preparing this rulemaking, NMFS and the U.S. Navy discussed the nature, frequency, and control over joint or U.S. Navy-led training and testing activities with foreign entities to identify opportunities to encourage foreign militaries to adopt mitigation. NMFS and the U.S. Navy examined the Royal Australian Navy strike report for any lessons that could inform U.S. Navy strike mitigation. NMFS considered the Royal Australian Navy strikes along with other recent U.S. Navy strikes to determine whether these strikes indicate an increased risk of strike by the U.S. Navy in this region during the early summer months. NMFS also considered the species struck in this incident, fin whales, along with other literature, when considering the likelihood of certain species to be struck by the U.S. Navy. Finally, NMFS considered the fact that two fin whales were struck by the Royal Australian Navy qualitatively when considering other fin whale population and mortality trends, as well as the take proposed for authorization, as part of the negligible impact analysis.

Standard Operating Procedures

For training and testing to be effective, personnel must be able to safely use their sensors and weapon systems as they are intended to be used in a real-world situation and to their optimum capabilities. While standard operating procedures (SOPs) are designed for the safety of personnel and equipment and to ensure the success of training and testing activities, their implementation often yields additional benefits on environmental, socioeconomic, public health and safety, and cultural resources. Because standard operating procedures are essential to safety and mission success, the Navy considers them to be part of the proposed activities under NEPA and included them in the environmental analysis. We consider standard operating procedures as part of Navy's specified activity for the purposes of MMPA but also, where procedures are utilized (even in part) to reduce impacts to marine mammal species and Navy's commitment to follow the measures are practicable, certain SOPs may also be required as mitigation. Details on standard operating procedures were provided in the 2018 HSTT proposed rule; please see the 2018 HSTT proposed rule, the 2017 Navy application, and Chapter 2 (*Description of Proposed Action and Alternatives*) of the 2018 HSTT FEIS/OEIS for more information.

As stated in its 2022 application, in 2018, the Navy updated its SOPs related to vessel safety to incorporate revised procedures regarding Lookouts for certain ship classes as per the 2021 Surface Ship Navigation Department Organization and Regulations Manual (NAVDORM). The 2021 NAVDORM requires the use of three Lookouts on Navy cruisers and destroyers as compared to the previous requirement of one Lookout when a vessel was underway and not engaged in sonar training or testing. However, as discussed in the Proposed Mitigation Measures section below, the Navy informed NMFS that requiring the additional Lookouts as mitigation is not practicable because this SOP may change in response to manning issues and national security needs. Further, since submission of its 2022 application, the Navy has updated its Lookout Training Handbook and implemented other training improvements, as described in the Proposed Mitigation Measures section (September 2022).

Description of Marine Mammals and Their Habitat in the Area of the Specified Activities

Marine mammal species and their associated stocks that have the potential to occur in the HSTT Study Area are presented in table 1 along with the best/minimum abundance estimate and associated coefficient of variation value. Consistent with the 2018 HSTT final rule and 2020 HSTT final rule, the Navy anticipates the take of individuals from 38 marine mammal species by Level A harassment and Level B harassment incidental to training and testing activities from the use of sonar and other transducers, in-water detonations,

air guns, and impact pile driving/vibratory extraction activities. As described in detail later, serious injury or mortality of six species is also analyzed and proposed for authorization.

In the 2018 HSTT proposed rule and 2018 HSTT final rule, we presented a detailed discussion of marine mammals and their occurrence in the HSTT Study Area, inclusive of important marine mammal habitat (*e.g.,* ESA-designated critical habitat), biologically important areas (BIAs), national marine sanctuaries (NMSs), and unusual mortality events (UMEs). Please see these rules and the 2017 and 2019 Navy applications for additional information beyond what is provided herein. While there have been some minor changes described here, there have been no changes to important marine mammal habitat, NMSs, or ESA designated critical habitat since the issuance of the 2018 HSTT final rule that change our determination of which species or stocks have the potential to be affected by the Navy's activities or the information in the *Description of Marine Mammals and Their Habitat in the Area of the Specified Activities* section in the 2019 HSTT proposed rule and 2020 HSTT final rule. Therefore, the information presented in those sections of the 2019 HSTT proposed rule and 2020 HSTT final rule remains current and valid with the exception of the information about UMEs, BIAs, and revised humpback whale stock structures, discussed below.

On April 21, 2021, NMFS designated critical habitat for the endangered Western North Pacific Distinct Population Segment (DPS), the endangered Central America DPS, and the threatened Mexico DPS of humpback whales (86 FR 21082). Areas proposed as critical habitat include specific marine areas located off the coasts of California, Oregon, Washington, and Alaska. None of the designated critical habitat overlaps with the HSTT Study Area. One of the proposed areas, critical habitat Unit 19, would have overlapped with the SOCAL range in the HSTT Study Area but was excluded after consideration of potential national security and economic impacts of designation. NMFS, in the final rule designating critical habitat for humpback whales, identified prey species, primarily euphausiids and small pelagic schooling fishes of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth, as an essential habitat feature. NMFS, through a critical habitat review team (CHRT), also considered inclusion of migratory corridors and passage features, as well as sound and the soundscape, as essential habitat features. NMFS did not include either in the final critical habitat, however, as the CHRT concluded that the best available science did not allow for identification of any consistently used migratory corridors or definition of any physical, essential migratory or passage conditions for whales transiting between or within habitats of the three DPSs. The best available science also currently does not enable NMFS to identify particular sound levels or to describe a certain soundscape feature that is essential to the conservation of humpback whales. Regardless of whether critical habitat is designated for a particular area, NMFS has considered all applicable information regarding marine mammals and their habitat in the analysis supporting these proposed regulations.

NMFS has reviewed the 2022 final Stock Assessment Reports (SARs; Carretta *et al.* 2023, Young *et al.* 2023). For all species except humpback whale, NMFS determined that neither the SARs nor any other new information changes our determination of which species or stocks have the potential to be affected by the Navy's activities. For humpback whale, the 2022 final SARs include a revision to the humpback whale stock structure in the Pacific Ocean. In the 2020 HSTT final rule, NMFS authorized take of the CA/OR/WA stock and Central North Pacific stock of humpback whale. Given the revised stock structure, in this proposed rule, NMFS has reanalyzed the potential for take of each stock of humpback whale and determined that the Central America/Southern Mexico-CA/OR/WA, Mainland Mexico—CA/OR/WA stock, and Hawaii stocks are likely to be taken by the Navy's activities. Please refer to the 2022 Alaska and Pacific Ocean SARs for additional information about these new stocks.)

The species considered but not carried forward for analysis are two American Samoa stocks of spinner dolphins—(1) the Kure and Midway stock and (2) the Pearl and Hermes stock. There is no potential for overlap with any stressors from Navy activities and therefore there would be no incidental takes, in which case, these stocks are not considered further.

TABLE 1—MARINE MAMMAL OCCURRENCE WITHIN THE HSTT STUDY AREA

Common name	Scientific name	Stock	Status		Occurrence	Seasonal absence	Stock abundance (CV)/minimum population
			MMPA	ESA			
Blue whale	*Balaenoptera musculus*	Eastern North Pacific	Strategic, Depleted	Endangered	Southern California	—	1,898 (0.085)/1,767.
	Central North Pacific	Strategic, Depleted	Endangered	Hawaii	Summer	133 (1.09)/63.	
Bryde's whale	*Balaenoptera brydei/edeni.*	Eastern Tropical Pacific	—	—	Southern California	—	unknown.
		Hawaii	—	—	Hawaii	—	602 (0.22)/501.
Fin whale	*Balaenoptera physalus*	CA/OR/WA	Strategic, Depleted	Endangered	Southern California	—	11,065 (0.405)/7,970.
		Hawaii	Strategic, Depleted	Endangered	Hawaii	Summer	203 (0.99)/101.
Humpback whale	*Megaptera novaeangliae.*	Central America/Southern Mexico—CA/OR/WA.	Strategic	Endangered [1]	Southern California	Winter	1,496 (0.171)/1,284.
		Mainland Mexico—CA/OR/WA.	Strategic	Threatened [1]	Southern California	Winter	3,477 (0.101)/3,185.
		Hawai'i	—	—[1]	Hawaii	Summer	11,278 (0.56)/7,265.
Minke whale	*Balaenoptera acutorostrata.*	CA/OR/WA	—	—	Southern California	—	915 (0.792)/509.
		Hawaii	—	—	Hawaii	Summer	438 (1.05)/212.
Sei whale	*Balaenoptera borealis*	Eastern North Pacific	Strategic, Depleted	Endangered	Southern California	—	519 (0.40)/374.
		Hawaii	Strategic, Depleted	Endangered	Hawaii	Summer	391 (0.9)/204.

TABLE 1—MARINE MAMMAL OCCURRENCE WITHIN THE HSTT STUDY AREA—Continued

Common name	Scientific name	Stock	Status		Occurrence	Seasonal absence	Stock abundance (CV)/minimum population
			MMPA	ESA			
Gray whale	*Eschrichtius robustus*	Eastern North Pacific	—	—	Southern California	—	26,960 (0.05)/25,849.
		Western North Pacific	Strategic, Depleted	Endangered	Southern California	—	290 (NA)/271.
Sperm whale	*Physeter macrocephalus.*	CA/OR/WA	Strategic, Depleted	Endangered	Southern California	—	1,997 (0.57)/1,270.
		Hawaii	Strategic, Depleted	Endangered	Hawaii	—	5,707 (0.23)/4,486.
Pygmy sperm whale	*Kogia breviceps*	CA/OR/WA	—	—	Southern California	Winter and Fall	4,111 (1.12)/1,924.
		Hawaii	—	—	Hawaii	—	42,083 (0.64) 25,695.
Dwarf sperm whale	*Kogia sima*	CA/OR/WA	—	—	Southern California	—	unknown.
		Hawaii	—	—	Hawaii	—	unknown.
Baird's beaked whale	*Berardius bairdii*	CA/OR/WA	—	—	Southern California	—	1,363 (0.53)/894.
Blainville's beaked whale.	*Mesoplodon densirostris.*	Hawaii	—	—	Hawaii	—	1,132 (0.99)/564.
Cuvier's beaked whale	*Ziphius cavirostris*	CA/OR/WA	—	—	Southern California	—	5,454 (0.27)/4,214.
		Hawaii	—	—	Hawaii	—	4,431 0.41/3,180.
Longman's beaked whale.	*Indopacetus pacificus*	Hawaii	—	—	Hawaii	—	2,550 (0.67)/1,527.
Mesoplodont beaked whales.	*Mesoplodon spp*	CA/OR/WA	—	—	Southern California	—	3,044 (0.54)/1,967.
Common Bottlenose dolphin.	*Tursiops truncatus*	California Coastal	—	—	Southern California	—	453 (0.06)/346.
		CA/OR/WA Offshore	—	—	Southern California	—	3,477 (0.696)/2,048.
		Hawaii Pelagic	—	—	Hawaii	—	unknown.
		Kauai and Niihau	—	—	Hawaii	—	NA NA/97.
		Oahu	—	—	Hawaii	—	NA.
		4-Islands	—	—	Hawaii	—	NA.
		Hawaii Island	—	—	Hawaii	—	unknown.
False killer whale	*Pseudorca crassidens*	Main Hawaiian Islands Insular.	Strategic, Depleted	Endangered	Hawaii	—	167 (0.14)/149.
		Hawaii Pelagic	—	—	Hawaii	—	2,086 (0.35)/1,567.
		Northwestern Hawaiian Islands.	—	—	Hawaii	—	477 (1.71)/178.
Fraser's dolphin	*Lagenodelphis hosei*	Hawaii	—	—	Hawaii	—	40,960 (0.7)/24,068.
Killer whale	*Orcinus orca*	Eastern North Pacific Offshore.	—	—	Southern California	—	300 (0.1)/276.
		West Coast Transient	—	—	Southern California	—	349 (N/A)/349.
		Hawaii	—	—	Hawaii	—	161 (1.06)/78.
Long-beaked common dolphin.	*Delphinus capensis*	California	—	—	Southern California	—	83,379 (0.216)/69,636.
Melon-headed whale	*Peponocephala electra*	Hawaiian Islands	—	—	Hawaii	—	40,647 (0.74)/23,301.
		Kohala Resident	—	—	Hawaii	—	unknown.
Northern right whale dolphin.	*Lissodelphis borealis*	CA/OR/WA	—	—	Southern California	—	29,285 (0.72)/17,024.
Pacific white-sided dolphin.	*Lagenorhynchus obliquidens.*	CA/OR/WA	—	—	Southern California	—	34,999 (0.222)/29,090.
Pantropical spotted dolphin.	*Stenella attenuata*	Oahu	—	—	Hawaii	—	unknown.
		4-Islands	—	—	Hawaii	—	unknown.
		Hawaii Island	—	—	Hawaii	—	unknown.
		Hawaii Pelagic	—	—	Hawaii	—	39,768 (0.51)/25,548.
Pygmy killer whale	*Feresa attenuata*	Tropical	—	—	Southern California	Winter & Spring	unknown.
		Hawaii	—	—	Hawaii	—	10,328 (0.75)/5,885.
Risso's dolphins	*Grampus griseus*	CA/OR/WA	—	—	Southern	—	6,336 (0.32)/4,817.
		Hawaii	—	—	California Hawaii	—	7,385 (0.22)/6,150.
	Steno bredanensis	NSD[2]	—	—	Southern California	—	unknown.
Rough-toothed dolphin		Hawaii	—	—	Hawaii	—	76,357 (0.41)/54,804.
Short-beaked common dolphin.	*Delphinus delphis*	CA/OR/WA	—	—	Southern California	—	1,056,308 (0.21)/ 888,971.
Short-finned pilot whale	*Globicephala macrorhynchus.*	CA/OR/WA	—	—	Southern California	—	836 (0.79)/466.
		Hawaii	—	—	Hawaii	—	12,607 (0.18)/10,847.
Spinner dolphin	*Stenella longirostris*	Hawaii Pelagic	—	—	Hawaii	—	unknown.
		Hawaii Island	—	—	Hawaii	—	665 (0.09)/617.
		Oahu and 4-Islands	—	—	Hawaii	—	unknown.
		Kauai and Niihau	—	—	Hawaii	—	unknown.
		Kure and Midway	—	—	Hawaii	—	unknown.
		Pearl and Hermes	—	—	Hawaii	—	unknown.
Striped dolphin	*Stenella coeruleoalba*	CA/OR/WA	—	—	Southern California	—	29,988 (0.3)/23,448.

TABLE 1—MARINE MAMMAL OCCURRENCE WITHIN THE HSTT STUDY AREA—Continued

Common name	Scientific name	Stock	Status		Occurrence	Seasonal absence	Stock abundance (CV)/minimum population
			MMPA	ESA			
		Hawaii	—	—	Hawaii	—	35,179 (0.23)/29,058.
Dall's porpoise	*Phocoenoides dalli*	CA/OR/WA	—	—	Southern California	—	16,498 (0.61)/10,286.
Harbor seal	*Phoca vitulina*	California	—	—	Southern California	—	30,968 (NA)/27,348.
Hawaiian monk seal	*Neomonachus schauinslandi.*	Hawaii	Strategic, Depleted	Endangered	Hawaii	—	1,465[3] (0.03)/1,431.
Northern elephant seal	*Mirounga angustirostris*	California	—	—	Southern California	—	187,386 (NA)/85,369.
California sea lion	*Zalophus californianus*	U.S. Stock	—	—	Southern California	—	257,606 (NA)/233,515.
Guadalupe fur seal	*Arctocephalus townsendi.*	Mexico to California	Strategic, Depleted	Threatened	Southern California	—	34,187 (NA)/31,019.
Northern fur seal	*Callorhinus ursinus*	California	Depleted	—	Southern California	—	14,050 (NA)/7,524.

Note: A "—" indicates that this column does not apply.

[1] The Mainland Mexico-CA–OR–WA stock and the Mexico-North Pacific stock (which does not occur in the HSTT Study Area) of humpback whale comprise the Mexico DPS. The Hawai'i stock comprises the Hawai'i DPS. The Central America/Southern Mexico-CA–OR–WA stock comprises the Central America DPS.

[2] NSD—No stock designation. Rough-toothed dolphin has a range known to include the waters off Southern California, but there is no recognized stock or data available for the U.S. West Coast.

[3] The best official estimate of the total population size from the NMFS 2022 Stock Assessment Report (Carretta *et al.* 2023) is 1,465. This estimate is based on available data through 2020 data for Kure and Midway Atolls, Nihoa Island, and the MHI, and through 2019 for all other subpopulations. More recent survey data for 2021 and 2022 indicate an increasing trend in population size. NMFS estimates a total population size for 2022 of 1,605 (NOAA 2023).

Unusual Mortality Events

An UME is defined under section 410(6) of the MMPA as a stranding that is unexpected, involves a significant die-off of any marine mammal population, and demands immediate response. From 1991 to the present, there have been 17 formally recognized UMEs affecting marine mammals in California and Hawaii and involving species under NMFS' jurisdiction. There is one UME that is applicable to our evaluation of the Navy's activities in the HSTT Study Area. The gray whale UME along the west coast of North America is active and involves ongoing investigations. At the time of publication of the 2020 HSTT final rule, there was an active UME for Guadalupe fur seal, which NMFS fully considered in its analysis (85 FR 41780, July 10, 2020). This UME was closed on September 2, 2021, and therefore, it is not discussed further beyond the information provided here. The UME was closed because conditions under which the UME was declared are no longer occurring or have become persistent. Scientists documented a reduction in strandings compared to peak UME years. The team of scientists who investigated this UME determined the cause of the UME as being due to malnutrition in Guadalupe fur seal pups and yearlings from ecological factors (*e.g.,* warm water events) in the Pacific Ocean causing suboptimal prey conditions. Please see *https://www.fisheries.noaa.gov/national/marine-life-distress/unusual-mortality-event-2015-2021-guadalupe-fur-seal-and-2015* for additional information on this UME.

Gray Whale UME

Since January 1, 2019, elevated gray whale strandings have occurred along the west coast of North America, from Mexico to Canada. As of June 25, 2023, there have been a total of 674 strandings along the coasts of the U.S., Canada, and Mexico, with 333 of those strandings occurring along the U.S. coast. Of the strandings on the U.S. coast, 135 have occurred in Alaska, 83 in Washington, 22 in Oregon, and 93 in California. Full or partial necropsy examinations were conducted on a subset of the whales. Preliminary findings in several of the whales have shown evidence of emaciation. These findings are not consistent across all of the whales examined, so more research is needed. As part of the UME investigation process, NOAA has assembled an independent team of scientists to coordinate with the Working Group on Marine Mammal Unusual Mortality Events to review the data collected, sample stranded whales, consider possible causal-linkages between the mortality event and recent ocean and ecosystem perturbations, and determine the next steps for the investigation. Please refer to: *https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2023-gray-whale-unusual-mortality-event-along-west-coast-and* for more information on this UME. See the Preliminary Analysis and Negligible Impact Determination section for additional information on how NMFS has considered this UME in this proposed rule.

Biologically Important Areas

Since publication of the 2020 HSTT final rule, Kratofil *et al.* (2023) identified updated BIAs in Hawaii. The HSTT Study Area overlaps the updated BIAs for small and resident populations of the following species in Hawaii: spinner dolphin, short-finned pilot whale, rough-toothed dolphin, pygmy killer whale, pantropical spotted dolphin, melon-headed whale, false killer whale, dwarf sperm whale, Cuvier's beaked whale, common bottlenose dolphin, and Blainville's beaked whale. Further, the HSTT Study Area overlaps updated BIAs for humpback whale reproduction in Hawaii. The updated BIAs overlap critical Navy training and testing areas within the HSTT Study Area, including most of the internal Navy operating areas. Please see Kratofil *et al.* (2023) for additional details about the BIAs.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section provides a discussion of the ways in which components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and whether those impacts are reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or

survival. In the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the 2018 HSTT proposed and final rules, and as updated by the 2020 HSTT final rule, NMFS provided a description of the ways marine mammals may be affected by the same activities that the Navy will be conducting during the 7-year period analyzed in this rulemaking in the form of serious injury or mortality, physical trauma, sensory impairment (permanent and temporary threshold shifts and acoustic masking), physiological responses (particularly stress responses), behavioral disturbance, or habitat effects. We do not repeat the information here, all of which remains current and applicable, and instead summarize any new relevant information from the scientific literature. For more information we refer the reader to those rules and the 2018 HSTT FEIS/OEIS (Chapter 3, Section 3.7 *Marine Mammals*), which NMFS participated in the development of via our cooperating agency status and adopted to meet our NEPA requirements.

In the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the 2018 HSTT final rule, we stated that it has been speculated for some time that beaked whales might have unusual sensitivities to sonar sound due to their likelihood of stranding in conjunction with mid-frequency active sonar (MFAS) use, although few definitive causal relationships between MFAS use and strandings have been documented, and no such findings have been documented with Navy use in Hawaii and southern California. On March 25, 2022, a beaked whale (species unknown) stranded in Honaunau Bay, Hawaii. The animal was observed swimming into shore and over rocks. Bystanders intervened to turn the animal off of the rocks, and it swam back out of the Bay on its own. Locals reported hearing a siren or alarm type of sound underwater on the same day, and a Navy vessel was observed from shore on the following day. The Navy confirmed it used continuous active sonar (CAS) within 50 km (27 nmi) and 48 hours of the time of stranding, though the stranding has not been definitively linked to the Navy's CAS use.

An initial study of another deep diving odontocete, the sperm whale, found similar behavioral responses and reductions in foraging when whales were exposed to pulsed active sonar (PAS) and CAS at similar cumulative Sound Exposure Levels (SEL_{cum}), even though the CAS signal had a lower source level than the PAS signal. This may indicate that animals were, in this case, responding to the cumulative energy of a signal rather than the instantaneous amplitude (Cure *et al.* 2021, Isojunno *et al.* 2020). If a beaked whale were inshore of a Navy vessel using either PAS or CAS MFAS, and responded by moving away from the vessel, they could find themselves in shallow water and become disoriented, as may have happened in the case of Honaunau Bay. In addition, the animal was not seen after it returned to sea, so blood tissue samples could not be obtained. There has been a growing body of literature about the impacts of new pathogens on the health and stranding of marine mammals, including beaked whales in Hawaii and other locations in the Pacific (*e.g.,* Clifton *et al.* 2023 and West *et al.* 2013).

New Pertinent Science Since Publication of the 2020 HSTT Final Rule

NMFS has reviewed new relevant information from the scientific literature since publication of the 2020 HSTT final rule. Summaries of the new key scientific literature reviewed since publication of the 2020 HSTT final rule are presented below. The literature generally falls into the following topic areas: Vessel Strike; Aircraft Noise; Hearing, Vocalization, and Masking; Hearing Loss (Temporary Threshold Shift (TTS) and Permanent Threshold Shift (PTS)); Behavioral Reactions; Stranding; Population Consequences of Disturbance and Cumulative Stressors; Methodology for Assessing Acoustic Impacts.

Vessel Strike

Crum *et al.* (2019) analyzed a modeling framework using encounter theory to estimate the risk of lethal commercial vessel strike to North Atlantic right whales. Seasonal mortality rates of right whales decreased by 22 percent on average after a speed rule was implemented, indicating that the rule is effective at reducing lethal collisions. The rule's effect on risk was greatest where right whales were abundant and vessel traffic was heavy but varied considerably across time and space.

Keen *et al.* (2019) compared vessel traffic patterns in the Southern California Bight, San Francisco, and the Pacific Northwest and found fin whales had a higher risk of nighttime vessel strikes with the nighttime risk being double daytime risk. The authors concluded that the shipping lanes contained 14 percent of all traffic volume and contributed 13 percent of all strike risk similar to conclusions reached by Rockwood *et al.* (2017). However, the authors also point out that a California Current Ecosystem (CCE) wide shipping speed reductions would not be practicable. Instead, they proposed 24-hour speed restrictions around and within shipping lanes would be more effective and feasible than nighttime only speed restrictions elsewhere. Keen *et al.* (2019b) reported high fin whale habitat suitability throughout the Southern California Bight, in particular inshore in winter and in southern portions of the Bight, which include HSTT SOCAL Study Area.

Leaper (2019) estimated that a global 10 percent reduction in shipping speeds could result in a reduction of underwater sound associated with shipping by approximately 40 percent and vessel strike risk by around 50 percent by 2050. The vessel strike risk reduction done by the author is highly variable based solely on the relationship between ship speed and risk, qualitative in its findings, and speculative.

Redfern *et al.* (2019) compared risk of vessel strike to baleen whales around the Santa Barbara Channel based on 8 years of shipping data (2008–2015). Species evaluated include blue whales, fin whales, and humpback whales using available spatial habitat models and satellite tagging results. Spatial habitat modeling data included the years 1991, 1993, 1996, 2001, 2005, 2008, and 2009. The authors defined collision risk based on the co-occurrence of whales and ships for various management scenarios focused on adding shipping routes, expanding existing area to be avoided, and reducing shipping speed associated with these areas. Encounter rate theory was used to predict relative mortality resulting from vessel strikes by estimating (a) the encounter rate; (b) the number of encounters that result in a collision; and (c) the probability that a collision is lethal (Martin *et al.* 2016, Rockwood *et al.* 2017, Crum *et al.* 2019). The authors concluded that expanding the existing areas to be avoided and speed reductions within shipping lanes and their approaches would be the most effective solutions. Ship speeds declined in the Bight from 2008 to 2015 because California air pollution regulations and economic factors made slow-steaming strategies more favorable, therefore reduction in risk from slowing ships was greatest in 2008 and lowest in 2015.

Rockwood and Jahncke (2019) estimated that humpback whale mortality from January to April in Southern California alone was 6.5 whales (1.63/month), based upon modeling using updated abundance

estimates for humpback whales off Southern California. When added to the estimated mortality from July to November, the total estimated annual humpback mortality from vessel strikes in California alone was 23.4 deaths (16.9 + 6.5). This study did not include information for January to April for fin or blue whales and did not estimate humpback mortality in central or Northern California. Thus, even this updated study may underestimate whale mortality. The author's focus was exclusively on shipping approaches to San Francisco Bay (Northern California) and Los Angeles/Long Beach (Southern California) based on Rockwood *et al.* 2017 with new local fine scale analysis. The paper postulated potential mortality from models, not actual reported strikes. The model is used to predict whale mortality based on factors listed in Rockwood *et al.* 2017. In the model results, cargo vessels, especially container ships, accounted for more than half of the predicted mortality for all whale species in both Northern and Southern California with oil tankers accounting for the second highest mortality. The author's recommendation concludes with commercial industry-wide shipping speed reduction recommendations given the model is biased on mortality as a function of speed. In summary, Rockwood and Jahncke (2019) only addresses commercial shipping strike risk associated with major California commercial ports, and therefore, the paper may have limited applicability to how the Navy trains and tests in SOCAL.

Sèbe *et al.* (2019) assesses previous publications on whale vessel strike risk methodology and proposed a systematic approach to addressing the issue called the Formal Safety Assessment: (1) identification of hazards, (2) assessment of risks, (3) risk control options, (4) cost-benefit assessment, and (5) recommendations for decision-making. The authors provided a case study based on data from Rockwood *et al.* (2017). No new data analysis is presented in the paper. Caveats to Sèbe *et al.* (2019) are similar to those mentioned for Rockwood *et al.* (2017, 2019): older marine mammal data that may not be reflective of current or future distribution and focus on limited navigation within shipping approaches by commercial ships means that this study may have somewhat limited applicability to how the Navy trains and tests in SOCAL.

Szesciorka *et al.* (2019) concluded that while whales have some cues to avoid ships, this is true only at close range, under certain oceanographic conditions and if the whale is not otherwise distracted by feeding, breeding, or other behaviors. The paper is based on a single blue whale reaction observed in the Santa Barbara Channel, north of, and outside of, SOCAL. The blue whale was tagged as part of the U.S. Navy-funded Southern California Behavioral Response Study (SOCAL BRS) 2010–2015 and exposed to simulated MFAS when a closest point of approach of 93 m from a passing commercial container ship was noted. The whale was only tagged for a couple of hours before tag detachment. As other published papers report from the SOCAL BRS and as cited in the 2018 HSTT FEIS/OEIS, there can be significant individual variation in response to anthropogenic sources, which in this case would include vessel transit.

Blondin *et al.* (2020) estimated blue whale vessel strike risk in the Southern California Bight by combining predicted daily whale distributions with continuous vessel movement data for 4 years (2011, 2013, 2015, 2017). The study focuses on the northern Southern California Bight associated with the commercial vessel traffic separation zone through Santa Barbara Channel approaching the Port of Los Angeles/Long Beach. This area is north of and outside of SOCAL. The authors found that vessel traffic activity across years (2011, 2013, 2015, 2017) was variable and whale spatial probability was also variable based on inter-annual fluctuations in environmental conditions. Similar to previous monitoring efforts in Southern California, blue whales are typically in higher concentrations north of SOCAL from July-November (Mate *et al.* 2018), and Blondin *et al.* (2021) also picked up on this seasonal variability in their analysis. Oceanographic conditions favorable for krill development and concentration (*i.e.,* cool water periods) would lead to increased blue whale occurrence and higher strike risk as evidenced during the higher number of blue whale strikes in 2007 (Berman-Kowalewski *et al.* 2010). Finally, the coarse level of data analyzed by the authors does not account for short-term patchy prey conditions influencing blue whale occurrence and may result in overestimation of average risk.

Redfern *et al.* (2020) revised their 2019 assessments of vessel strike risk off California using interannual variability of risk across multiple years for blue whale, fin whale and humpback whale. The authors showed higher concentrations of both blue and fin whales along the Central California coast as compared to within SOCAL. Magnitude of vessel strike risk was influenced by the ship traffic scenario. In addition, interannual species variability (1991, 1993, 1996, 2001, 2005, 2008, and 2009) also influenced the magnitude of vessel strike risk, but did not change whether nearshore or offshore scenarios had higher risk. The author's conclusions were similar to Redfern *et al.* (2019). Figure 2 from Redfern *et al.* (2020) illustrates mean blue whale, fin whale, and humpback whale vessel strike risk for California based on data through 2009. Results from more recent NMFS surveys in 2014 and 2018 may or may not change this assessment in the future.

Rockwood *et al.* (2020b) calculated expected blue whale and humpback whale mortality for hypothetical compliance scenarios by imposing speed caps within and adjacent to vessel traffic lanes leading to the Port of San Francisco in Central California, 400 miles (643.7 km) north of SOCAL. Rookwood *et al.* (2020a) had already demonstrated this area off Central California had concentrated krill prey with associated higher distributions of blue whales and humpback whales. Rookwood *et al.* (2020b) used better temporal resolution density data than previous modeling efforts reported by Rookwood *et al.* (2017). Biological data analysis for Rookwood *et al.* (2020b) was based on regional monthly krill and whale surveys from 2004–2017. Rockwood *et al.'*s (2020b) overall modeling conclusions were that lower commercial ship speeds within the vessel traffic lanes could potentially reduce whale mortality from vessel strike. The authors acknowledge that local changes in whale abundance can have strong effects on both inter-annual and long-term patterns of ship-strike mortality.

Bernknopf *et al.* (2021) examined the socioeconomic benefits of using remotely-sensed information instead of in situ observations for determining blue whale occurrence in the eastern North Pacific Ocean. Their analysis used blue whale spatial distribution through 1991–2009 projects as representative of 2017 densities (Becker *et al.* 2012) combined with automatic identification system (AIS) derived measures of civilian commercial vessel traffic to predict blue whale vessel strike risk, called the Reference Case by the authors. The authors then compared estimated blue whale strike risk in a second analysis that, instead of using empirically measured blue whale observations converted into spatial habitat maps, used satellite tracking and environmental data to identify the spatial and temporal distribution of blue

whales, called the Counterfactual Case by the authors (Hazen *et al.* 2017). Estimated mean fatal strikes to blue whales for the Reference Case based on empirical density data from 1991–2009 ranged from 0.0490 to 2.5877 (max. values >1.000 between June to October) (see Table 2 in Bernknopf *et al.* 2021). Estimated mean fatal strikes to blue whales for the Counterfactual Case based on environmental estimates of blue whale density in 2017 ranged from 0.0286 to 2.1556 (max. values >1.000 between August to October). An important caveat to this research is that the two approaches result in different strike risks due to using different blue whale density estimates.

Barkaszi *et al.* (2021) designed a model to estimate risks to large whales from shipping associated with offshore wind development along the U.S. Atlantic Coast. A key caveat for the model is that it is based on civilian vessel types associated with wind energy construction (*e.g.,* tugs, service craft, *etc.*) with relatively fixed, direct routes to offshore wind sites. Therefore, while lower vessel speeds can reduce mortality, prediction and implementation of reduced speed zones are a far more complex challenge (Barkaszi *et al.* 2021). Vessel speed has less effect on strike risk over a fixed distance with fixed target density when there are no behavioral components considered (Yin *et al.* 2019). Vessel speed has a significant effect on strike risk only when behavioral components are considered, thus the ability for the user to input animal or vessel aversion is an important variable that can provide insights to the encounter risk based on vessel speeds.

Cusato (2021) discusses the merits of vessel traffic separation changes or mandatory commercial ship speed reductions in the Santa Barbara Channel to reduce the risk of vessel strikes to large whales. The author compares it to similar restrictions on the U.S. East Coast for North Atlantic right whales. The paper is a policy discussion rather than an analysis of current biological distribution of large whales and associated risk. Cusato (2021) focuses on reducing risk from commercial ships in the current vessel traffic separation scheme within the Santa Barbara Channel. Speed restrictions in the Channel would need to be implemented through either Federal regulations or Federal statute. The author also correctly points out legitimate concerns that operating large vessels at slow speeds in certain conditions could pose a safety risk because large vessels are more difficult to control and steer at slower speeds.

Hausner *et al.* (2021) examined tradeoffs of blue whale vessel strikes and speed reduction mitigation over a 17-year period from 2002 to 2018 in the Southern California Bight under two management scenarios verses a ''fixed strategy'' that implements speed reductions for a fixed time period each year. The two management strategies were (1) a ''daily strategy'' implementing speed reductions in response to whale habitat conditions on a daily basis, and (2) a ''seasonal strategy'' implementing speed reductions in response to whale habitat conditions on a seasonal basis. The period of the author's data analysis also covers the abnormal marine heat wave along the U.S. West Coast (2014–2016). The study's focus was exclusively with the traffic separation lanes leading from the Santa Barbara Channel to the Ports of Los Angeles and Long Beach, a narrow corridor north of and outside of SOCAL. The daily and seasonal management strategies were more effective in reducing blue whale strike risk in the Santa Barbara channel than the fixed strategy. The daily management strategy had the highest protective effect. This apparent difference in strategies also applied during and after the 2014–2016 marine heat wave where the daily strategy added even extra protection. The authors acknowledged that interannual variation on blue whale presence in the shipping lanes added some variability to their analysis. In addition, their study only considered blue whales sighted within the Traffic Separation Scheme, as opposed to the broader region where vessels transit through or a blue whale could occur.

Ransome *et al.* (2021) documented 40 vessel strikes to large whales in the Eastern Tropical Pacific Ocean between 1905 and 2017 off the coasts of 10 Central and South American countries (Mexico to Columbia). The authors concluded that vessel strikes to large whales are more prolific in this region than previously reported. For instance, the author's findings of 40 vessel strikes was over three times greater than previous reporting and still is likely under reporting total whale strikes. The majority of whale strikes occurred from the 1950s onward with the growth of modern shipping and whale watching. Humpback whales were the most commonly struck species (45 percent) although 30 percent of the species were not identified in their data.

Rockwood *et al.* (2021), similar to Rockwood *et al.* (2020b), calculated potential whale strike mortalities using AIS vessel data and whale density data to estimate mortality under several management scenarios within the commercial shipping lanes passing through Santa Barbara Channel and San Pedro Channel to and from the Ports of Los Angeles and Long Beach. While the Santa Barbara Channel is approximately 100 miles (160.9 km) north of SOCAL, Rockwood *et al.*'s study area also included the southern vessel traffic approach to Los Angeles and Long Beach which did extend into the northeast coastal portion of SOCAL. Recent whale surveys were not available for this effort, so the authors used long-term average blue, fin, and humpback whale densities from Becker *et al.* (2016). The author's model also predicted a higher level of whale vessel strikes from commercial ships than Rockwood *et al.* (2017), although the authors acknowledged that for the 2020 publication they included more vessel classes than for the 2017 publication.

Silber *et al.* (2021) examined the risk to gray whales from commercial shipping in the North Pacific. Vessel strike risk was highest for gray whales including the Western North Pacific Distinct Population Segment (WNP DPS) along most of the migratory routes. Highest risk to the WNP DPS of gray whales was outside of the SOCAL in the western Bering Sea, along the east coast of the Kamchatka peninsula (Russia), and coastlines of Japan. For both Eastern North Pacific and WNP DPSs of gray whales, the greatest vessel strike risk along the U.S. West Coast was from Washington to Central California.

Helm *et al.* (2023) looked at strike risk to foraging humpback whales surfacing around large cruise ships transiting Glacier Bay National Park, Alaska. The authors concluded that the probability of foraging humpback whales remaining near the surface after first sightings was relatively high. While this puts humpback whales at increased risk of ship strike, it also allows shipboard observers more time to spot whales in order to maneuver the ship to avoid a strike.

Lookout Effectiveness

A recent study by Oedekoven and Thomas (2022) was designed to evaluate the effectiveness of Navy Lookouts at detecting marine mammals before they entered a defined set of mitigation zones (*i.e.,* 200, 500, and 1,000 yd (182.9, 457.2, and 914.4 m)) during MFAS training activities. This study also compared Lookout effectiveness with that of trained marine mammal observers. Lookout teams were comprised of varying numbers of Lookouts depending on the type of ship and the training activity that was occurring (noting that the data was

collected prior to the Navy's change in its SOPs to require the use of three Lookouts on Navy cruisers and destroyers.) Marine mammal observer teams consisted of two dedicated observers. Results of this study indicate that Navy Lookout Teams, which include Lookouts and other crew members, have approximately an 80 percent chance of failing to detect a pod of large baleen whales (rorquals) before they come closer than a mitigation range of 200 yd (182.9 m), compared with a 49 percent chance for trained marine mammal observers. The probability of a pod remaining undetected by Lookouts was greater for larger mitigation zones (*i.e.,* 85 percent at 500 yd (457.2 m); 91 percent at 1,000 yd (914.4 m)). These values require some level of interpretation with regard to the numerical results. For instance, the study's statistical model assumed that Navy ships moved in a straight line at a set speed for the duration of the field trials, and that animals could not move in a direction perpendicular to a ship. Violation of this model assumption would underestimate Lookout effectiveness for some data points. The values for both Navy Lookouts and the Marine Mammal Observers include animals under the water that would not have been available for detection by a Lookout. This study suggests that detection of marine mammals is less certain than previously assumed at certain distances.

Hearing, Vocalization, and Masking

Branstetter *et al.* (2021) measured underwater, masked hearing thresholds for frequencies between 0.5 and 80 kilohertz (kHz) in two killer whales. Critical ratios computed from the threshold measurements ranged from 16 to 32 decibels (dB). For communication signals in the 1.5–15 kHz range, killer whales would require the signal to be up to 26 dB above background Gaussian noise to be detected. The authors noted that ambient background noise in the marine environment is not Gaussian, the tones used in this study do not contain as much frequency information as biologically relevant signals, and the temporal and spectral characteristics of actual signals and noise may result in some degree of release from masking. These results are consistent with critical ratio measurements from other odontocete species, despite differences in hearing ability and head size.

Fournet *et al.* (2021) measured call amplitudes from male bearded seals in the Beaufort Sea under different ambient noise conditions. The results showed that estimated source levels of seal calls increased with ambient noise up to approximately 100–105 dB root-mean-squared (rms), above which no further Lombard effect was observed. This suggests that masking of bearded seal mating calls may occur, resulting in reduced communication range, which could reduce the ability of bearded seals to detect one another, mate, and reproduce.

Mercado (2021) aimed to characterize how units within humpback whale songs were systematically varied using a large dataset of recordings from off the coast of Kona, Hawaii. The data showed that narrowband, reverberant units repeated at regular time intervals and dominated most song sessions, while broadband units were less predictable and occupied frequency bands that did not overlap with the narrowband units. The persistent production of narrowband units at regular time intervals resulted in consistent reverberation, which could either function to increase the range at which the song can be detected, or listen for fluctuations in echoes to indicate the presence of whale-sized targets.

Rey-Baquero *et al.* (2021) collected theodolite and passive acoustic data on humpback whales in a pristine environment along the Colombian Pacific for 2 months. When acoustic data (n=34 files) were analyzed for unit duration and inter-unit interval before and after boats passed, song unit lengths were shorter and more variable when boats were present. The second aim of this study was to model the whales' communication space during ambient noise or one to two boats traveling slowly. The most common peak frequency of this stock's song (350 Hz) was used in the model, and, along with a whale's location along the coast, informed calculations of transmission loss. However, the source level of ''typical whale-watching boats'' (145 dB re 1 uPa (decibels referenced to 1 micropascal) at 1 m; (Erbe *et al.* 2012)) and humpback whales (153 dB re 1 uPa at 1 m; (Au *et al.* 2006)) were taken from previous studies. Authors found that the infrequent addition of ecotour boat noise could temporarily reduce the ''very audible area'' (>10 dB SNR) in their song's commonly used peak frequency (350 Hz) by 63 percent.

Ruscher *et al.* (2021) measured aerial behavioral hearing thresholds in a Hawaiian monk seal (*Neomonachus schauinslandi*). The results showed a hearing range between 0.1 and 33 kHz with relatively poor sensitivity compared to Phocinae seals. The most sensitive thresholds were 40 dB re 20 µPa measured at 800 Hz and 3.2 kHz. The resulting audiogram was most similar to the northern elephant seal, which is the only other species of Monachinae seal with audiogram data (Reichmuth *et al.* 2013). This study suggested that hearing sensitivity of Monachinae seals is substantially reduced compared to other species within their functional hearing group (phocid carnivores in air; PCA); therefore, the use of the PCA weighting function to predict auditory impacts is likely conservative for Hawaiian monk seals.

Sills *et al.* (2021) measured underwater auditory detection thresholds in a male Hawaiian monk seal, and the range of most sensitive hearing was between 0.2 and 33 kHz. Peak hearing sensitivity of 73 dB re 1 µPa was observed at 1.6 kHz. The audiogram for this individual was similar but narrower and elevated compared to the hearing group (phocid carnivores in water; PCW) composite audiogram used to assess impacts to this species. Underwater vocalizations were also measured, and 6 call types were identified, which had peak energy between 55 and 400 Hz. The number of calls produced per minute fluctuated seasonally and peaked in the breeding season with the highest call rates recorded in December.

Sweeney *et al.* (2022) examined the difference between noise impact analyses using unweighted broadband sound pressure levels (SPLs) and analyses using auditory weighting functions. The recordings used to conduct parallel analyses in three marine mammal species groups were from a shipping route in Canada. Since shipping noise was predominantly in the low-frequency spectrum, bowhead whales perceived similar weighted and unweighted SPLs while narwhals and ringed seals experienced lower SPLs when auditory weighting functions were used. The data provide a real-world example to support the use of weighting functions based on hearing sensitivity when estimating audibility and potential impact of vessel noise on marine mammals.

A study by von Benda-Beckmann *et al.* (2021) modeled the effect of pulsed and continuous 1–2 kHz active sonar on sperm whale echolocation clicks and found that the presence of upper harmonics in the sonar signal increased masking of clicks produced in the search phase of foraging compared to buzz clicks produced during prey capture. Different levels of sonar caused intermittent to continuous masking (120 to 160 dB re 1 µPa2, respectively), but varied based on click level, whale orientation, and prey target strength. CAS resulted in a greater percentage of

time that echolocation clicks were masked compared to PAS.

Kastelein *et al.* (2021c) compared the ability of harbor porpoises to detect signals in constant-amplitude noise with amplitude-modulated noise. Underwater, behavioral hearing thresholds were measured from harbor porpoises at 4 kHz under three conditions: ambient noise (control), sinusoidally amplitude modulated (SAM) masking noise, and Gaussian (constant amplitude) masking noise. Both masker types were centered at 4 kHz with a one-third octave bandwidth and were tested at various SPLs. The SAM noise was also tested at modulation rates from 1–90 hertz (Hz). The 4 kHz hearing test signals were 0.5, 1, and 2 seconds in duration. The results showed that, compared to Gaussian noise, up to 14.5 dB of masking release (from ''dip listening'') was observed in lower-modulation rate (1–5 Hz) SAM noise. The effect of masking on communication space is often modeled using constant-amplitude noise, whereas most Navy sources contain gaps, more like amplitude-modulated noise. This study suggests that the signal duration, masker level, and masker modulation rate and depth should be considered when modeling the effect of noise on signal detection.

Isojunno *et al.* (2021) used data from 15 tagged sperm whales (Isojunno *et al.* 2020) to evaluate odontocete echolocation behavior as a function of received sonar exposures. Statistical analysis revealed small reductions in the number of buzzes and movement during sonar, but the most apparent change in echolocation behavior was a Lombard effect observed during higher sea states (increased surface noise). No behavioral changes in orientation relative to the sonar source were observed that would suggest an anti-masking strategy for spatial release from masking. Theoretical modeling of masking potential in terms of detection range revealed that search phase clicks would likely be masked during both PAS and CAS, but the buzz clicks would not. For regular search phase clicks to be continuously masked, SELs would have to be equal to or greater than 160 and 173 dB re 1 μPa^2s (dB referenced to 1 micropascal squared seconds) for PAS and CAS, respectively. Overall, the data showed more evidence for masking by increases in ambient noise (surface noise from higher sea states), than for sonar. This result could be due, in part, to the 1–2 kHz narrowband sonar masker, which is not comparable to broadband maskers such as ambient noise or shipping noise.

Matthews and Parks (2021) reviewed the existing literature on North Atlantic right whale acoustic behavior and summarize information on acoustic behavior of the Southern right whale, North Pacific right whale, and bowhead whale. The authors reviewed primary literature on whale vocalizations, anatomical modeling, and behavioral responses to playbacks to conclude that the North Atlantic right whale might have a hearing range of 20 Hz to 22 kHz. However, vocalization data cannot be used to directly estimate audible range since there are many examples of mammals (including marine mammals) that vocalize with energy below the frequency of best hearing, and calls can also contain high-frequency harmonics that are above the upper limit of hearing. The anatomical model developed by Ketten (1994) was used by Parks *et al.* (2007) to estimate a functional hearing range of 15 Hz to 18 kHz for this species.

Jacobson *et al.* (2022) modeled the probability of Blainville's beaked whale group vocal periods (GVPs) on the Pacific Missile Range Facility during periods of no naval activity, naval activity without hull-mounted MFAS, and naval activity with hull-mounted MFAS. Data were collected from bottom-mounted hydrophones on the range before, during, and after six Submarine Commanders Course (SCC) exercises. At an MFAS received level of 150 dB re 1 µPa rms (root mean square), the probability of GVP detection decreased by 77 percent (95 percent CI: 67 percent–84 percent) compared to periods when general training activity was ongoing and by 87 percent (95 percent CI: 81 percent–91 percent) compared to baseline conditions. This study found a greater reduction in p(GVP) with MFAS than observed in a prior study of Blainville's beaked whales at the Atlantic Undersea Test and Evaluation Center (AUTEC) (Moretti *et al.* 2014). The authors suggest that this may be due to the baseline period in the AUTEC study including naval activity without MFAS, potentially lowering the baseline p(GVP), or due to differences in the residency of the populations at each range.

Branstetter and Sills (2022) reviewed direct laboratory (*i.e.,* psychoacoustic) studies of marine mammal hearing in noise. Psychoacoustic studies of auditory masking in marine mammals were described in detail and categorized by the type of signal and masker (*e.g.,* tone in white noise), and specific conditions under which masking is reduced (*i.e.,* release from masking). Specifically, comodulation masking release, or the reduction in masking due to amplitude or frequency modulation differences between the signal and noise, and spatial release from masking, or the reduction in masking due to spatial separation between signal and noise and the directional hearing ability of the listener, are discussed. Finally, energetic masking, or the ability of the listener to detect a signal was compared to informational masking, or the ability of the listener to comprehend the signal was reviewed. The authors point out that while the body of scientific evidence thus far shows that processes of the ear result in energetic masking, more research on informational masking is needed to develop realistic communication space models. This is because current communication space models are based on 50 percent signal detection rather than some threshold of successful signal recognition or interpretation by the listener.

Hearing Loss (TTS and PTS)

Houser (2021) reviews existing literature on the relationship between auditory threshold shift and tissue destruction in mammals. According to small terrestrial mammal literature, TTSs of approximately 30–50 dB measured 24 hours after sound exposure induced progressive tissue damage despite the return of normal hearing thresholds. Although large TTSs allow for full recovery of hearing, pathological tissue destruction may occur; however, smaller-magnitude TTSs are unlikely to result in tissue damage. The author concludes that the current criteria of 40 dB of TTS measured within minutes of the noise exposure as the onset of injury is likely to encompass recoverable auditory threshold shift without tissue damage. This publication supports the use of current definitions of auditory injury in marine mammals.

Kastelein *et al.* (2022a) measured underwater behavioral hearing thresholds in two California sea lions at 0.6, 0.85, and 1.2 kHz before and after exposure to a one-sixth-octave noise band centered at 0.6 kHz for 60-minutes. Hearing tests were also conducted at 1, 1.4, and 2 kHz after exposure to a one-sixth-octave noise band centered at 1 kHz for 60-minutes. For the 0.6 kHz exposure, the maximum TTS was 7.5 dB (6.7 dB mean) for a 210 dB cumulative SEL (SEL_{cum}) exposure at the hearing test frequency one-half octave above the center frequency of the fatiguing stimulus (0.85 kHz), which recovered after approximately 12 minutes. For the 1 kHz exposure, the maximum TTS was 10.6 dB (9.6 dB mean) after a 195 dB SEL_{cum} exposure at the hearing test frequency one-half octave above the center frequency of the fatiguing

stimulus (1.4 kHz). Mean threshold shift (TS) greater than 6 dB (mean = 8.0 dB, min = 7.2 dB, max = 8.5 dB) was also observed after exposure to the 1 kHz fatiguing stimulus at 195 dB SEL_{cum} for the 1 kHz hearing test frequency. For this exposure frequency, hearing recovered within 24 minutes. The results of this study show individuals exhibiting onset of TTS in water at lower received levels than the otariid thresholds in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017).

Kastelein *et al.* (2022b) measured underwater behavioral hearing thresholds in two California sea lions at 8, 11.3, and 16kHz before and after exposure to a one-sixth-octave noise band centered at 8 kHz for 60-minutes. Hearing tests were also conducted at 32 kHz after exposure to a one-sixth-octave noise band centered at 16 kHz for 60-minutes. For the 8kHz exposure, the maximum TTS was 20.2 dB (18 dB mean) for a 190 dB SEL_{cum} exposure at the hearing test frequency one-half octave above the center frequency of the fatiguing stimulus (11.3 kHz), which recovered after approximately 12 minutes. For the 16 kHz exposure, the maximum TTS was 19.7 dB (16.3 dB mean) after a 207 dB SEL_{cum} exposure at the hearing test frequency one-half octave above the center frequency of the fatiguing stimulus (22.4 kHz). For these exposure frequencies and scenarios, hearing recovered within 72 minutes or less. The results of this study show TTS onset in-water occurred at lower received levels than what the current otariid criteria in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III'') (Navy, 2017) suggest.

Kastelein *et al.* (2021a) measured underwater behavioral hearing thresholds at 0.5, 0.71, and 1 kHz in one harbor porpoise before and after exposure to one-sixth-octave band noise centered at 0.5 kHz. Maximum TTS was 8.9 dB (mean = 7.6 dB) at the 0.5 kHz hearing test frequency after a 205-dB SEL_{cum} exposure. For the 0.71 and 1 kHz hearing test frequencies, no mean TTS > 6 dB was observed. However, at 0.71 kHz, maximum TTS was 6.5 dB (mean = 5.8 dB) was observed after a 205-dB SEL_{cum} exposure. At 1 kHz, a maximum of 6.3 dB of TTS (mean = 5.7 dB) occurred after 206-dB SEL_{cum} exposures. All shifts < 5 dB recovered within 12 minutes and shifts > 6 dB recovered within 60 minutes. These results are consistent with the criteria and thresholds described in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017).

Kastelein *et al.* (2021b) measured behavioral, underwater hearing thresholds at 2, 2.8, and 4.2 kHz in two sea lions before and after exposure to band-limited noise centered at 2 kHz. Sea lion hearing was also tested at 4.2, 5.6, 8 kHz before and after exposure to noise centered at 4 kHz. Maximum TTS was 24.1 dB (22.4 dB mean) at the 5.6 kHz test frequency after a 205-dB SEL_{cum} exposure centered at 4 kHz. Threshold shifts greater than or equal to 6 dB occurred at 187, 181, and 187 dB SEL_{cum} for 4.2, 5.6, and 8 kHz test frequencies respectively. After exposure to the 2-kHz noise, maximum TTS of 11.1 dB (10.5 dB mean) occurred for 203 dB SEL_{cum} at the 2 kHz test frequency. Threshold shifts greater than or equal to 6 dB occurred at SEL_{cum} of 192, 186, and 198 dB for test frequencies 2, 2.8, and 4.2 kHz respectively. These data suggest that one-half octave above the exposure frequency is the most sensitive to noise exposure. TTS between 6 and 10 dB recovered within 60 minutes, 10–15 dB of TTS recovered within 120 min, and TTS up to 24.1 dB recovered after 240 minutes. The results of this study show individuals exhibiting onset of TTS in-water at lower received levels than the current otariid criteria (''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017)).

Kastelein *et al.* (2020a) measured underwater, behavioral hearing thresholds in one harbor porpoise before and after exposure to playbacks of one-sixth-octave band noise centered at 1.5 kHz and a 6.5 kHz continuous wave. Following exposure to the 1.5 kHz noise band at 201 dB SEL_{cum}, a maximum of a 7.8 dB, 9.8 dB, and 7 dB TTS was observed for 1.5, 2.1, and 3 kHz hearing frequencies respectively. After exposure to the 6.5 kHz continuous wave at 184 dB SEL_{cum}, a maximum of a 7.5, 16.7, and 11.8 dB TTS was observed for 6.5, 9.2, and 13 kHz hearing frequencies respectively. For the 6.5 kHz exposure, a mean TTS > 6 dB was observed for the 178 and 180 dB SEL_{cum} when the hearing test frequency was 9.2 kHz, and for the 180 dB SEL_{cum} when the hearing test frequency was 13 kHz. The results of this study show that the animal incurred onset of TTS at higher received levels than what the current HF cetacean criteria in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017) indicate for both 1.5 and 6.5 kHz.

Kastelein *et al.* (2020b) measured underwater, behavioral hearing thresholds in two harbor seals before and after exposure to playbacks of one-sixth-octave band noise centered at 0.5, 1, and 2 kHz. Hearing tests were conducted at the center frequency, one-half octave above, and 1 octave above center frequency. No TTS > 6 dB was observed for any hearing frequency after 204, 210, or 211 dB SEL_{cum} exposures to the 0.5 kHz noise band. For the 1 kHz exposure frequency, max TTS of 7.4 dB (6.1 mean) was observed after a 207 dB SEL_{cum} exposure at a hearing frequency of 1.4 kHz. For this exposure frequency, no other test condition produced TTS > 6 dB; although, a 5.9 dB shift (at 1.4 kHz) occurred at 206 dB SEL_{cum}. For the 2 kHz noise band, after a 201 dB SEL_{cum} exposure, max TTS of 12 dB was measured one octave above the center frequency (4 kHz). For this exposure frequency, TTS > 6 dB was observed at SEL_{cum} > 201, 198, and 192 dB for hearing frequencies 2, 2.8, and 4 kHz respectively. All shifts recovered within 1 hour. These results of this study show that the animal incurred lower TTS (*i.e.,* smaller threshold shifts) at higher received levels than what the current phocid pinniped criteria in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017) indicate.

Kastelein *et al.* (2020c) measured underwater, behavioral hearing thresholds in one harbor porpoise before and after exposure to playbacks of one-sixth-octave band noise centered at 88.4 kHz. Maximum TTS of 13.6 dB was observed at 197 dB SEL_{cum} for the 100 kHz hearing test frequency. No TTS > 6 dB was observed for any SEL_{cum} at the 88.4 kHz test frequency. For 125 kHz, shifts > 6 dB were observed for 191, 194, and 197 dB SEL_{cum} exposures, with a mean TTS of 5.4, 6.1, and 5.9 dB, respectively. The results of this study show that the animal incurred TTS at higher received levels than what the current HF cetacean criteria in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017) suggest.

Kastelein *et al.* (2020d) measured underwater, behavioral hearing thresholds in one harbor porpoise before and after exposure to airgun impulses (''shots''). Exposure conditions varied with regard to number of airguns, number of shots, light cues, and position of the dolphin relative to the airguns. Hearing test frequencies were 2, 4, and 8 kHz, and no TTS > 6 dB was observed. The results of this study show that the animal would incur TTS onset at higher received levels than what the current HF cetacean criteria in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017) suggest.

Kastelein *et al.* (2020e) measured underwater, behavioral hearing thresholds in two harbor seals before and after exposure to playbacks of one-sixth-octave band noise centered at 40 kHz. For the 50 kHz hearing test frequency, a maximum TTS of 30.7 dB was observed 12–16 minutes after the 189 dB $SEL_{cum,}$ and a mean TTS > 6 dB was observed for all SEL_{cum} 177 dB and above. The 30-dB shift recovered after 3 days. No TTS > 6 dB was observed for any SEL_{cum} at the 63 kHz test frequency for either seal. At 40 kHz, mean TTS of 9.2 dB was observed after a 189-dB SEL. The results of this study show that the animal incurred TTS at lower received levels than what the current phocid criteria in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017) suggest.

Sills *et al.* (2020) exposed one bearded seal to multiple impulsive underwater noise exposures (seismic air gun ''shots''). Hearing tests were conducted at 100 Hz and 400 Hz after exposures to 2, 4, and 10 shots. After a 4-shot (191 dB SEL_{cum}) exposure, max TTS of 9.4 dB was observed, but no other TTS > 6 dB was demonstrated, despite four 10-shot (194–195 dB SEL_{cum}) exposures. It is possible that TTS recovered during the measurements, as quantified by a mean ''first miss'' of 7.5 dB for the 10-shot exposures (mean TTS was 2.2 dB). The results of this study show that the animal incurred TTS onset at lower received levels than what the current criteria in ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'' (Navy, 2017) suggest. Behavioral responses were also scored and averaged across three observers. For most exposures, the seal exhibited mild/detectable responses, and all scores indicated that the seal did not move more than half his body and consistently participated in the study.

Tougaard *et al.* (2022) reviewed the most recent temporary TTS data from phocid seals and harbor porpoises and compared empirical data to the predictive exposure functions put forth by Southall *et al.* (2019), which were based on data collected prior to 2015. The authors concluded that more recent data supports the thresholds used for harbor porpoises (categorized as 'very high frequency', or VHF cetaceans), which over-estimated the hearing impact for sounds above 20 kHz in frequency. Similarly, the new data for phocid seals show TTS onset thresholds that are well-above the predicted levels for sounds below 5 kHz in frequency. However, phocid seals might be more sensitive to higher frequency sound exposures than predicted, as the TTS onset data for frequencies higher than 20 kHz was below the predicted levels.

von Benda-Beckmann *et al.* (2022) assessed whether correcting for kurtosis, a measure of sound impulsiveness, improved the ability to predict TTS in a marine mammal. Two different kurtosis correction factors were tested by applying them to frequency-weighted sound exposure levels (SEL_{cum}) and fitting (linear least squares) previously collected harbor porpoise TTS data to create dose-response functions, then comparing the resulting R^2 values to that of the standard function used to fit TTS growth data. TTS data from both continuous and intermittent sound exposures were used. For intermittent and continuous 1–2 kHz exposures combined, kurtosis-corrected fits were poorer (R^2 = 0.47, 0.68) than SEL_{cum}-based fits (R^2 = 0.73). For intermittent exposures of different types, one of the kurtosis-corrections resulted in a better fit (R^2 = 0.84) than SEL_{cum} (R^2 = 0.64), but only when a model fitting parameter denoting the relationship between SEL_{cum} and risk of permanent hearing loss was specifically derived from harbor porpoise TTS growth data. The conclusions from this study were that the kurtosis-corrected SELs did not explain differences in TTS between intermittent and continuous sound exposures, likely because silent intervals provided an opportunity for hearing recovery that could not be accounted for by these models. Kurtosis might still be useful for evaluating sound exposure criteria for different types of sounds having various degrees of impulsiveness.

Behavioral Reactions

In a study by Benti *et al.* (2021), vocalizations from Northeast Atlantic herring-feeding killer whales and Northeast Pacific mammal-eating killer whales were played back to humpback whales in Norwegian waters while their behavior was monitored through animal-borne tags and visual observations. In five of six cases the humpback whales approached the fish-eating killer whales, suggesting some attraction. The response to the mammal-eating killer whales varied with the behavioral context of the humpback whales. The results suggested that the calls of the fish-eating killer whales may have acted like a dinner-bell and initiated approach and foraging behavior in the humpback whales, while the unfamiliar sounds of the mammal-eating killer whales may have been perceived as a threat in offshore waters, but led to mixed behavior during inshore herring foraging by humpback whales. These results indicated that the humpback whales were able to discriminate between the different call types and respond with different behavioral strategies.

Boisseau *et al.* (2021) exposed foraging minke whales in Icelandic waters to an acoustic deterrent device that emitted 15 kHz pure tones with a source level of 198 dB rms. Pulse length and the number of pulses in a block were randomized but average pulse length was 752 millisecond (ms) with a 10 percent duty cycle. The source was deployed from a Zodiac boat 500 m away from an animal for the first two exposures, and 1000 m away in the remaining 8 exposures (max received level of 150 dB RMS at a minimum distance of 338 m). Video-range tracking was used to track animals before, during, and after the exposures and dive duration (sec), swim speed (km/h), reoxygenation rate (blows/min), and path predictability were also examined. During the exposure, animal speed and dive duration increased, measures of path predictability increased indicating straighter paths, and reoxygenation rate decreased. Path predictability had a strong relationship with received level whereas speed and dive duration did not, which suggested those two metrics were more influenced by the presence of the exposure signal than the received sound level.

Curé *et al.* (2021) conducted controlled exposure experiments using both PAS (5 percent duty cycle) and CAS (95 percent duty cycle) to measure and score tagged sperm whale behavioral responses. No sonar control exposures resulted in significantly fewer and less severe behavioral responses than sonar exposures. No significant differences were observed between sonar types, but the presence of killer whales or pilot whales did significantly increase the number of responses. The probability of observing low and medium severity responses increased with cumulative sound exposure level (SEL, dB re 1 µPa2 s), reaching a probability of 0.5 at approximately 173 dB SEL for low severity responses. Medium severity responses reached a probability of approximately 0.35 at cumulative SELs between 179 and 189 dB. This study suggested that both PAS and CAS exposure resulted in a greater number of behavioral changes in sperm whales as compared to the vessel (control) alone, and the types of behavioral responses might differ across sonar types.

Czapanskiy *et al.* (2021) modeled energetic costs associated with behavioral response to MFAS using

datasets from 11 cetaceans' feeding rates, prey characteristics, avoidance behavior, and metabolic rates. Authors found that the short-term energetic cost was influenced more by lost foraging opportunities than increased locomotor effort during avoidance. Additionally, the model found that mysticetes incurred more energetic cost than odontocetes, even during mild behavioral responses to sonar.

Durbach *et al.* (2021) analyzed acoustic tracks from minke whales detected on the Pacific Missile Range Facility (PMRF) in Hawaii in 3 years before, during, and after major Navy training exercises. These tracks were fit using a continuous-time correlated random walk at 5-minute interpolated locations. During sonar periods, fast movement became more northerly and more directed (less turning), with less movement south and east in the direction of the training activity, and this more northerly movement continued after sonar cessation. Specifically, whales to the north of the training activity were more likely to head north, while whales that were west of the activity were more likely to head west. Headings did not appear to change for slow, undirected movement during sonar. In addition, fast movement was more likely to occur during sonar than during any other period (70 percent during vs 35–41 percent in the other periods). Finally, whales were more likely to stop calling when in the fast state although not necessarily more during sonar than in other periods; in contrast, slow moving whales were more likely to stop calling during sonar than other periods. These results demonstrated that minke whales moved faster and movements were more directed during periods of active sonar. Minke whales also avoided the locations of the ships producing the sonar and were more likely to cease calling during sonar.

Fernandez-Betelu *et al.* (2021) used passive acoustic data recorded over a 10-year time period to assess the effects of impulsive noise produced during offshore activities on coastal bottlenose dolphin occurrence. Offshore activities included seismic surveys and pile driving from wind farm construction. Echolocation detections of dolphins were compared across years with and without offshore activity and also across days with and without impulsive noise. The effect of distance from the noise-producing activities on dolphin detections was also investigated by placing recorders (CPODs) at locations expected to be the most (impact areas) and least (reference areas) impacted by noise. No consistent relationship was found between annual dolphin occurrence and impulsive noise, but significantly more detections were observed on days with impulsive noise. The results showed that dolphins were not displaced by impulsive noise levels up to 141 dB re 1 µPa and as close as 20 km (10.8 nmi) from the impact area. These results suggest that the increase in dolphin detections during far-field noise was likely due to an increase in the number and/or amplitude of echolocation vocalizations.

Hastie *et al.* (2021) studied how the number and severity of avoidance events may be an outcome of marine mammal cognition and risk assessment. Five captive grey seals were given the option to forage in a high- or low-density prey patch while continuously exposed to silence, pile driving, or tidal turbine playbacks (source levels = 148 dB re 1 µPa at 1 m) for 1 hour. One prey patch was closer to the speaker, so had a higher received level in experimental exposures. Overall, seals avoided both anthropogenic noise playback conditions with higher received levels when the prey density was limited but would forage successfully and for as long as control conditions when the prey density was higher, demonstrating a classic cognitive approach utilized with predation risk and profit balancing.

In a study by Holt *et al.* (2021a), DTAGs (miniature sound and movement recording tags) were attached with suction cups to Southern Resident Killer Whales in the Salish Sea to investigate the relationship between probability of prey capture and vessel and sound variables. The predicted probability of prey capture was lower when vessels increased their speed. Received noise level did not significantly affect the probability of prey capture. The rate of descent during dives was slower when echosounders were on. The observed effects of echosounders suggest that whales prolonged their foraging efforts to successfully hunt, which could be caused by acoustic masking or increased attention to vessels. The rate of descent increased with increasing broadband noise levels and decreasing vessel distance. Decrease prey abundance also decreased the probability of predicted prey capture.

Holt *et al.* (2021b) attached DTAGs to 23 Southern Resident Killer Whales in the San Juan Islands over 3 field seasons in order to investigate the effects of vessel distance on underwater foraging behavior. When vessels were less than 366 m away, whales (n=13) decreased the number of dives associated with prey capture and the amount of time spent in these dives. Additionally, female killer whales were more likely to stop foraging, socializing, and prey-sharing and instead start traveling when vessels approached at this distance. At the same distance from vessels, male orcas were more likely to transition from close prey capture to socializing and prey-sharing, but would not stop general foraging behavior, such as searching for prey at deeper depths. Female orcas may therefore be at greater risk than males during close vessel interactions.

Kates Varghese *et al.* (2021) analyzed the effect of two separate surveys using a 12 kHz multibeam echosounder (*i.e.,* downward directed, unlike ASW sonar) over the Southern California Antisubmarine Warfare Range (SOAR) hydrophone array on Cuvier's beaked whale foraging. The authors conducted a spatial analysis, building off a temporal analysis of a previously presented dataset (Varghese *et al.* 2020). There were differences in spatial use of the SOAR for foraging between the 2 survey years. While no change in overall foraging effort was detected before, during, and after the surveys each year, some localized spatial shifts in foraging hot spots were detected during and after the survey in the second year. Because of the known heterogeneity of prey patches on SOAR, lack of evidence of avoidance of the sound source, and no observed change in overall foraging effort, the authors suggest that the observed spatial shifts were most likely due to prey dynamics.

Königson *et al.* (2021) tested the efficacy of Banana Pingers (300 ms, 59–130 kHz frequency modulated, 133–139 dB rms re 1 µPa at 1 m source level) as a deterrent for harbor porpoise in Sweden. As described previously, these pingers were designed to avoid potential pinniped responses. Authors used recorded echolocation clicks with C–PODs to measure the presence or absence of porpoise in the area. Porpoise were less likely to be detected at 0 m and within 100 m of an active pinger, but a pinger at 400 m appeared to have no effect.

In a study by Laborie *et al.* (2021), unmanned aerial vehicles (UAVs) were flown at three altitudes (25, 20, and 15 m) over Weddell seals, including adult males and females and females with pups. There was generally little response; 88 percent of the time the animals showed mild vigilance or no responses, and mothers rarely ended nursing. Agitation or escape responses only occurred in 12 percent of observations. The strongest response was in females with pups when wind speeds were lowest and therefore ambient noise levels were at their lowest. The probability of response

increased with lower altitude flights, so at altitudes over 25 m a low level of impact to Weddell seal behavior would be expected.

Manzano-Roth *et al.* (2022) found that cross seamount beaked whales reduced clusters of foraging pulses (Group Vocal Periods) during Submarine Command Course events and remained low for a minimum of 3 days after the MFA sonar activity.

An analysis subsequent to Varghese *et al.* (2020) suggested that the observed spatial shifts of Cuvier's beaked whales during multibeam echosounder activity on the Southern California Antisubmarine Warfare Range were most likely due to prey dynamics (Kates Varghese *et al.* 2021).

Ramesh *et al.* (2021) explored environmental drivers and the impact of shipping noise on fin whale vocalizations in Ireland. Approximately 3 months of passive acoustic fin whale call data from spring 2016 used in the habitat model found that fin whale calls increased at night, along with signs of higher prey availability. Fin whale calls were also less likely to be detected for every 1 dB re 1 µPa/minute increase in shipping noise levels (rms). However, these results should be used cautiously since the model was more likely to predict the absence of fin whale detections, rather than their presence.

Santos-Carvallo *et al.* (2021) monitored fin whale behavior before, during, and after the presence of whale watching vessels in Caleta Chañaral de Aceituno to determine if the whale watching activity was having any adverse impacts on the fin whales. Whale watching activities were only conducted by local artisanal fishers; 39 boats have permission but less than 20 conduct the whale watching activity. Land-based observations were conducted in January and February of 2015–2018 via binocular scans and focal follow tracking using a theodolite. Groups of whales were tracked through the area with continuous sampling of position, behavior, and presence of boats for every surfacing until they were no longer visible. Behavior was classified as traveling or resting, and the groups' swim speed, reorientation, and directness index, and these were modeled relative to the number of boats and whether the time period was before, during, or after the boats were present. Most observations occurred within the presence of at least one boat, but no more than three boats at one time. Travel swim speeds increased in the after period, while reorientation increased and directness decreased during and after the presence of boats. During rest behavior, reorientation increased during the presence of boats compared to before the boats were present, and directness decreased during the presence of boats. These results indicate that when whale watching vessels were present, the fin whales changed their direction of movement more frequently, with less linear movement than occurred before the boats arrived; this behavior may represent evasion or avoidance of the boats. The increase in travel swim speeds after the boats left the area may be related to the vessel's rapid speeds when leaving, sometimes in front of animals, leading to more avoidance behavior after the boats departed.

Arranz *et al.* (2021) conducted a noise exposure experiment which compared behavioral reactions of resting short-finned pilot whale mother-calf pairs during controlled approaches by a tour boat with two electric (136–140 dB) or petrol engines (139–150 dB). Approach speed (<4 kn (7.4 km per hour)), distance of passes (60 m (65.6 yd)), and vessel features other than engine noise remained the same between the two experimental conditions. Behavioral data was collected via unmanned aerial vehicle (UAV) and activity budgets were calculated from continuous focal follows. Mother pilot whales rested less, and calves nursed less, in response to both types of boat engines compared to control conditions (vessel >300 m (328 yd), stationary in neutral). However, they found no significant impact on whale behaviors when the boat approached with the quieter electric engine, while resting behavior decreased 29 percent and nursing decreased 81 percent when the louder petrol engine was installed in the same vessel.

Hiley *et al.* (2021) exposed groups of harbor porpoises to ''startle sounds'', which were 200-ms in duration and were band limited (5.5–20.5 kHz) with a peak frequency of 10.5 kHz and a source level of 176 dB re 1 µPa. There were 13 exposure sequences in which the startle sound was repeated for 15 minutes at a 0.6 percent duty cycle, and 11 control sequences in which vessels operated but no startle sounds were played. Despite a larger distance between porpoise groups and vessels during sound exposure trials (152 m) as compared to control trials (90 m), avoidance responses during exposures were significant whereas no avoidance was observed for controls. Porpoises avoided the area where sound exposures took place for approximately 30–60 minutes, and no long-term exclusion effect was observed.

Pellegrini *et al.* (2021) examined how boat presence impacts a unique subspecies of bottlenose dolphin (*Tursiops truncatus gephyreus,* Lahille's bottlenose) that vocalizes while foraging cooperatively with local fishermen who cast nets onto dolphin-herded fish while standing in coastal waters in Brazil. Dolphin vocalizations changed in response to the number, type, and speed of boats within 250 m. When more than one boat was present, dolphins produced fewer whistles and had a lower click rate and a longer whistle duration; initial and maximum frequency increased as well, especially when group size or calf presence increased. Whistles were longer duration when boat speed increased as well.

Martin *et al.* (2022) exposed a wild Cape fur seal breeding colony in Africa to playback recordings of boat noise and sea-side car traffic. Focal groups of at least six seals were approached by an experimenter who crawled within 6 m to avoid disturbing the seals. Seals were exposed to low (60–64 dB re 20 µPa rms SPL, broadcast at 6 m), medium (64–70 dB, broadcast at 3 m), or high (70–80 dB, broadcast at 1 m) levels, depending on the individual's distance to the speaker. No behavioral differences were found between low, medium, and high-level groups. Video recorded behavioral analysis demonstrated that mother-pup pairs spent less time nursing (15–31 percent) and more time awake (13–26 percent), vigilant (7–31 percent), and mobile (2–4 percent) during boat noise conditions compared to control conditions. Mothers were more vigilant (26 percent) than pups (7 percent) to medium levels of boat noise.

Jones-Todd *et al.* (2021) analyzed the movement of seven Blainville's beaked whales tagged at (AUTEC) relative to MFAS use during the SCC training event. Data from these tags was previously reported by Joyce *et al.* (2019). A continuous time correlated random walk movement model accounted for location accuracy by modeling 100 track imputations for each tag and arranged samples in equal time intervals. The probability of whale presence within the boundary of the instrumented range (on range), and outside the boundary of the instrumented range (off range) was modeled relative to the time since the last MFAS transmission. Results show there was a higher probability that whales on the range would go off range when there were MFAS transmissions, and that whales off the range would stay off the range when there were MFAS transmissions. These results indicate a response to MFAS that lasted for 3 days since transition rates on-off and off-on the range returned to baseline levels

after that amount of time. There was also variability in transition rates and time spent on/off range between individuals, which highlights the need to analyze a larger sample size of whales.

Durban *et al.* (2022) tested new methods of observing behavioral responses of groups of small delphinids to sonar, where the use of tags is challenging, and the response of the group is more salient than that of the individual. They tested the use of a land-based observation platform coupled with a drone and multiple acoustic recorders to observe the vocal behavior, group cohesion, group size, and group behavior before, during, and after a simulated sonar exposure. In a group of short-beaked common dolphins, the authors found the number of whistles and sub-groups to increase during the exposure period, but the directivity of the tracked subgroup did not change much.

Königson *et al.* (2022) tested the efficacy of Banana Pingers (300 ms, 59–130 kHz frequency modulated, 133–139 dB_{rms} re 1 µPa at 1 m source level) as a deterrent for harbor porpoise in Sweden. As described previously, these pingers were designed to avoid potential pinniped responses. Authors used recorded echolocation clicks with C–PODs to measure the presence or absence of porpoise in the area. Porpoise were less likely to be detected at 0 m and within 100 m of an active pinger, but a pinger 400 m appeared to have no effect.

Miller *et al.* (2022) investigated the risk disturbance hypothesis that an animal's response decision is a trade-off between perceived risk and the cost of a missed opportunity (the reward of foraging). The authors predicted that species that are more vulnerable to predation would be more likely to respond to both predator sounds and anthropogenic stressors. Using data collected from 2008 to 2017 during the 3S project in Norway, changes in foraging duration during killer whale playbacks and changes in foraging duration during mid-frequency sonar were positively correlated across the four species examined (listed in order of increasing sensitivity to foraging disruption: sperm whales, long-finned pilot whales, humpback whales, and northern bottlenose whales). This suggests that tolerance of predation risk may play a role in sensitivity to sonar disturbance.

Paitach *et al.* (2022) tested the efficacy of Banana Pingers (300 ms, 50–120 kHz frequency modulated, 145 dB +/− 3 dB at 1 m source level) as a deterrent and entanglement mitigation for Franciscana dolphins in Brazil. These pingers were designed to emit sound outside of the best hearing range for pinnipeds and were therefore less likely to incite a ''dinner bell'' effect. Authors used recorded echolocation clicks with C–PODs to measure the presence or absence of dolphins in the area. Dolphins were 19 percent and 15 percent less likely to be detected nearby and within 100 m of an active pinger respectively, but dolphins 400 m from the pinger did not appear to avoid it. While a reduction in vocalizations does not always equate to a reduction in presence, this species has been previously seen departing from areas with active pingers. Authors did not witness any habituation to the pinger during the length of the experiment (64 days), and although they recorded fewer dolphins in the area over time, they believe this was due to seasonality rather than habitat displacement.

Siegal *et al.* (2022) used Dtag data from 15 northern bottlenose whales tagged during 3S efforts off Norway (2013–2016) to estimate body density (to represent body condition by lipid energy stores) using hydrodynamic models and obtain foraging and anti-predator indicators based on vocal behavior and dive metrics. The authors compared relative anti-predator/foraging indices to body condition and found that relative anti-predator to foraging indices typically did not depend on body condition. This finding is inconsistent with the needs/assets hypothesis; an individual in poor condition would accept more risk (*i.e.,* engage in less anti-predator behavior) for foraging opportunities, whereas healthy animals can afford to be more risk averse (*i.e.,* have a relatively higher anti-predator to foraging index ratio). The authors suggest that this result may be due to an insufficient range of body conditions in the data set to determine a relationship, or a selection of bolder individuals in the tagging effort. The authors also suggest that animals in good condition may take greater predation risks because they may successfully flee. Three of the 15 whales were exposed to sonar (presented in prior 3S publications). The authors compared foraging and anti-predator metrics pre- and post-exposure, showing that all three animals increased their anti-predator index and reduced their foraging index.

Stanistreet *et al.* (2022) used passive acoustic recordings during a multinational navy activity to assess marine mammal acoustic presence and behavioral response to especially long bouts of sonar lasting up to 13 consecutive hours, occurring repeatedly over 8 days (median and maximum SPL = 120 dB and 164 dB). Cuvier's beaked whales and sperm whales substantially reduced how often they produced clicks during sonar, indicating a decrease or cessation in foraging behavior. Few previous studies have shown sustained changes in foraging or displacement of sperm whales, but there was an absence of sperm whale clicks for 6 consecutive days of sonar activity. Sperm whales returned to baseline levels of clicks within days after the activity, but beaked whale detection rates remained low even 7 days after the exercise. In addition, there were no detections from a Mesoplodon beaked whale species within the area during and at least 7 days after the sonar activity. Clicks from northern bottlenose whales and Sowerby's beaked whales were also detected but were not frequent enough at the recording site used to compare clicks between baseline and sonar conditions.

Benhemma-Le Gall *et al.* (2021) compared harbor porpoise presence and foraging activity between periods of baseline and construction at two Scottish offshore windfarms with arrays of echolocation click detectors (C–PODs). Noise levels were measured with calibrated noise recorders, and vessel presence was tracked with AIS data. Authors found an 8–17 percent decline in porpoise presence compared to baseline, with more porpoises (more buzzing) further from vessels, construction sites, and related higher levels of noise. The probability of porpoise occurrence by source vessels decreased by 9–23 percent without piling activity, and by 40–54 percent during pile driving. Porpoises were displaced up to 12 km (6.5 nmi) from pile driving and 4 km (2.2 nmi) from construction vessels. At an average vessel distance of 2 km (1.1 nmi), porpoise occurrence decreased by up to 35 percent. Outside piling hours, porpoise detection decreased by 17 percent (0.26), and foraging (buzzes) decreased by up to 41.5 percent (0.03) with increasing noise levels (159 and 155 dB re 1 µPa, respectively). During piling activities, porpoise occurrence began lower (0.16, 102 dB) but occurrence still decreased by 9 percent (0.07), and foraging (buzzes, beginning at 0.76, 104 dB) also decreased by 61.8 percent (0.15) with increasing noise levels (161 and 155 dB re 1 µPa, respectively).

Kastelein *et al.* (2022c) recorded pile driving sounds 100 m from construction for an offshore windfarm turbine, and six versions of the sound were created with varying frequency content using low-pass filters at 44.1, 6.3, 3.2, 1.5, 1.0,

and 0.5 kHz, at levels of 135 dB re 1 μPa²s. When authors played these impulsive sounds back to a single harbor porpoise in a pool, she increased swim speed, respiration rate, distance from the transducer, and occasionally jumped in response to the sounds with higher frequencies present (*i.e.,* the sounds with a wider bandwidth, especially sounds low-pass filtered at 44.1 and 6.3 kHz). However, the porpoise still moved away from the three most narrowband sounds, just not as far. Results indicate that frequency weighting of SEL may improve prediction of harbor porpoise behavioral responses, and authors present the argument that weighted SELs should be used for reporting behavioral response threshold levels for criteria.

Todd *et al.* (2022) detected harbor porpoises with C–PODS before, during, and after pile driving for an oil and gas platform from 2015–2020. Pile driving single strike SEL at 750 m was 160–164 dB re 1 μPa²s. Porpoise detections significantly decreased at the beginning of the construction project, but detections appeared to return to baseline levels within 5 months. According to the authors, the lack of significant trend over years indicated that porpoises returned to the area and did not experience habitat displacement for the entire 5-year period.

Physiological Responses and Stress

Elmegaard *et al.* (2021) exposed two captive harbor porpoises to sonar sweeps (6–9 kHz, 500 msec duration, 50–100 msec rise time, varying received levels (RL)) and pulsed sounds (50 msec duration, peak frequency 40 kHz, half power bandwidth of ~5 kHz, rise time < 5 msec, varying RL) to investigate startle reflex and changes in heart rate. The sonar exposures did not elicit startle responses; the initial two to three exposures induced bradycardia (a slow heart rate), with subsequent habituation. This habituation was conserved after a 3-year pause in exposures. The authors suggest that the initial bradycardia allows ''a prolonged breath-hold to assess the nature of a novel stimuli or flee in crypsis if needed;'' in naïve wild cetaceans, the reduced peripheral perfusion caused by this response may reduce N_2 diffusion from supersaturated tissues during dive ascents, increasing risk of decompression sickness. Startle responses to the pulse exposures were directly correlated to RL. The 50 percent motor-startle probability threshold was around 130 dB re 1 μPa (rms50). This is ~85 dB above hearing threshold and is similar to that observed in bottlenose dolphins (~90 dB over hearing threshold) (Gotz *et al.* 2020). No significant change in heart rate was observed. The authors suggest that the parasympathetic cardiac dive response may override any transient sympathetic response, or that diving mammals may not have the cardiac startle response seen in terrestrial mammals in order to maintain volitional cardiovascular control at depth.

Fahlman *et al.* (2021) reviews decompression theory and the mechanisms dolphins have evolved to prevent high N2 levels and gas emboli (*i.e.,* bends-like symptoms) in normal conditions. However, in times of high stress, the selective gas exchange hypothesis states that this mechanism can break down. In addition, circulating microparticles may be useful biomarkers for decompression stress in cetaceans.

Yang *et al.* (2021) measured cortisol concentrations in blood samples of two captive bottlenose dolphins and found significantly higher levels after exposure to high sound level (140 dB re 1 μPa) impulsive noise playbacks, compared to control and low sound levels (0 and 120 dB re 1 μPa, respectively). Six cytokine gene transcriptions were also measured in blood samples and two (IL–10 and IFN-γ) showed significant changes at high sound level exposure, compared to control and low sound levels. Results suggest that repeated exposures or sustained stress response to impulsive sounds may increase an affected individual's susceptibility to pathogens, affect growth and reproduction, *etc.* In addition, no avoidance behavior was observed during the trials, indicating that stress-induced physiological changes could be present despite the absence of behavioral changes.

Williams *et al.* (2022) measured physiological and behavioral responses in narwhals in the Arctic during seismic airgun impulse exposure compared to control conditions. Responses were measured using heart rate-accelerometer-depth recorders and changes in locomotor, cardiovascular, and respiratory responses were observed following exposure. Airgun SELs, as received at 10 m depth during sound source verifications, were approximately 152 dB re 1 μPa²s at 1 km (0.5 nmi) range and decreased to approximately 120 dB re 1 μPa²s at 10 km (5.4 nmi) dives. The response to seismic and vessel noise was a reduction in gliding descents and prolonged periods of high intensity activity associated with periods of elevated stroke frequencies. Noise exposure also resulted in periods of prolonged and intense bradycardia (*i.e.,* slowed heart rate). An increase in post-dive respiratory rates occurred during recovery from noise-exposed dives compared to control dives.

Stranding

Danil *et al.* (2021) document the findings of NOAA's investigation of the strandings of three coastal bottlenose dolphins in 2015 at Silver Strand Training Complex in NOAA Technical Memorandum NMFS–SWFSC–641. On October 21, 2015, two dolphins were found stranded dead near each other on the beach. Because a Navy major training exercise (MTE) was underway, these strandings met the criteria of an Uncommon Stranding Event in accordance with the Southern California Stranding Response Plan in the Navy's Phase 2 LOA for HSTT. A third decomposed dolphin was found in the same area 10 days later. Examination of the dolphins resulted in findings indicative of severe acute trauma, including lower jaw subcutaneous hemorrhage, emphysema, and cervical blubber hemorrhage. Additional signs of injury to the cerebrum and heart, or lipids in the lungs were also discovered. No hemorrhage was found near the ears. At least two of the dolphins showed signs of feeding before stranding, and all were in robust condition. There were no external signs of strike or entanglement. These observations and lack of others did not clearly determine the cause of the acute trauma. Based on previous case studies, the investigators determined that underwater detonation, peracute underwater entrapment (*i.e.,* fisheries interaction), or sonar were the most plausible causes. The Navy notes that sonar has not been associated with these kinds of symptoms before, nor has there ever been any association between dolphin mortality and sonar. No anti-submarine (ASW) sonar or explosive use was associated with the Navy MTE; however, unit level training with MF1 sonar occurred on October 19 (for 35 minutes) and October 20 (62 minutes in total), with sonar use as close as 6 nmi (11.1 km) to the stranding location. No known squid or bait fishing efforts within U.S. waters occurred in the vicinity preceding the strandings. The Navy notes that it is unknown what fishing efforts occurred in Mexican territorial waters immediately south of the stranding location.

Wang *et al.* (2021) conducted an auditory-evoked potential (AEP) hearing test on a single stranded 19-year-old male melon-headed whale in the 9.5—181 kHz frequency range. Tone pip trains were presented underwater at a depth of 0.3 m and 1 m distance from the whale, and AEPs were recorded by suction cup electrodes on the skin surface. Hearing was measured in this

individual after it had been stranded and during attempted rehabilitation in a concrete pool. Eighteen frequencies were measured once, and eight frequencies were measured twice, yielding an audiogram that showed elevated hearing thresholds (compared to the pygmy killer whale) between 10 and 100 kHz. There are no data from normal-hearing individuals of the melon-headed whale species to which this study's data can be compared.

Population Consequences of Disturbance and Cumulative Stressors

Southall *et al.* (2021) provided updated guidance and methods to assess the severity of behavioral responses by marine mammals to several types of anthropogenic noise sources. The criteria developed in the 2007 effort were updated by explicitly distinguishing between captive and field studies, decoupling their respective severity scales, and splitting the severity scale into three categories of foraging, survival, and reproduction. In addition, the updated guidance changed the categorization of noise sources and began to consider long term consequences of exposures rather than just immediate responses. Additional and consistent metrics to be reported in behavioral response studies are recommended, including subject-specific metrics (*e.g.,* functional hearing group, age class, sex, behavioral state, presence of calf), exposure context metrics (*e.g.,* exposure type, range to source, source and animal depth, presence of other species or other noise sources), and noise exposure metrics (*e.g.* exposure duration, rise time, number of exposures, SPL [rms and p-p], SEL, SNR). The authors then applied the severity scale to acute exposure studies using sonar sources, continuous (industrial) sources, pile driving sources, and airgun sources. For the long-term exposure analysis, a set of factors developed by Bejder and Samuels (2003) were applied to long-term studies on whale-watching and other long-term exposure or multi-exposure datasets. These factors included metrics of short-term impacts and long-term survival measures, characteristics of the studies, and sources of anthropogenic disturbance. The applied examples of scoring both acute and long-term studies of behavioral response provide a framework for other researchers to apply the same metrics to their own studies.

Migrating humpback whale mother-calf pairs' responses to seismic surveys were modeled by Dunlop *et al.* (2021) using both a forwards and backward approach. While a typical forwards approach can determine if a stressor would have population-level consequences, authors demonstrated that working backwards through a population consequences of disturbance (PCoD) model can be used to assess the ''worst case'' scenario for an interaction of a target species and stressor. Assumptions for the extreme scenario were likely exaggerated (*e.g.,* in area for > 48 hours, exposed to > 3 air gun events) but lack data to inform humpback nursing behavior and calf survivability during acoustic stressors. The results demonstrated that migrating whales would not likely experience enough of a delay as a result of disturbance to result in population consequences, but whales disturbed in breeding or resting areas would be more vulnerable to consequences of disturbance.

Greenfield *et al.* (2020) demonstrated that bottlenose dolphins who had been injured from boat strike or entanglement experienced a decline in their social network's preferred associations, and as a result were more vulnerable to predation and less fecund.

Hin *et al.* (2021) used a previously published energy budget model for pilot whales (Hin *et al.* 2019) to examine how lost foraging days affect individuals in a population at carrying capacity. In this model, depletion of prey is dependent on whale density, and prey density limits the energy available for growth, reproduction, and survival. The authors assumed extreme disturbance events for this study: consecutive days of no foraging affecting all individuals in a population. The undisturbed whale population was regulated through the effect of prey availability on calf survival and pregnancy rates and on age at first reproduction of females. During a disturbance event, population decline was generally attributed to loss of lactating females and calves due to reduced body condition. The subsequent increase in prey density and per capita prey availability, however, resulted in improved body condition in the population overall and decreased age at first calf. As disturbance duration was increased (~40 days of no foraging), the population would enter extreme decline towards extinction.

Murray *et al.* (2021) conducted a cumulative effects assessment on Northern and Southern Resident killer whales, which involved both a Pathways of Effects conceptual model and a Population Viability Analysis quantitative simulation model. Authors found that both populations were highly sensitive to prey abundance and were also impacted by the interaction of low prey abundance with vessel strike, vessel noise, and polychlorinated biphenyls contaminants. However, more research is needed to validate the mechanisms of vessel disturbance and environmental contaminants.

Pirotta *et al.* (2020) reformulated their previous dynamic energy budget model (Pirotta *et al.* 2018) to investigate the state-dependent life history strategies of female long-finned pilot whales and trade-offs between their body condition (*i.e.,* ability to offset starvation during pregnancy and provide milk), prey availability, and decision to reproduce in situations with and without disturbance. Many whales in this model attempted to reproduce young, and while that had no cost in situations without disturbance, young mothers would starve and die when foraging was prevented by some disturbance event or because resources were low (winter). Whale reproductive strategies resulted in lower lifetime reproductive output, compared to the model used in Hin *et al.* (2019).

Pirotta *et al.* (2021) integrated different sources of data (*e.g.,* controlled exposure data, activity monitoring, telemetry tracking, and prey sampling) into a bioenergetic model, which was used to predict effects from sonar on a blue whale's daily energy intake. Approximately half of the simulated whales had no change in daily net energy intake because they either had no response or were not exposed. However, the other half experienced a decrease in net energy intake. A portion (11 percent) of those simulated whales had negative net energy even after brief (*e.g.,* 6–30 min) or weak (*e.g.,* 160–180 dB re 1 µPa source level) events, which indicated that they would not be able to cover that day's energetic cost. This dichotomy in results was due to the variation in activity budgets, lunging rates and ranging patterns between tagged whales. This evidence suggests that context can influence the predicted costs of disturbance even more than body size or prey density distribution on a daily scale (although prey availability and abundance affected behavioral patterns).

Pirotta *et al.* (2022) evaluated potential long-term effects of changing environmental conditions and military sonar by modeling vital rates of Eastern North Pacific blue whales. Previous work from Pirotta *et al.* (2021) was used as a foundation for incorporating the most recent best available science into the vital rate model presented in this study. Using data and underlying models of behavioral patterns, energy budgets, body condition, contextual responses to noise, and prey resources, the model predicted female vital rates

including survival (age at death), and reproductive success (number of female calves). The model simulation results showed that ''[e]nvironmental changes were predicted to severely affect vital rates, while the current regime of sonar activities was not.'' The case study used an annual sonar regime in SOCAL based on the description of the action in the Navy's 2018 HSTT FEIS/OEIS. Additional military sonar scenarios were modeled, and a ten-fold increase in sonar activity combined with a shift in geographical location to overlap with main feeding areas of blue whales resulted in a moderate decrease in lifetime reproductive success (Cohen's d = 0.47). However, there was no effect on survival (Cohen's d = 0.05).

Pirotta (2022) covered the development of bioenergetic models [''any mechanistic model where the principles of metabolic ecology are used to describe how an individual animal acquires energy from food resources (*i.e.,* energy intake) and allocates assimilated energy to various life history functions (*i.e.,* energy costs, including maintenance and survival, growth and reproduction)''] with a focus on applications to marine mammals. This article provided a thorough overview of the history of marine mammal bioenergetic models, defined relevant terminology, and explained the differences between general types of models.

McHuron *et al.* (2021) developed a state-dependent behavioral and life history model to predict the probability of Western gray whale mother-calf pair survival with and without acoustic disturbance and with or without adequate prey availability on their summer foraging grounds. Pregnant mother movement, feeding behavior, fat mass and fetal length were input data for the model. Since prey availability was co-dependent on whales having access to high-density offshore areas by mid-July, nearshore seismic surveys had no impact on population fecundity or mother-calf survival. This model overcomes a key challenge in PCoD literature by providing a link between behavioral responses and vital rates; authors recommend focusing on species that are data rich to accurately characterize the biology of the focal species, metrics of fitness, and key qualities of their environment.

Joy *et al.* (2022) presented a hypothetical case study for fin whales off Southern California exposed to stationary single-ship 53C sonar events over the course of a year, using the Navy's Phase 3 behavioral response function (BRF). Two model runs were compared: using $\alpha = 0.05$ (average 20-minute movement disruption) and $\alpha = 0.99$ (average 3 days movement disruption). When animals returned to baseline behavior after a short disturbance ($\alpha = 0.05$), there was less regional displacement and thus more instances of behavioral disturbance over the course of a year. When animals returned to baseline behavior after a longer period ($\alpha = 0.99$), there were fewer instances of behavioral disturbances over the course of a year due to cumulative displacement from habitat near the sonar source.

Keen *et al.* (2021) reviewed 15+ years of PCoD modeling and identified the most critical factors for determining long-term impacts to populations. Critical factors include life-history traits, disturbance source characteristics, and environmental conditions. No specific model or quantitative assessment was proposed.

Methodology for Assessing Acoustic Impacts

Palmer *et al.* (2022) recorded North Atlantic right whale upcalls using 10 Marine Autonomous Recording Units deployed in Cape Cod Bay from February to May 2009. A modified equation was provided for determining the effective survey area, including a Lombard coefficient, for single sensor applications. The authors state manual annotation or verification is nearly always used to confirm automated detector outputs prior to near-real-time conservation measures due to limitations in automatic detector capabilities.

Aircraft Noise

Kuehne *et al.* (2020) measured in-air and underwater sound from low-altitude EA–18G Growler flights in the immediate vicinity of Ault Field at Naval Air Station Whidbey Island (NASWI). Data were collected by two in-air recorders and one hydrophone placed just off the runway at a depth of 30 meters. The underwater 10-flight average sound measurement was 134 ± 3 dB re 1 µPa rms in the highest 1-second window. The results showed that the peak frequency range of the Growler overflight noise both in air and underwater was between 50 and 1,000 Hz, which is typically a frequency range with high background noise underwater, particularly in areas with large amounts of vessel traffic (Erbe *et al.* 2012). The study did not include behavioral observations of wildlife, and the authors' conclusions about potential impacts to wildlife were unsupported by data from the study. In a separate effort, Kuehne and Olden (2020) relied on volunteers to identify military aircraft noise in recordings taken on land on the Olympic Peninsula. This study also did not examine impacts to or responses by wildlife to aircraft.

We reiterate that NMFS reviewed the Navy's analysis and conclusions that aircraft noise will not result in incidental take of marine mammals, and finds the analysis and conclusions complete and supportable, as stated in the 2018 HSTT final rule. Please see section 3.7 (Marine Mammals) of the 2018 HSTT FEIS/OEIS for additional information.

Conclusion for New Pertinent Science Since Publication of the 2020 HSTT Final Rule

Having considered the best scientific information available, specifically new relevant information published since the 2020 HSTT final rule, we have preliminarily determined that there is no new information that substantively affects our analysis of impacts on marine mammals and their habitat that appeared in the 2020 HSTT final rule, all of which remains applicable and valid for our assessment of the effects of the Navy's activities during the 7-year period of this rulemaking.

Estimated Take of Marine Mammals

This section indicates the number of takes that NMFS is proposing for authorization, which are based on the amount of take that NMFS anticipates could occur or is likely to occur, depending on the type of take and the methods used to estimate it, as described below. NMFS coordinated closely with the Navy in the development of their incidental take application and preliminarily agrees that the methods the Navy has put forth described herein, in the 2019 HSTT proposed rule, 2020 HSTT final rule, and in the 2018 HSTT proposed and final rules to estimate take (including the model, thresholds, and density estimates), and the resulting numbers are based on the best available science and appropriate for authorization, with the exception of that of humpback whales, discussed further below. The number and type of incidental takes that could occur or are likely to occur annually remain identical to those authorized in the 2018 HSTT regulations and 2020 HSTT regulations, with the exception of proposed takes by serious injury or mortality by vessel strike and harassment takes of humpback whale stocks in Southern California (due to the new stock structure).

Takes are predominantly in the form of harassment, but a small number of serious injuries or mortalities could

occur. For military readiness activities, the MMPA defines ''harassment'' as (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B harassment).

Proposed authorized takes would primarily be in the form of Level B harassment, as use of the acoustic and explosive sources (*i.e.,* sonar, air guns, pile driving, explosives) and is more likely to result in the disruption of natural behavior patterns to a point where they are abandoned or significantly altered (as defined specifically at the beginning of this section but referred to generally as behavioral disturbance) or TTS for marine mammals. There is also the potential for Level A harassment in the form of auditory injury and/or tissue damage (the latter from explosives only) to result from exposure to the sound sources utilized in training and testing activities. Additionally, serious injuries or mortalities of mysticetes (except for sei whales, minke whales, Bryde's whales, Central North Pacific stock of blue whales, Hawaii stock of fin whales, Western North Pacific stock of gray whales, and sperm whales) could occur through vessel strike. Proposed mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

Generally speaking, for acoustic impacts, NMFS estimates the amount and type of harassment by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals would experience behavioral disturbance or incur some degree of temporary or permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day or event; (3) the density or occurrence of marine mammals within these ensonified areas; and (4) and the number of days of activities or events.

Acoustic Thresholds

Using the best available science, NMFS, in coordination with the Navy, has established acoustic thresholds that identify the most appropriate received level of underwater sound above which marine mammals exposed to these sound sources could be reasonably expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered or to incur TTS (equated to Level B harassment) or permanent threshold shift (PTS) of some degree (equated to Level A harassment). Thresholds have also been developed to identify the pressure levels above which animals may incur non-auditory injury from exposure to pressure waves from explosive detonation.

We described the acoustic thresholds and the methods used to determine thresholds, none of which have changed, in detail in the *Acoustic Thresholds* section of the 2018 HSTT final rule; please see the 2018 HSTT final rule for detailed information. Further, in the 2020 HSTT final rule, we described new relevant information from the scientific literature since publication of the 2018 HSTT final rule. Since publication of the 2020 HSTT final rule, a number of additional studies have published, including several associated with TTS in harbor porpoises and seals (*e.g.,* Kastelein *et al.* 2020d; Kastelein *et al.* 2021a and 2021b; Sills *et al.* 2020). NMFS is aware of these recent papers, summarized above in the *New Pertinent Science Since Publication of the 2020 HSTT Final Rule* section. NMFS is currently working with the Navy to update NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing Version 2.0 (Acoustic Technical Guidance; NMFS 2018) to reflect relevant papers that have been published since the 2018 update on our 3–5 year update schedule in the Acoustic Technical Guidance. First, we note that the recent peer-reviewed updated marine mammal noise exposure criteria by Southall *et al.* (2019) provide identical PTS and TTS thresholds and weighting functions to those provided in NMFS' Acoustic Technical Guidance.

NMFS will continue to review and evaluate new relevant data as it becomes available and consider the impacts of those studies on the Acoustic Technical Guidance to determine what revisions or updates may be appropriate. However, any such revisions must undergo peer and public review before being adopted, as described in the Acoustic Technical Guidance methodology. While some of the relevant data may potentially suggest changes to TTS/PTS thresholds for some species, any such changes would not be expected to change the predicted take estimates in a manner that would change the necessary determinations supporting the issuance of these regulations, and the data and values used in this proposed rule reflect the best available science.

Navy's Acoustic Effects Model

The Navy proposes no changes to the Acoustic Effects Model as described in the 2018 HSTT final rule (and incorporated by reference in the 2020 HSTT final rule), and there is no new information that would affect the applicability or validity of the model. Please see the 2018 HSTT final and proposed rules and Appendix E of the 2018 HSTT FEIS/OEIS for detailed information.

Range to Effects

The Navy proposes no changes from the 2018 HSTT final rule (and subsequent 2020 HSTT final rule) to the type and nature of the specified activities to be conducted during the 7-year period analyzed in this proposed rule, including equipment and sources used and exercises conducted. NMFS has reviewed and will continue to review and evaluate new relevant data as it becomes available and consider the impacts of those studies on the Acoustic Technical Guidance to determine what revisions/updates may be appropriate. However, any such revisions must undergo peer and public review before being adopted, as described in the Acoustic Guidance methodology. While some of the relevant data may potentially suggest changes to TTS/PTS thresholds for some species (*e.g.,* Kastelein *et al.* (2020a) shows onset of TTS incurred by a harbor porpoise at higher received levels than would have been anticipated based on the existing criteria, while Kastelein *et al.* (2022a) shows onset of TTS in otariids in water at lower received levels than the existing criteria), our assessment suggests that any such changes would not be expected to change the predicted take estimates in a manner that would change the necessary determinations supporting the issuance of these regulations, and the data and values used in the 2018 HSTT final rule, 2020 HSTT final rule, and this proposed rule reflect the best available science. Therefore, the ranges to effects in this proposed rule are identical to those described and analyzed in the 2018 HSTT final rule and 2020 HSTT final rule, including received sound levels that may cause onset of significant behavioral response and TTS and PTS in hearing for each source type or explosives that may cause non-auditory injury. Please see the *Range to Effects* section and tables 24 through 40 of the 2018 HSTT final rule for detailed information.

Marine Mammal Density

The Navy proposes no changes to the methods used to estimate marine mammal density described in the 2018 HSTT final rule, and there is no new information that would affect the applicability or validity of these methods or change the results in a manner that would change the necessary determinations supporting the issuance of these regulations. The Navy's estimate of marine mammal density as described in the 2018 HSTT final rule remains valid, though, as described herein, NMFS has incorporated new information regarding humpback whale stock structure into its analysis. Please see the 2018 HSTT final rule, and below, for detailed information.

As noted above, NMFS regularly updates SARs, and in this rulemaking considers the 2022 final SARs (Carretta *et al.* 2023, Young *et al.* 2023). While these SARs contain updated information, the Navy's estimate of marine mammal density as described in the 2018 HSTT final rule remains valid for the following reasons. The Navy uses its Marine Species Density Database (NMSDD) for its analysis, which is derived from multiple sources, including but not limited to SARs. In contrast, for most cetacean species, the SAR is estimated using line-transect surveys or mark-recapture studies (*e.g.,* Barlow, 2010; Barlow and Forney, 2007; Calambokidis *et al.* 2008). The result provides one single abundance value for each species across broad geographic areas, but it does not provide information on the species density or concentrations within that area, and it does not estimate density for other timeframes or seasons that were not surveyed. A change in a stock's abundance indicated in a SAR does not necessarily indicate a change in that stock's density in any given area. Therefore, stocks in the HSTT Study Area with higher abundance estimates in the most recent SARs in comparison to the abundance estimates at the time that marine mammal densities were derived for the HSTT Study Area do not necessarily now occur in higher densities in the HSTT Study Area. For humpback whale, while the stock structure in the Pacific Ocean was revised in the 2022 final SARs, the discussion above remains true regarding density of humpback whales in the HSTT Study Area across all stocks.

Take Requests

As in the 2018 HSTT final rule and 2020 HSTT final rule, the Navy determined that the three stressors below could result in the incidental taking of marine mammals. NMFS has reviewed the Navy's data and analysis and determined that it is complete and accurate, and NMFS agrees that the following stressors have the potential to result in takes of marine mammals from the Navy's planned activities:

- Acoustics (sonar and other transducers; air guns; pile driving/extraction);
- Explosives (explosive shock wave and sound, assumed to encompass the risk due to fragmentation); and
- Physical Disturbance and Strike (vessel strike).

NMFS reviewed and agrees with the Navy's conclusion that acoustic and explosive sources have the potential to result in incidental takes of marine mammals by harassment, serious injury, or mortality. NMFS carefully reviewed the Navy's analysis and conducted its own analysis of vessel strikes, determining that the likelihood of any particular species of large whale being struck is quite low. However, as noted previously, in 2021, two separate U.S. Navy vessels struck unidentified large whales on two separate occasions, one whale in June 2021 and one whale in July 2021. In May 2023, the U.S. Navy struck a large whale, which based on available photos and video, NMFS and the Navy have determined was either a fin whale or sei whale. NMFS agrees that vessel strikes have the potential to result in incidental take from serious injury or mortality for certain species of large whales, and the Navy has specifically requested coverage for these species. Therefore, the likelihood of vessel strikes, and later the effects of the incidental take that is being proposed to be authorized, has been fully analyzed and is described below.

Regarding the quantification of expected takes from acoustic and explosive sources (by Level A and Level B harassment, as well as mortality resulting from exposure to explosives), the number of takes are based directly on the level of activities (days, hours, counts, *etc.,* of different activities and events) in a given year. In the 2020 HSTT final rule, take estimates across the 7 years were based on the Navy conducting 4 years of a representative level of activity and 3 years of maximum level of activity. As in the 2020 HSTT final rule, the Navy proposes to use the maximum annual level to calculate annual takes (which would remain identical to what was determined in the 2020 HSTT final rule, with the exception of attribution of takes to humpback whale stocks), and the sum of all years (4 representative and 3 maximum) to calculate the 7-year totals for this rulemaking.

The quantitative analysis process used for the 2018 HSTT FEIS/OEIS and the 2017 and 2019 Navy applications to estimate potential exposures to marine mammals resulting from acoustic and explosive stressors is detailed in the technical report titled *Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing* (U.S. Department of the Navy, 2018). The Navy Acoustic Effects Model estimates acoustic and explosive effects without taking mitigation into account; therefore, the model overestimates predicted impacts on marine mammals within mitigation zones. To account for mitigation for marine species in the take estimates, the Navy conducts a quantitative assessment of mitigation. The Navy conservatively quantifies the manner in which procedural mitigation is expected to reduce the risk for model-estimated PTS for exposures to sonars and for model-estimated mortality for exposures to explosives, based on species sightability, observation area, visibility, and the ability to exercise positive control over the sound source. Where the analysis indicates mitigation would effectively reduce risk, the model-estimated PTS are considered reduced to TTS and the model-estimated mortalities are considered reduced to injury. For a complete explanation of the process for assessing the effects of mitigation, see the 2017 Navy application and the *Take Requests* section of the 2018 HSTT final rule. The extent to which the mitigation areas reduce impacts on the affected species and stocks is addressed separately in the *Preliminary Analysis and Negligible Impact Determination* section.

No changes have been made to the quantitative analysis process to estimate potential exposures to marine mammals resulting from acoustic and explosive stressors and calculate take estimates, with the exception of take of humpback whales to account for the change in stock structure. Please see the documents described in the paragraph above, the 2018 HSTT proposed rule, the 2018 HSTT final rule, and below for detailed descriptions of these analyses. While Oedekoven and Thomas (2022) suggest that detection of marine mammals is less certain than previously assumed at certain distances, NMFS has independently evaluated the Navy's method for application of mitigation effectiveness in estimating take and agrees that it is appropriately applied to augment the model in the prediction and authorization of injury and

mortality as described in the rule, including after consideration of Oedekoven and Thomas (2022). In summary, we believe the Navy's methods, including the method for incorporating mitigation and avoidance, are the most appropriate methods for predicting PTS, TTS, and behavioral disturbance. But even with the consideration of mitigation and avoidance, given some of the more conservative components of the methodology (*e.g.,* the thresholds do not consider ear recovery between pulses), we would describe the application of these methods as identifying the maximum number of instances in which marine mammals would be reasonably expected to be taken through PTS, TTS, or behavioral disturbance.

Summary of Requested Take From Training and Testing Activities

Based on the methods discussed in the previous sections and the Navy's model and quantitative assessment of mitigation, the Navy provided its take estimate and request for authorization of takes incidental to the use of acoustic and explosive sources for training and testing activities both annually (based on the maximum number of activities that could occur per 12-month period) and over the 7-year period in its 2019 rulemaking/LOA application. With the exception of changes to humpback whale take, described below, annual takes (based on the maximum number of activities that could occur per 12-month period) from the use of acoustic and explosive sources are identical to those presented in tables 41 and 42 and in the *Explosives* subsection of the *Take Requests* section of the 2018 HSTT final rule. The 2022 Navy application includes the Navy's updated take estimate and request for take by vessel strike due to vessel movement in the HSTT Study Area. NMFS reviewed the Navy's data, methodology, and analysis and determined that it was complete, but NMFS has reanalyzed the potential for vessel strike following the May 2023 strike, as described in the Estimated Take from Vessel Strikes and Explosives by Serious Injury or Mortality section. NMFS agrees that the estimates for incidental takes by harassment from all sources as well as the incidental takes by serious injury or mortality from explosives requested for authorization are the maximum number of instances in which marine mammals are reasonably expected to be taken at the time of Navy's request, and continues to be for all stocks other than humpback whales, for which changes are described below. NMFS also agrees that the takes by serious injury or mortality as a result of vessel strikes could occur. Note that, consistent with the 2020 HSTT final rule, the total amount of estimated incidental take from acoustic and explosive sources over the total 7-year period covered by the 2019 Navy application is less than the annual total multiplied by seven. Although the annual estimates are based on the maximum number of activities per year and therefore, the maximum possible estimated takes, the 7-year total take estimates are based on the sum of 3 maximum years and 4 representative years, with the exception of humpback whale stocks that occur in SOCAL for which 7-year total take is conservatively estimated as the annual total multiplied by seven. Not all activities occur every year. Some activities would occur multiple times within a year, and some activities would occur only a few times over the course of the 7-year period. Using 7 years of the maximum number of activities each year would vastly overestimate the amount of incidental take that would occur over the 7-year period where the Navy knows that it will not conduct the maximum number of activities each and every year for the 7 years.

As described above in the Description of Marine Mammals and Their Habitat in the Area of the Specified Activities section, the 2022 final SARs include a revision to the humpback whale stock structure in the Pacific Ocean. In the 2020 HSTT final rule, NMFS authorized take of the CA/OR/WA stock and Central North Pacific stock of humpback whale. Given the revised stock structure, in this proposed rule, NMFS has reanalyzed the potential for take of each stock of humpback whale and determined that the Central America/Southern Mexico-CA/OR/WA, Mainland Mexico—CA/OR/WA stock, and Hawaii stocks are likely to be taken by the Navy's activities.

Under the new stock structure, the Hawaii stock (Hawaii DPS) is the only stock that would occur in Hawaii. Therefore, the Hawaii stock of humpback whale is the only humpback whale stock anticipated to be taken by the Navy's activities in the HRC, and all takes of the Central North Pacific stock of humpback whale that were authorized in the 2020 HSTT final rule are anticipated to be of individuals from the new Hawaii stock. In SOCAL, the takes of individuals from the former CA/OR/WA stock that were authorized in the 2020 HSTT final rule are anticipated to be of individuals from the new Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stock.

Please see the Estimated Harassment Take from Testing Activities and Estimated Harassment Take from Training Activities sections below for the estimated annual and 7-year total number and type of Level A harassment and Level B harassment for each humpback whale stock.

Estimated Harassment Take From Training Activities

For training activities, table 11 of the 2020 HSTT final rule summarizes the Navy's take estimate and request in the 2019 Navy application and the maximum amount and type of Level A harassment and Level B harassment that NMFS concurred is reasonably expected to occur by species or stock and authorized in the 2020 HSTT LOA. In the 2022 Navy application, the Navy requested no change to this authorized take, though as described above, NMFS has since published the 2022 final SARs, which include a revision to humpback whale stock structure. For the estimated 7-year total amount and type of Level A harassment and Level B harassment, see table 11 of the 2020 HSTT final rule for all species other than humpback whale. For the estimated amount and type of Level A harassment and Level B harassment annually, see table 41 in the 2018 HSTT final rule for all species other than humpback whale. Note that take by Level B harassment includes both behavioral disturbance and TTS. Navy Figures 6–12 through 6–50 in Section 6 of the 2017 Navy application illustrate the comparative amounts of TTS and behavioral disturbance for each species annually, noting that if a modeled marine mammal was ''taken'' through exposure to both TTS and behavioral disturbance in the model, it was recorded as a TTS.

TABLE 2—HUMPBACK WHALE TAKE FROM ACOUSTIC AND EXPLOSIVE EFFECTS FOR ALL TRAINING ACTIVITIES IN THE HSTT STUDY AREA

Species	Stock	Annual		7-Year total	
		Level B harassment	Level A harassment	Level B harassment	Level A harassment
Humpback whale [a]	Hawaii	5,604	1	34,437	12
	Central America/Southern Mexico-CA/OR/WA (Central America DPS).	585	0	[b] 4,095	0
	Mainland Mexico—CA/OR/WA (Mexico DPS).	669	1	[b] 4,683	7

[a] Combined, takes from the Central America/Southern Mexico- CA/OR/WA stock and the Mainland Mexico CA/OR/WA stock are equal to takes of the CA/OR/WA stock authorized in the 2020 HSTT final rule.
[b] Unlike other species and stocks, for the Central America/Southern Mexico-CA/OR/WA stock and Mainland Mexico-CA/OR/WA stock, NMFS estimated the 7-year take by Level B harassment by multiplying the annual estimated take by seven. However, between the two stocks, NMFS does not anticipate that the total number of takes by Level B harassment across all 7 years would exceed the 7,962 takes by Level B harassment from training activities that were authorized for the CA/OR/WA stock of humpback whales in the 2020 HSTT final rule.

Estimated Harassment Take From Testing Activities

For testing activities, table 12 of the 2020 HSTT final rule summarizes the Navy's take estimate and request in the 2019 Navy application and the maximum amount and type of Level A harassment and Level B harassment that NMFS concurred is reasonably expected to occur by species or stock and authorized in the 2020 HSTT LOA. In the 2022 Navy application, the Navy requested no change to this authorized take. For the estimated 7-year total amount and type of Level A harassment and Level B harassment, see table 12 of the 2020 HSTT final rule. For the estimated amount and type of Level A harassment and Level B harassment annually, see table 42 in the 2018 HSTT final rule. Note that take by Level B harassment includes both behavioral disturbance and TTS. Navy Figures 6–12 through 6–50 in section 6 of the 2017 Navy application illustrate the comparative amounts of TTS and behavioral disturbance for each species annually, noting that if a modeled marine mammal was ''taken'' through exposure to both TTS and behavioral disturbance in the model, it was recorded as a TTS.

TABLE 3—HUMPBACK WHALE TAKE FROM ACOUSTIC AND EXPLOSIVE EFFECTS FOR ALL TESTING ACTIVITIES IN THE HSTT STUDY AREA

Species	Stock	Annual		7-Year total	
		Level B harassment	Level A harassment	Level B harassment	Level A harassment
Humpback whale [a]	Hawaii	3,522	2	23,750	19
	Central America/Southern Mexico—CA/OR/WA.	291	0	[b] 2,037	0
	Mainland Mexico—CA/OR/WA	449	0	[b] 3,143	0

[a] Combined, takes from the Central America/Southern Mexico-CA/OR/WA stock and the Mainland Mexico CA/OR/WA stock are equal to takes of the CA/OR/WA stock authorized in the 2020 HSTT final rule.
[b] Unlike other species and stocks, for the Central America/Southern Mexico-CA/OR/WA stock and Mainland Mexico-CA/OR/WA stock, NMFS estimated the 7-year take by Level B harassment by multiplying the annual estimated take by seven. However, between the two stocks, NMFS does not anticipate that the total number of takes by Level B harassment across all 7 years would exceed the 4,961 takes by Level B harassment from testing activities that were authorized for the CA/OR/WA stock of humpback whales in the 2020 HSTT final rule.

Estimated Take From Vessel Strikes and Explosives by Serious Injury or Mortality
Vessel Strike

Vessel strikes from commercial, recreational, and military vessels are known to affect large whales and have resulted in serious injury and fatalities to cetaceans (Abramson *et al.* 2011; Berman-Kowalewski *et al.* 2010; Calambokidis, 2012; Douglas *et al.* 2008; Laggner, 2009; Lammers *et al.* 2003; Van der Hoop *et al.* 2012; Van der Hoop *et al.* 2013; Crum *et al.* 2019). Records of collisions date back to the early 17th century, and the worldwide number of collisions appears to have increased steadily during recent decades (Laist *et al.* 2001; Ritter 2012) due to increases in the number and speed of large vessels, increased reporting of strikes, and increased abundance of some large whales (Ransome *et al.* 2021), among other factors.

Numerous studies of interactions between surface vessels and marine mammals have demonstrated that free-ranging marine mammals often, but not always (*e.g.,* McKenna *et al.* 2015; Smultea *et al.* 2022; Szesciorka *et al.* 2019), engage in avoidance behavior when surface vessels move toward them. It is not clear whether these responses are caused by the physical presence of a surface vessel, the underwater noise generated by the vessel, or an interaction between the two (Amaral and Carlson, 2005; Au and Green, 2000; Bain *et al.* 2006; Bauer 1986; Bejder *et al.* 1999; Bejder and Lusseau, 2008; Bejder *et al.* 2009; Bryant *et al.* 1984; Corkeron, 1995; Erbe, 2002; Félix, 2001; Goodwin and Cotton, 2004; Lemon *et al.* 2006; Lusseau, 2003; Lusseau, 2006; Magalhaes *et al.* 2002; Nowacek *et al.* 2001; Richter *et al.* 2003; Scheidat *et al.* 2004; Simmonds, 2005; Watkins, 1986; Williams *et al.* 2002; Wursig *et al.* 1998). Several authors suggest that the noise generated during vessel movement is probably an important factor (Blane and Jaakson, 1994; Evans *et al.* 1992; Evans *et al.* 1994). Water disturbance may also be a factor. These studies suggest that the behavioral responses of marine mammals to surface vessels are similar to their behavioral responses to

predators. Avoidance behavior is expected to be even stronger in the subset of instances during which the Navy is conducting training or testing activities using active sonar or explosives.

The marine mammals most vulnerable to vessel strikes are those that spend extended periods of time at the surface to restore oxygen levels within their tissues after deep dives (*e.g.,* sperm whales). In addition, some baleen whales seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.* 2004). These species are primarily large, slow-moving whales.

Some researchers have suggested the relative risk of a vessel strike can be assessed as a function of animal density and the magnitude of vessel traffic (*e.g.,* Fonnesbeck *et al.* 2008; Vanderlaan *et al.* 2008). Differences among vessel types also influence the probability of a vessel strike. The ability of any ship to detect a marine mammal and avoid a collision depends on a variety of factors, including environmental conditions, ship design, size, speed, and ability and number of personnel observing, as well as the behavior of the animal. Vessel speed, size, and mass are all important factors in determining if injury or death of a marine mammal is likely due to a vessel strike. For large vessels, speed and angle of approach can influence the severity of a strike. For example, Vanderlaan and Taggart (2007) found that between vessel speeds of 8.6 and 15 kn (15.9 and 27.8 km per hour), the probability that a vessel strike is lethal increases from 0.21 to 0.79. Large whales also do not have to be at the water's surface to be struck. Silber *et al.* (2010) found when a whale is below the surface (about one to two times the vessel draft), there is likely to be a pronounced propeller suction effect. This suction effect may draw the whale into the hull of the ship, increasing the probability of propeller strikes.

There are some key differences between the operation of military and non-military vessels, which make the likelihood of a military vessel striking a whale lower than some other vessels (*e.g.,* commercial merchant vessels). Key differences include:

- Many military ships have their bridges positioned closer to the bow, offering better visibility ahead of the ship (compared to a commercial merchant vessel);
- There are often aircraft associated with the training or testing activity (which can serve as Lookouts), which can more readily detect cetaceans in the vicinity of a vessel or ahead of a vessel's present course before crew on the vessel would be able to detect them;
- Military ships are generally more maneuverable than commercial merchant vessels, and if cetaceans are spotted in the path of the ship, could be capable of changing course more quickly;
- The crew size on military vessels is generally larger than merchant ships, allowing for stationing more trained Lookouts on the bridge. At all times when vessels are underway, trained Lookouts and bridge navigation teams are used to detect objects on the surface of the water ahead of the ship, including cetaceans. Additional Lookouts, beyond those already stationed on the bridge and on navigation teams, are positioned as Lookouts during some training events; and
- When submerged, submarines are generally slow moving (to avoid detection), and therefore, marine mammals at depth with a submarine are likely able to avoid collision with the submarine. When a submarine is transiting on the surface, there are Lookouts serving the same function as they do on surface ships.

Vessel strike to marine mammals is not associated with any specific training or testing activity but is rather a limited and sporadic, but possible, accidental result of Navy vessel movement within the HSTT Study Area or while in transit.

In 2009, the Navy began implementing additional mitigation measures to further reduce the likelihood of vessel strikes. Prior to the recent strikes in 2021 and 2023, there were two recorded U.S. Navy vessel strikes of large whales in the HSTT Study Area between 2009 and April 2021, a period of approximately 12 years.

Since 2021 there have been five documented strikes of large whales in SOCAL by naval vessels, three by the U.S. Navy and two by the Royal Australian Navy. As stated previously, the U.S. Navy struck a large whale in waters off Southern California in May 2023. Based on available photos and video, NMFS and the Navy have determined this whale was either a fin whale or sei whale. The U.S. Navy struck two unidentified large whales during the months of June and July 2021, and prior to that, on May 7, 2021, the Royal Australian Navy HMAS Sydney, a 147.5 m (161.3 yd) Hobart Class Destroyer, struck and killed two fin whales (a mother and her calf) while operating within SOCAL. In the case of the Royal Australian Navy strike, the carcasses were first sighted under the bow of the vessel while it was approaching the Naval Base in San Diego. The whales had been pinned to a sonar dome in the front of the vessel due to the force of water as the ship was underway. Based on interviews with HMAS Sydney personnel, the most likely time of impact with the two whales would have been around 6:25 a.m. when the vessel was located near Cortes Bank, and visibility was poor. The reported vessel speed at the estimated time of strike was 9 kn (16.7 km per hour). One minute before the estimated strike time a lookout reported whales off the starboard bow. The officer on-watch verbally acknowledged the report, slowed speed, and visually tracked the whales passing clear down the starboard side until they were clear of the ship. The morning of the strike, the HMAS Sydney was getting into position to participate in a U.S. Navy-led exercise later that day. Of note, throughout the remainder of the day visibility was poor and the vessel had implemented mitigation measures in multiple instances due to whale occurrence. In addition to being the only documented occurrence of a foreign military vessel strike of a large whale within the HSTT Study Area, the HMAS Sydney vessel strike was also somewhat unique, as compared to other reported military vessel strikes, in that two whales were apparently struck at one time, and both remained pinned to the front of the vessel until the vessel approached the port.

On June 29, 2021, a U.S. Navy cruiser struck an unknown whale species approximately 95 nmi west of San Diego. The ship was returning from Hawaii, heading to a rendezvous with a fuel replenishment vessel (oiler) for an Underway Replenishment. Off-duty sailors noticed a group of whales approaching the ship from the port quarter (*i.e.,* left rear of the ship), an area unique to cruisers with some equipment structures blocking close aboard sight. The first indication of a whale within the 500-yd mitigation zone immediately prior to the strike was when an off-duty sailor on the flight deck witnessed the whale briefly surface on the aft port quarter before diving. Shortly after this occurred blood was noticed in the wake, and a floating whale body was eventually observed behind the ship. The ship's speed was 25 kn (46.3 km per hour) at the estimated time the strike occurred. The Navy also noted that, on the morning before the strike occurred, the ship had maneuvered several times to avoid whale blows beyond the 500-yd (457.2 m) mitigation zone, closer to 1,000 yd (914.4 m).

On July 11, 2021, a U.S. Navy cruiser struck an unknown whale species

approximately 90 nmi (166.7 km) south-southwest of San Diego. The vessel was a participant in a MTE (Large Integrated Anti-Submarine Warfare—Composite Unit Training Exercise) within the SOCAL portion of the action area. The vessel was maneuvering for pending flight operations to receive an inbound helicopter. At 2:27 p.m., the starboard lookout sighted what they believed to be a whale crossing immediately under the vessel's bow. The conning officer attempted to maneuver the vessel by turning to port but internal watchstanders subsequently felt the ship shudder aft. The vessel's combat center observed a red slick 600 yd (548.6 m) astern on a flight deck camera and a brief surfacing of the whale itself, but no carcass was observed. There had not been any sightings of large whales off the bow leading up to the incident. Although the ship was traveling at 25–30 kn (46.3–55.6 km per hour) one hour before the estimated strike time, at ten minutes before, the vessel changed course and reduced its speed to 17 kn (31.5 km per hour). These 2021 incidents were the first known U.S. Navy vessel strikes in the HSTT Study Area since 2009.

On May 20, 2023, a U.S. Navy aircraft carrier was at sea conducting independent, unit-level flight training for the embarked airwing approximately 70 nmi west of San Diego. Training exercises concluded for the day at approximately 7:44 p.m. local time. Navy personnel discovered a whale impinged on the bow of the vessel at approximately 8:00 p.m. local time. The vessel was traveling at approximately 5 kn and had recently made a turn to reset position for the evening when the Navy personnel discovered the whale. Navy personnel captured video and photos of the carcass, and based on those images, NMFS and the Navy have determined this whale was either a fin whale or sei whale; the two species are very similar morphologically and are difficult to distinguish from one another at sea. Navy personnel stopped the vessel to allow lack of momentum to dislodge the carcass from the bow, and based on lack of further observations after the carcass dislodged, it is believed to have sunk around 9:30 p.m. local time. Navy personnel on board the vessel reported that they did not feel an impact from striking the whale. Prior to the strike, between 6:45 p.m. and 7:45 p.m., the forward Lookouts on the vessel observed two whales crossing the vessel's bow but did not provide a distance between the vessel and the whales. One Lookout reported seeing the blow and the other reported seeing 'humps' (presumably the dorsal of the animal). Both whales were sighted past the ship's course to the northwest. Within the same time window, one of the aft Lookouts observed a single whale swimming parallel to the ship and soon passed astern of the ship. During the same time, independent of the sightings and for general movement reasons, the ship changed speed from 17 knots to 10 knots at 7:22 p.m.

For the same reasons listed above describing why the likelihood of a military vessel striking a whale is lower than that of some other vessels striking whales, it is also highly unlikely that a Navy vessel would strike a whale, dolphin, porpoise, or pinniped without detecting it. Specifically, Navy ships have Lookouts, including on the forward part of the ship that can visually detect a hit animal in the event ship personnel do not feel the strike (which has occurred). Accordingly, NMFS is confident that the Navy's reported strikes are accurate and appropriate for use in the analysis. Navy's strict internal procedures and mitigation requirements include reporting of any vessel strikes of marine mammals, and the Navy's discipline, extensive training (not only for detecting marine mammals, but for detecting and reporting any potential navigational obstruction), and strict chain of command give NMFS a high level of confidence that all strikes actually get reported.

As noted above, the 2021 Royal Australian Navy vessel strikes were first observed when the vessel came to port at Naval Base San Diego. However, such a scenario is unlikely on a U.S. Navy vessel. While U.S. Navy cannot speculate on the configurations of other ships bows and even sonar dome specifications (that may be at the bow), the Navy believes it would be implausible for a marine mammal to become lodged on the sonar dome of a U.S. Navy ship and remain undetected due to a technological standard operating procedure. Sonar domes on U.S. Navy ships have a pressurized rubber window that maintains 150 pound-force per square inch (PSI) through the ship's fire main. If anything affects the pressure, an alarm sounds in the sonar control room. In the event of a whale strike in that location, this alarm would alert personnel that something hit the sonar dome. Further, the shape, hydrodynamic design, construction using a non-abrasive material, and regular hull cleaning procedures to remove barnacles and other growth on U.S. Navy ships also make it unlikely that a whale would become lodged and remain undetected on a U.S. Navy ship's bow or even sonar dome. While in the case of the May 2023 strike, described above, a whale also became lodged on the ship's bow, the aircraft carrier that struck the whale does not have active or passive sonar capabilities (*i.e.,* no sonar dome), nor does it have a bulbous bow, and the whale was more quickly discovered by Navy personnel.

In order to better account for the accidental nature of vessel strikes to large whales in general and the potential risk from U.S. Navy vessel movement within the HSTT Study Area during the remaining period of the HSTT rule in particular, the Navy requested the HSTT rule be modified to authorize additional incidental takes by vessel strike based on probabilities derived from a Poisson distribution using vessel strike data between 2009–2021 in the HSTT Study Area (the time period from when current mitigations were instituted until the Navy conducted the analysis for the 2022 Navy application), as well as historical at-sea days in the HSTT Study Area from 2009–2015 and estimated at-sea days for the period from 2016 to 2025 covered by the current regulations. This distribution predicted the probabilities of a specific number of strikes (n=0, 1, 2, *etc.*) over the remaining period of the regulations at the time of the Navy's analysis (2022–2025).

The Navy used the two fin whale strikes (2009) and two unidentified large whale strikes (2021) in their calculations to determine the number of strikes likely to result from its activities over the remaining 3 years of the rule (2023–2025, although worldwide strike information from all Navy activities and other sources was used to inform the species that may be struck). The Navy evaluated data beginning in 2009 as that was the start of the Navy's Marine Species Awareness Training and adoption of additional mitigation measures to address vessel strike, which will remain in place along with additional and modified mitigation measures during the 7 years of this rulemaking. From this analysis, the Navy concluded that there was a 27 percent chance that zero whales would be struck by Navy vessels over the remaining period of the rule (which, at the time that the application was submitted, was 4 years), and a 35, 23, and 10 percent chance that one, two, or three whales, respectively, would be struck over the remaining 4 years of the rule. Therefore, the Navy estimated that there was some probability that the Navy could strike, and take by serious injury or mortality, up to three large whales incidental to training and testing

activities within the HSTT Study Area over what would have been the remaining 4 years of the current authorization, and the Navy requested authorization of two additional takes of large whales by serious injury or mortality by vessel strike, beyond the three takes authorized by the 2020 HSTT final rule (85 FR 41780, July 10, 2020).

NMFS has since updated this analysis to reflect that an additional strike of an unidentified large whale occurred in May 2023 (either a fin whale or sei whale, as stated above) and that additional time has passed since the Navy submitted the 2022 Navy application. Based on further discussions with the Navy, NMFS has also updated the way it calculated at-sea days. This is a different manner of calculating at-sea days for the purposes of the strike analysis rather than a change in Navy's activity levels. For 2010–2015, the at-sea days used in NMFS' calculation reflected historic at-sea days in the HSTT action area based on positional vessel data records (Mintz, 2016). While the actual annual at-sea days from 2016-present are currently classified, NMFS' updated calculation reflects an extrapolation of the 2010–2015 at-sea days (using the formula $y = -64x + 131555$) to estimate the number of at-sea days in 2016 (Navy, 2022). The number of at-sea days derived for 2016 was 2,056 at-sea days, which reflects the downward trend in HSTT vessel activity from 2010–2015. Since we do not have sufficient information to say whether or not this downward trend continued for the years 2017–2022, we conservatively estimate the average over these years was the same as the 2016 extrapolated value of 2,056 at-sea days. This analysis only included at-sea days for Navy warships greater than 65 feet (*i.e.,* destroyers are the smallest ship class included). Navy vessels smaller than 65 feet have never reported a whale strike in the Pacific, and therefore, we consider it unlikely that this would occur in the remaining 2.5 years of the regulations.

TABLE 4—HSTT 2009 THROUGH MID-2023 AT-SEA DAYS USED FOR THE VESSEL STRIKE PROBABILITY CALCULATION

Year	At-sea days	Derivation
2009	4,233	Estimated average based on 2010–2015 data.
2010	5,207	Based on positional vessel data.
2011	4,483	Based on positional vessel data.
2012	4,081	Based on positional vessel data.
2013	4,041	Based on positional vessel data.
2014	4,272	Based on positional vessel data.
2015	3,311	Based on positional vessel data.
2016	2,056	Extrapolated from 2010–2015 regression.
2017	2,056	Extrapolated from 2010–2015 regression.
2018	2,056	Extrapolated from 2010–2015 regression.
2019	2,056	Extrapolated from 2010–2015 regression.
2020	2,056	Extrapolated from 2010–2015 regression.
2021	2,056	Extrapolated from 2010–2015 regression.
2022	2,056	Extrapolated from 2010–2015 regression.
2023 (first half of year)	1,028	Extrapolated from 2010–2015 regression, then reduced by half.
2009–Mid-2023 total	45,048	

NMFS then used the number of past Navy vessel strikes and the at-sea days to calculate a vessel strike rate for 2009 through mid-2023. The estimated total number of Navy at-sea days (for vessels greater than 65 feet) for 2009 through mid-2023 was 45,048 days. Dividing the five known strikes during that period by the at-sea days (*i.e.,* 5 strikes/45,048 at-sea days) results in a strike rate of 0.000111 strikes per day.

As described above, NMFS conservatively assumed that the average number of at-sea days from mid-2023 through 2025 (the remaining period of the regulations) will be the same as the 2016 extrapolated value of 2,056. Therefore, the estimated at-sea days within the action area for the period from mid-2023 through 2025 is 5,140 days. NMFS multiplied the historic daily strike rate by the estimated at-sea days from mid-2023 through 2025 (0.000111 strikes per day × 5,140 days) to estimate the number of whale strikes anticipated during that period. This calculation predicts an estimated 0.57 strikes over the remaining 2.5 years of the regulations (mid-2023 through 2025).

As explained above, according to the U.S. Navy, the May 2021 vessel strike of two fin whales by a Royal Australian Navy vessel did not occur while that vessel was participating in a U.S. Navy-led training exercise, and the strike of those two fin whales is not included in the estimated take by vessel strike calculation. Instead, as noted below, NMFS considered the 2021 vessel strike by the Royal Australian Navy along with other strike information when determining which species could be among the estimated large whales struck.

NMFS used a Poisson distribution to derive the probabilities of a specific number of strikes (n=0, 1, 2, *etc.*) from mid-2023 through 2025, given the estimated 0.57 strikes during that period. NMFS' probability analysis concluded that there is a 57 percent chance that zero whales would be struck by U.S. Navy vessels over the remaining period of the rule (mid-2023 through 2025), and a 32, 9, and 2 percent chance that one, two, or three whales, respectively, would be struck over the remaining 2.5 years of the regulations. Further, there is an estimated 11 percent chance that the Navy would strike more than one large whale over the remaining period of the rule (mid-2023 through 2025). We have assessed these probabilities and determined that the strike up to two large whales could occur over the remaining duration of the regulations, for a total of five takes by serious injury or mortality of large whales by vessel strike total over the 7-year duration of the regulations (three takes authorized in the 2020 HSTT final rule (85 FR 41780, July 10, 2020) which have occurred, plus two additional takes).

In addition to the reasons listed above that make it unlikely that the Navy will hit a large whale (more maneuverable ships, larger crew, *etc.*), vessel strike of dolphins, small whales, porpoises, and pinnipeds is considered very unlikely. Dating back more than 20 years and for as long as it has kept records, the Navy has no records of any small whales or

pinnipeds being struck by a vessel as a result of Navy activities. Over the same time period, NMFS and the Navy have only one record of a dolphin being struck by a vessel as a result of Navy activities. The dolphin was accidentally struck by a Navy small boat in fall 2021 in Saint Andrew's Pass, Florida. The smaller size and maneuverability of dolphins, small whales, and pinnipeds generally make such strikes very unlikely. Other than this one reported strike of a dolphin in 2021, NMFS has never received any reports from other LOA or Incidental Harassment Authorization holders indicating that these species have been struck by vessels. In addition, worldwide vessel strike records show little evidence of strikes of these groups from the shipping sector and larger vessels, and the majority of the Navy's activities involving faster-moving vessels (that could be considered more likely to hit a marine mammal) are located in offshore areas where smaller delphinid, porpoise, and pinniped densities are lower. Based on this information, NMFS concurs with the Navy's assessment and recognizes the potential for (and is proposing for authorization) incidental take by vessel strike of large whales only (*i.e.,* no dolphins, small whales, porpoises, or pinnipeds) over the course of the 7-year regulations from training and testing activities as discussed below.

Next, after determining that take of up to five large whales could occur, NMFS considered which species could be among the five large whales struck. As noted in the 2018 HSTT proposed and final rules, the 2019 HSTT proposed rule, and 2020 HSTT final rule, in the 2017 Navy rulemaking/LOA application, the Navy initially considered a weight of evidence approach that considered relative abundance, historical strike data over many years, and the overlap of Navy activities with the stock distribution in their request. NMFS updated this analysis to consider several factors, in addition to the overlap of Navy activities with stock distribution: (1) The relative likelihood of striking one stock versus another based on available strike data from all vessel types as denoted in the Carretta *et al.* (2021; referenced in the Pacific SARs), the Pacific and Alaska SARs (Carretta *et al.* 2023 and Young *et al.* 2023), and unpublished NMFS vessel strike data for 2019–2021; and (2) whether the Navy has ever struck an individual from a particular species or stock in the HSTT Study Area, and if so, how many times. NMFS did not consider relative abundance, as was considered in previous analyses, given that the relative abundance of a stock does not necessarily inform its occurrence in a specific area. Further, NMFS did not consider the historical strike data from older years (prior to 2015), given that more recent data is more relevant to determining occurrence of, and strike risk to, various stocks. NMFS updated the analysis with NMFS' vessel strike probability analysis for the remaining 2.5 years of the rule and included new/updated vessel strike data from the SARs and NMFS records for California and Hawaii.

To address number (1) above, for SOCAL, NMFS compiled information from Carretta *et al.* (2021) and unpublished NMFS vessel strike data for 2020–2021 for California on known annual rates of large whale serious injury or mortality from vessel collisions (this data includes the strike of 2 fin whales by the Royal Australian Navy in 2021, but does not include Navy strikes in 2021 and 2023 because the species struck is not known). Use of Carretta *et al.* (2021) rather than the Pacific SAR allows NMFS to separate strikes that occurred in California from strikes to the same stocks that occurred in other locations. For the HRC, NMFS compiled information from the Pacific and Alaska SARs and unpublished NMFS vessel strike data for 2019–2021 for Hawaii on known annual rates of large whale serious injury or mortality from vessel collisions. The annual rates of large whale serious injury or mortality from vessel collisions from those sources help inform the relative susceptibility of large whale species to vessel strike in SOCAL and the HRC; therefore, we considered only reported strikes where the species struck was identified with sufficient certainty (*i.e.,* ''known strikes''). Additionally, the M/SI in the 2022 SAR considers modeled takes for some, but not most species and stocks (*i.e.,* M/SI for humpback whale includes modeled takes from Rockwood *et al.* (2017)). Using known strike data for all species and stocks allows us to consider-like metrics for this comparative analysis. (Note we rely on the M/SI estimates from the 2022 SAR in our Negligible Impact Analysis. We also consider modeled takes of species from Rockwood *et al.* (2017) in table 7). We summed the annual rates of serious injury or mortality from vessel collisions in California and Hawaii as calculated above and then divided each species' annual rate by this sum to get the proportion of strikes for each species/stock (table 5).

TABLE 5—ANNUAL RATES OF SERIOUS INJURY AND MORTALITY FROM VESSEL STRIKE AND PERCENTAGE OF TOTAL STRIKES BY SPECIES IN SOCAL AND THE HRC

ESA status	Species	Stock	SOCAL annual known strikes (2015–2021)	HRC annual known strikes (2015–2021)	Percentage of total annual strikes
Listed	Blue whale	Central North Pacific		0	0.0
		Eastern North Pacific	0.57		6.5
	Fin whale [a]	California, Oregon, & Washington	1.57		17.8
		Hawaiian		0	0.0
	Humpback whale	Central America/Southern Mexico-CA/OR/WA (Central America DPS).	[b] 1		11.3
		Mainland Mexico-CA/OR/WA (Mexico DPS).			
	Sei whale	Eastern North Pacific	0.14		1.6
		Hawaiian		0	0.0
	Gray whale	Western North Pacific	0		0.0
	Sperm whale	California, Oregon, & Washington	0		0.0
		Hawaiian		0	0.0
Not listed	Gray whale	Eastern North Pacific	2.14		24.3
	Bryde's whale	ETP stock	0		0.0
		Hawaiian		0	0.0
	Minke whale	CA/OR/WA	0		0.0

TABLE 5—ANNUAL RATES OF SERIOUS INJURY AND MORTALITY FROM VESSEL STRIKE AND PERCENTAGE OF TOTAL STRIKES BY SPECIES IN SOCAL AND THE HRC—Continued

ESA status	Species	Stock	SOCAL annual known strikes (2015–2021)	HRC annual known strikes (2015–2021)	Percentage of total annual strikes
		Hawaiian	.....	0	0.0
	Humpback whale	Hawaii (Hawaii DPS)	.....	3.4	38.5
Total	.....	.....	8.82		.....

[a] This includes the two fin whales struck by the Royal Australian Navy in May 2021.
[b] This strike occurred to an individual of the CA/OR/WA stock under the previous stock structure. As such, in its analysis, NMFS assumed that this strike could have been of either stock.

To inform the likelihood of striking a particular species of large whale, we multiplied the percent of total annual strikes for a given species in table 5, by the total percent likelihood of striking at least one whale during the remaining period of the rule (2023–2025; *i.e.,* 43 percent, as described by the probability analysis above). We also calculated the percent likelihood of striking a particular species of large whale twice during the remaining period of the rule by squaring the value estimated for the probability of striking a particular species of whale once (*i.e.,* to calculate the probability of an event occurring twice, multiply the probability of the first event by the second). The results of these calculations are reflected in the last two columns of table 6. We note that these probabilities vary from year to year as the average annual mortality changes depending on the specific range of time considered; however, over the years and through updated data in the SARs and unpublished NMFS records, stocks tend to consistently maintain a relatively higher or relatively lower likelihood of being struck.

TABLE 6—PERCENT LIKELIHOOD OF STRIKING EACH STOCK ONE OR TWO TIMES OVER 2.5 YEARS AND TOTAL KNOWN U.S. NAVY STRIKES IN THE HSTT STUDY AREA

Species	Stock	Total known U.S. Navy strikes in HSTT study area	Percent likelihood of 1 strike over 2.5 years	Percent likelihood of 2 strikes over 2.5 years
Blue whale	Central North Pacific	0	0.00	0.00
	Eastern North Pacific	1 in SOCAL (2004)	2.81	0.08
Fin whale	CA/OR/WA	3 in SOCAL (2009, 2023[a])	[b] 7.74	[b] 0.60
	Hawaiian	0	0.00	0.00
Humpback whale	Central America/Southern Mexico-CA/OR/WA (Central America DPS).	0	4.93	0.24
	Mainland Mexico-CA/OR/WA (Mexico DPS).			
Sei whale	Eastern North Pacific	1 in SOCAL (2023[a])	0.69	0.00
	Hawaiian	0	0.00	0.00
Gray whale	Western North Pacific	0	0.00	0.00
Sperm whale	CA/OR/WA	0.00	0.00	
	Hawaiian	1 in HRC (2007)	0.00	0.00
Gray whale	Eastern North Pacific	3 in SOCAL (1993, 1998)	10.55	1.11
Bryde's whale	ETP stock	0	0.00	0.00
	Hawaiian	0	0.00	0.00
Minke whale	CA/OR/WA	0	0.00	0.00
	Hawaii	0	0.00	0.00
Humpback whale	Hawaii (Hawaii DPS)	2 in HRC (2003)	16.76	2.81

[a] Based on available photos and video, NMFS and the Navy have determined the May 2023 strike was of either a fin whale or sei whale. In the analysis herein, NMFS has assumed that this strike could have been of either species, and has therefore, accounted for it in both the fin whale and sei whale strike totals. Given that we are unable to identify the species of the whales struck by the U.S. Navy in 2021, NMFS did not include the two 2021 strikes in this part of the analysis.
[b] This includes the two fin whales struck by the Royal Australian Navy in May 2021.

The percent likelihood calculated as described above are then considered in combination with the information indicating the known species that the Navy has hit in the HSTT Study Area since 1991 (since they started tracking consistently; table 6). We note that for the lethal take of species specifically denoted in table 7 below, 47 percent of those struck by the Navy (8 of 17 in the Pacific) remained unidentified (including the May 2023 strike, which as stated above, NMFS and the Navy have determined was of either a fin whale or sei whale). However, given the information on known stocks struck, the analysis below remains appropriate. We also note that Rockwood *et al.* (2017) modeled the likelihood of vessel strike of blue whales, fin whales, and humpback whales on the U.S. West Coast (discussed in more detail in the *Serious Injury or Mortality* subsection of the *Preliminary Analysis and Negligible Impact Determination* section), and those numbers help inform the relative likelihood that the Navy could hit those stocks.

For each indicated stock, table 7 includes the percent likelihood of

striking an individual whale from a particular stock during the remaining 2.5 years of the rule once based on SAR data, Carretta *et al.* (2021), and unpublished NMFS vessel strike data from 2019–2021 for Hawaii; total strikes from Navy vessels in the HSTT Study Area, and modeled vessel strikes from Rockwood *et al.* (2017). The last column indicates the annual mortality proposed to be authorized.

TABLE 7—SUMMARY OF FACTORS CONSIDERED IN DETERMINING THE NUMBER OF INDIVIDUALS IN EACH STOCK POTENTIALLY STRUCK BY A VESSEL

ESA status	Species	Stock	Percent likelihood of one strike over 2.5 years	Total known U.S. Navy strikes in HSTT study area (1993–2009)	Rockwood *et al.* 2017 modeled vessel strikes [1]	Annual authorized take from 2020 HSTT final rule	Proposed annual authorized take
Listed	Blue whale	Central North Pacific	0.00	0			0
		Eastern North Pacific	2.81	1 in SOCAL (2004)	18	0.14	0.14
	Fin whale	CA/OR/WA	[2] 7.74	3 in SOCAL (2009, 2023 [3])	43	0.29	0.57
		Hawaii	0.00	0			0
	Humpback whale [4]	Central America/Southern Mexico-CA/OR/WA (Central America DPS).	4.93	0	22	0.14	0
		Mainland Mexico-CA/OR/WA (Mexico DPS).					0.14
	Sei whale	Eastern North Pacific	0.69	1 in SOCAL(2023) [3]			0.14
		Hawaii	0.00	0			0
	Gray whale	Western North Pacific	0.00	0			0
	Sperm whale	CA/OR/WA	0.00	0			0
		Hawaii	0.00	1 in HRC (2007)		0.14	0
Not listed	Gray whale	Eastern North Pacific	10.55	3 in SOCAL (1993, 1998)		0.29	0.57
	Bryde's whale	Eastern Tropical Pacific	0.00	0			0
		Hawaii	0.00	0			0
	Minke whale	CA/OR/WA	0.00	0			0
		Hawaii	0.00	0			0
	Humpback whale	Hawaii (Hawaii DPS) [5]	16.76	2 in HRC (2003)		0.29	0.29

[1] Rockwood *et al.* modeled likely annual vessel strikes off the West Coast for these three species only.
[2] This includes the two fin whales struck by the Royal Australian Navy in May 2021.
[3] Based on available photos and video, NMFS and the Navy have determined the May 2023 strike was of either a fin whale or sei whale. In the analysis herein, NMFS has assumed that this strike could have been of either species, and has therefore, accounted for it in both the fin whale and sei whale strike totals.
[4] In the 2020 HSTT final rule, take of humpback whale by serious injury and mortality by vessel strike in Southern California was attributed to the former CA/OR/WA stock and the Mexico DPS. Text explains why takes in SOCAL come from the Mexico DPS, and therefore the Mainland Mexico-CA/OR/WA stock.
[5] The 2022 final SAR reports vessel strike data for the Hawaii stock of humpback whales in Alaska, Washington, and Hawaii. Only vessel strike data from Hawaii was incorporated into our analysis as Alaska and Washington are outside of the HSTT Study Area.

Accordingly, stocks that have no record of ever having been struck by any vessel are considered to have a zero percent likelihood of being struck by the Navy in the 7-year period of the rule. Stocks that have never been struck by the Navy, have rarely been struck by other vessels, and have a low percent likelihood based on the historical vessel strike calculation are also considered to have a zero percent likelihood to be struck by the Navy during the 7-year rule. We note that while vessel strike records have not differentiated between Eastern North Pacific and Western North Pacific gray whales, given their small population size and the comparative rarity with which individuals from the Western North Pacific stock are detected off the U.S. West Coast, it is highly unlikely that they would be encountered, much less struck. This rules out all but seven stocks. Further, it is unlikely that the Hawaii stock of sperm whale would be struck given the zero percent likelihood of striking a sperm whale as indicated by the quantitative analysis above, the fact that the last U.S. Navy strike of a Hawaii stock sperm whale was in 2007, before the mitigation updates discussed above, and that, with the exception of humpback whales, vessel strikes (both military and non-military) of other large whale species in the HRC are extremely rare events (Carretta 2021b; Carretta 2022). (The 2020 HSTT final rule authorized 1 take (0.14 annual take) by mortality of the Hawaii stock of sperm whale.)

As stated previously, based on available photos and video of the whale struck by the U.S. Navy in Southern California in 2023, NMFS and the Navy have determined this whale was either a fin whale or sei whale. While the species of the two whales struck by the U.S. Navy in 2021 are unknown, given the following factors, NMFS expects these strikes may have been CA/OR/WA fin whales or Eastern North Pacific (ENP) gray whales, or some combination of these two stocks. These species have the highest annual rates of mortality/serious injury (M/SI) from vessel collision in California (1.57, 2.14, respectively, as noted above; which is approximately one and a half to two times higher than the species with the next highest strike rate, humpback whale, and approximately two to four times higher than the strike rate of blue whale). Additionally, gray whale and fin whale have the most recorded vessel strike incidents by military vessels in SOCAL and are the only stocks known to have been hit more than one time by naval vessels in the SOCAL portion of the HSTT Study Area (3 gray whale strikes by the U.S. Navy (1993, 1998), 2 or 3 fin whale strikes by the U.S. Navy (2009, potentially 2023), and 2 fin whale strikes by the Royal Australian Navy (2021)). Further, accounting for undocumented vessel strikes, Rockwood *et al.* (2021) estimated that in their study area off Southern California from 2012–2018, on average 8.9 blue, 4.6 humpback, and 9.7 fin whales were killed by civilian vessel strikes from June to November each year. In addition, they estimated that, on average, 5.7 humpback whales were killed by civilian vessel strike from January–April per year (Rockwood *et al.* 2021). For fin whales in particular, model-predicted densities of large whales in the Southern California Bight from May to July 2021 (the time period during which the 2021 strikes of two unidentified whales by the U.S. Navy occurred) estimated fin whale abundance as being nearly an order of magnitude higher than either blue or humpback whale abundance during this time period (Becker *et al.* 2020; Zickel

et al. 2021). Ship-whale encounter models for the U.S. West Coast Exclusive Economic Zone also indicated that vessel strike mortality estimates for fin whales were significantly higher than for blue whales and humpback whales (Rockwood *et al.* 2017). The comparatively higher modeled vessel strike rates for fin whales result from both the larger population as well as the more offshore distribution that overlaps significantly with several major shipping routes for a much greater spatial extent (Rockwood *et al.* 2017). Based on 1,243 visual boat-based sightings of 2,638 fin whales from 1991–2011, Calambokidis *et al.* (2015) found fin whale concentration areas included the San Clemente Basin where the 2021 Navy vessel strikes occurred (Tanner and Cortez Banks area and the shelf edge west of San Nicolas Island were also reported as fin whale concentration areas). There are two different populations of fin whales that occur in the Southern California Bight: a seasonal population, and a population that occurs year-round with offshore/inshore movements (Campbell *et al.* 2015; Falcone *et al.* 2022). This would likely make fin whales more susceptible to vessel strike year-round, as compared to other large whale species that may occur seasonally within SOCAL. Based on all of these factors, there is a reasonable likelihood that the CA/OR/WA stock of fin whales or ENP stock of gray whales could be struck twice during the remaining 2.5 years of the rule. Therefore, we propose that, of the five total takes by serious injury or mortality by vessel strike of large whales proposed to be authorized, up to four of those takes could be of the CA/OR/WA stock of fin whale or the ENP stock of gray whale given that the two strikes of unidentified large whales in 2021 could have been of either stock. Further, consistent with the 2020 HSTT final rule, we propose that, of the five total takes by serious injury or mortality by vessel strike of large whales proposed to be authorized, up to two of those takes could occur in Hawaii, and therefore be of individuals of the Hawaii stock of humpback whale.

Based on the information summarized in table 7 and the fact that there is the potential for up to two large whales to be struck over the remaining 2.5 years of the rule (five strikes over the full 7-year rule period), one individual from the Eastern North Pacific stock of blue whale, Mainland Mexico-CA/OR/WA stock of humpback whale, or Eastern North Pacific stock of sei whale could be among the two whales struck during the remaining effective period of the regulations (2023–2025). The total strikes of Eastern North Pacific blue whales and the percent likelihood of striking one based on the historic strike calculation above can both be considered moderate compared to other stocks, and the Navy struck a blue whale in 2004 (based on the historic strike calculation, the likelihood of striking two blue whales is well below one percent (table 6)). Therefore, we consider it reasonably likely that the Navy could strike one individual over the course of the 7-year rule, and given that we do not expect that the 2023 strike nor either of the 2021 U.S. Navy strikes of unidentified large whales were blue whales, we expect that this strike could occur during the remaining 2.5 years of the rule. The total strikes of Eastern North Pacific sei whales are low compared to other stocks, but NMFS and the Navy think it is possible that the Navy may have struck a sei whale in SOCAL in 2023. Therefore, we consider it reasonably likely that the Navy could strike a sei whale over the remaining 2.5 years of the rule. The Navy has not hit a humpback whale in the SOCAL portion of the HSTT Study Area. However, in 2016 a U.S. Coast Guard vessel participating in a Navy event struck a humpback whale in Hood Canal, and as a species, humpbacks have a moderate to high number of total strikes and percent likelihood of being struck. Although the likelihood of Central America/Southern Mexico-CA/OR/WA (Central America DPS) or Mainland Mexico-CA/OR/WA (Mexico DPS) humpback whales being struck by any vessel type is moderate to high relative to other stocks, the distribution of the Mexico DPS versus the Central America DPS, as well as the distribution of overall vessel strikes inside versus outside of the SOCAL area (the majority are outside), supports the reasonable likelihood that the Navy could strike one individual humpback whale from the Mainland Mexico-CA/OR/WA stock (Mexico DPS) over the 7-year duration of the rule, as described below.

Regarding the likelihood of striking a humpback whale from a particular DPS, we evaluated the relative abundance of each of these DPS in California waters. Curtis *et al.* (2022) estimated the abundance of the Central America DPS to be 1,496 whales. From Wade *et al.* (2017), about 93 percent (or 1,391 whales) of these humpbacks that winter in Central America will move to Oregon/California in the summer months. While there is currently no abundance estimate for the Mexico DPS, an estimated 3,477 whales from the Mexico DPS feed off the U.S. West Coast (Calambokidis and Barlow 2020; Curtis 2022). Based on this information, we estimate that approximately 30 percent of the humpback whales off the coast of California may be from the Central America DPS with the remaining 70 percent are expected to be from the Mexico DPS. Therefore, we anticipate that if a Navy vessel strike of a humpback whale were to occur within SOCAL, it would likely be from the Mexico DPS. Last, Rockwood *et al.* (2017) supports a relative likelihood of 1:1:2 for striking blue whales, humpback whales, and fin whales off the U.S West Coast (though as noted above, more recent data suggests that the relative likelihood of striking a fin whale is higher and suggests that the two 2021 U.S. Navy vessel strikes of unidentified large whales may have been fin whales), which, in consideration of more recent data also supports the proposed authorized take included in this rule, which is 1, 1, and 4, respectively over the 7-year period. For these reasons, one lethal take of a Mainland Mexico-CA/OR/WA humpback whale (Mexico DPS) could occur and is proposed for authorization.

For Hawaii stocks, given that all known vessel strikes between 2015 and 2021 were of humpback whales, we anticipate that any vessel strike of a large whale in Hawaii would be of the Hawaii stock of humpback whale. Given that this stock has the highest percentage of total annual strikes (38.5 percent) and a 2.81 percent chance of being struck twice over the remaining 2.5 years (more than twice that of the species with the next highest percentage, gray whale), NMFS proposes to authorize two lethal takes of Hawaii humpback whales.

As described above, the Navy's analysis suggests and NMFS' analysis concurs that the likelihood of vessel strikes to the stocks below is discountable due to the stocks' relatively low occurrence in the HSTT Study Area, particularly in core HSTT training and testing subareas, and the fact that the stocks have not been struck by the Navy and are rarely, if ever, recorded struck by other vessels. Therefore, NMFS is not proposing to authorize lethal take for the following stocks: Blue whale (Central North Pacific stock), Bryde's whale (Eastern Tropical Pacific stock and Hawaii stock), fin whale (Hawaii stock), gray whale (Western North Pacific stock), humpback whale (Central America/Southern Mexico-CA/OR/WA stock, Central America DPS), minke whale (CA/OR/WA stock and Hawaii stock), sei whale (Hawaii stock), and sperm

whale (CA/OR/WA stock and Hawaii stock).

Also of note, while information on past Navy vessel strikes can serve as a reasonable indicator of future vessel strike risk, future conditions may differ from the past in ways that could influence the likelihood of a large whale vessel strike occurring. In general, the magnitude of vessel strike risk may be increasing over time as many whale populations are gradually recovering from centuries of commercial whaling (Redfern *et al.* 2020). Increased vessel strike risk off California in recent decades has been associated with increases in the abundance of fin and humpback whale populations in the North Pacific (Redfern *et al.* 2020). It has also been suggested that the blue whale population in the Eastern North Pacific, inclusive of the SOCAL portion of the action area, is at carrying capacity and recovered to pre-whaling levels (Monnahan *et al.* 2014). In addition, the magnitude of risk may also be affected by shifts in whale distributions over time in response to environmental factors including climate change, marine heatwaves, and associated changes in prey distribution.

Historically, military vessel strikes of large whales within the HSTT Study Area have been rare events with only seven such strikes occurring over the past 14 years, five U.S. Navy strikes, and two Royal Australian Navy strikes. However, the fact that four of these strikes occurred within a 3-month period (May–July) in 2021, and two occurred within a 4-month period (February–May) in 2009, suggests that military vessel strikes in SOCAL can be both highly episodic and clustered. The four large whale strikes in 2021 (two strikes of unidentified large whales by the U.S. Navy and two fin whale strikes by the Royal Australian Navy) appear to be outliers in the time series of military vessel strikes in SOCAL for that period. However, particularly in consideration of the 2023 U.S. Navy strike, these strikes could also represent an early indicator of an increased military vessel strike risk within SOCAL based on the factors discussed above. Results from a survey of whale watching vessel operators and crew in Southern California, combined with remote sensing data in the area, suggest that the number of large whales may have been greater in May through July of 2021 compared with previous years in certain high military vessel traffic and ''core'' use HSTT areas off southern California, particularly farther offshore as well as closer to shore off San Diego Bay (Zickel MJ *et al.* 2021).

In conclusion, while take by vessel strike across any given year is sporadic, based on the information and analysis above, including consideration of the 2021 and 2023 strikes by the U.S. Navy, NMFS anticipates no more than five takes of large whales by M/SI could occur over the 7-year period of the rule. Of those five whales over the 7-years, no more than four may come from the following stocks: gray whale (Eastern North Pacific stock) and fin whale (CA/OR/WA stock). No more than two may come from the Hawaii stock of humpback whales. No more than one may come from the following stocks: blue whale (Eastern North Pacific stock), sei whale (Eastern North Pacific), and humpback whale (Mexico-North Pacific stock or Mainland Mexico-CA/OR/WA, Mexico DPS). Accordingly, NMFS has evaluated under the negligible impact standard the M/SI of 0.14, 0.29, or 0.57 whales annually from each of these species or stocks (*i.e.,* 1, 2, or 4 takes, respectively, divided by 7 years to get the annual number), along with the expected incidental takes by harassment.

Explosives

The Navy's model and quantitative analysis process used for the 2018 HSTT FEIS/OEIS and in the Navy's 2017 and 2019 applications to estimate potential exposures of marine mammals to explosive stressors is detailed in the technical report titled *Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing report* (U.S. Department of the Navy, 2018). Specifically, over the course of a modeled maximum year of training and testing, the Navy's model and quantitative analysis process estimates M/SI of two short-beaked common dolphin and one California sea lion as a result of exposure to explosive training and testing activities (please see section 6 of the 2017 Navy application where it is explained how maximum annual estimates are calculated). Over the 7-year period of the 2020 HSTT regulations, M/SI of 8 short-beaked common dolphins and 5 California sea lions (13 marine mammals in total) is estimated as a result of exposure to explosive training and testing activities. NMFS proposes no changes to the authorization of take by M/SI as a result of explosive use as the Navy proposes no changes to its activities from that described in the 2018 HSTT final rule, and after reviewing all new information, we find that our previous analyses remain applicable. Please refer to the 2018 HSTT final rule and 2020 HSTT final rule for additional information.

Proposed Mitigation Measures

Under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable adverse impact on the species or stock(s) and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock(s) for subsistence uses (''least practicable adverse impact''). NMFS does not have a regulatory definition for least practicable adverse impact. The 2004 NDAA amended the MMPA as it relates to military readiness activities and the incidental take authorization process such that a determination of ''least practicable adverse impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. For the full discussion of how NMFS interprets least practicable adverse impact, including how it relates to the negligible-impact standard, see the *Mitigation Measures* section in the 2018 HSTT final rule.

Section 101(a)(5)(A)(i)(II) requires NMFS to issue, in conjunction with its authorization, binding—and enforceable—restrictions (in the form of regulations) setting forth how the activity must be conducted, thus ensuring the activity has the ''least practicable adverse impact'' on the affected species or stocks. In situations where mitigation is specifically needed to reach a negligible impact determination, section 101(a)(5)(A)(i)(II) also provides a mechanism for ensuring compliance with the ''negligible impact'' requirement. Finally, the least practicable adverse impact standard also requires consideration of measures for marine mammal habitat, with particular attention to rookeries, mating grounds, and other areas of similar significance, and for subsistence impacts, whereas the negligible impact standard is concerned solely with conclusions about the impact of an activity on annual rates of recruitment and survival.[1] In evaluating what mitigation measures are appropriate, NMFS considers the potential impacts of the Specified Activities, the availability of measures to minimize those potential impacts, and the practicability of implementing those measures, as we

[1] Outside of the military readiness context, mitigation may also be appropriate to ensure compliance with the ''small numbers'' language in MMPA sections 101(a)(5)(A) and (D).

describe below. This proposed rule includes all mitigation measures required by the 2020 HSTT final rule (though two have been modified in this proposed rule), and our discussion in that rule remains complete and accurate (including reference to the 2018 HSTT final rule), except as described below.

Implementation of Least Practicable Adverse Impact Standard

Our evaluation of potential mitigation measures includes consideration of two primary factors:

(1) The manner in which, and the degree to which, implementation of the potential measure(s) is expected to reduce adverse impacts to marine mammal species or stocks, their habitat, and their availability for subsistence uses (where relevant). This analysis considers such things as the nature of the potential adverse impact (such as likelihood, scope, and range), the likelihood that the measure will be effective if implemented, and the likelihood of successful implementation; and

(2) The practicability of the measure(s) for applicant implementation. Practicability of implementation may consider such things as cost, impact on activities, and, in the case of a military readiness activity, specifically considers personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

While the language of the least practicable adverse impact standard calls for minimizing impacts to affected species or stocks, we recognize that the reduction of impacts to those species or stocks accrues through the application of mitigation measures that limit impacts to individual animals. Accordingly, NMFS' analysis focuses on measures that are designed to avoid or minimize impacts on individual marine mammals that are likely to increase the probability or severity of population-level effects.

While direct evidence of impacts to species or stocks from a specified activity is rarely available, and additional study is still needed to understand how specific disturbance events affect the fitness of individuals of certain species, there have been improvements in understanding the process by which disturbance effects are translated to the population. With recent scientific advancements (both marine mammal energetic research and the development of energetic frameworks), the relative likelihood or degree of impacts on species or stocks may often be inferred given a detailed understanding of the activity, the environment, and the affected species or stocks—and the best available science has been used here. This same information is used in the development of mitigation measures and helps us understand how mitigation measures contribute to lessening effects (or the risk thereof) to species or stocks. We also acknowledge that there is always the potential that new information, or a new recommendation could become available in the future and necessitate reevaluation of mitigation measures (which may be addressed through adaptive management) to see if further reductions of population impacts are possible and practicable.

In the evaluation of specific measures, the details of the specified activity will necessarily inform each of the two primary factors discussed above (expected reduction of impacts and practicability), and are carefully considered to determine the types of mitigation that are appropriate under the least practicable adverse impact standard. Analysis of how a potential mitigation measure may reduce adverse impacts on a marine mammal stock or species, consideration of personnel safety, practicality of implementation, and consideration of the impact on effectiveness of military readiness activities are not issues that can be meaningfully evaluated through a yes/no lens. The manner in which, and the degree to which, implementation of a measure is expected to reduce impacts, as well as its practicability in terms of these considerations, can vary widely. For example, a time/area restriction could be of very high value for decreasing population-level impacts (*e.g.,* avoiding disturbance of feeding females in an area of established biological importance) or it could be of lower value (*e.g.,* decreased disturbance in an area of high productivity but of less firmly established biological importance). Regarding practicability, a measure might involve restrictions in an area or time that impede the Navy's ability to certify a strike group (higher impact on mission effectiveness), or it could mean delaying a small in-port training event by 30 minutes to avoid exposure of a marine mammal to injurious levels of sound (lower impact). A responsible evaluation of ''least practicable adverse impact'' will consider the factors along these realistic scales. Accordingly, the greater the likelihood that a measure will contribute to reducing the probability or severity of adverse impacts to the species or stock or its habitat, the greater the weight that measure is given when considered in combination with practicability to determine the appropriateness of the mitigation measure, and vice versa. In the evaluation of specific measures, the details of the specified activity will necessarily inform each of the two primary factors discussed above (expected reduction of impacts and practicability), and will be carefully considered to determine the types of mitigation that are appropriate under the least practicable adverse impact standard. For more detail on how we apply these factors, see the discussion in the *Mitigation Measures* section of the 2018 HSTT final rule.

Assessment of Mitigation Measures for HSTT Rule

NMFS fully reviewed the Navy's specified activities and the mitigation measures for the 2020 HSTT final rule and determined, with the addition of the new and modified measures discussed herein, and after consideration of the new information and studies described above, that the proposed mitigation measures would result in the least practicable adverse impact on marine mammals (see the 2019 Navy application and the 2018 HSTT final rule for detailed information on the Navy's mitigation measures, with the exception of the new and modified measures described herein). NMFS worked with the Navy in the development of the Navy's mitigation measures, which were informed by years of implementation and monitoring. A complete discussion of the Navy's evaluation process used to develop, assess, and select mitigation measures, which was informed by input from NMFS, can be found in Chapter 5 (*Mitigation*) of the 2018 HSTT FEIS/OEIS. The process described in Chapter 5 (*Mitigation*) of the 2018 HSTT FEIS/OEIS robustly supports NMFS' independent evaluation of whether the mitigation measures would meet the least practicable adverse impact standard. The Navy has implemented the mitigation measures under the 2020 HSTT regulations and would be required to continue implementation of the mitigation measures identified in this rulemaking for the full 7 years it covers to avoid or reduce potential impacts from acoustic, explosive, and physical disturbance and vessel strike stressors.

The Navy also evaluated numerous measures in the 2018 HSTT FEIS/OEIS that were not included in the 2017 Navy application, and NMFS independently reviewed and considered all new information, and continues to concur with Navy's analysis that their inclusion

was not appropriate under the least practicable adverse impact standard. The Navy considered these additional potential mitigation measures in two groups. First, Chapter 5 (*Mitigation*) of the 2018 HSTT FEIS/OEIS, in the Measures Considered but Eliminated section, includes an analysis of an array of different types of mitigation that have been recommended over the years by NGOs or the public, through scoping or public comment on environmental compliance documents. Appendix K (Geographic Mitigation Assessment) of the 2018 HSTT FEIS/OEIS includes an in-depth analysis of time/area restrictions that have been recommended over time or previously implemented as a result of litigation.

Below, we summarize the mitigation measures (organized into procedural measures and mitigation areas) that NMFS has determined will ensure the least practicable adverse impact on all affected species and stocks and their habitat, including the specific considerations for military readiness activities, and including several measures that are new or modified since publication of the 2020 HSTT final rule.

In its 2022 application, the Navy proposed no changes to the procedural or geographic mitigation measures in the 2020 HSTT final rule. NMFS reviewed new information potentially pertinent to mitigation of the Navy's training and testing activities. While Lookouts are essential to detecting the potential for and potentially avoiding a vessel strike of a marine mammal, NMFS and the Navy have always acknowledged that Lookouts cannot prevent all vessel strikes. The recent U.S. Navy and Royal Australian Navy vessel strikes appear to confirm this, as these strikes occurred when Lookouts were posted. As acknowledged above, these recent incidents may represent an early indicator of an increased military vessel strike risk within SOCAL. Recent reports appear to reflect the sporadic, episodic, or clustered nature of vessel strike or may reflect a trend of increased large whale presence in this area in the early summer months. NMFS and Navy have discussed the circumstances of each of the recent strikes, including the Royal Australian Navy strike, and discussed ways of improving strike mitigation. In these further conversations, NMFS and the Navy developed several new and modified mitigation measures in comparison to those included in the 2020 HSTT final rule.

For vessel movement, the 2020 HSTT final rule required that ''When underway Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must maneuver to maintain distance.'' This measure has been updated to state that reducing speed may be an appropriate way to maneuver. The revised measure states that ''When underway, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must maneuver (which may include reducing speed as the mission or circumstances allow) to maintain distance.'' Of note, between 2009 and 2021 (the most recent year for which data is available), U.S. Navy vessels in the SOCAL portion of the HSTT Study Area maneuvered 316 times to avoid large whales during MTEs. The years 2017 and 2021 had the highest number of maneuvers (n=64 and n=82, respectively). In all years for which data is available (2009 to 2021), Navy cruisers and destroyers account for 51 to 100 percent of maneuvers during MTEs. With this modified measure, NMFS is emphasizing that Navy personnel should consider reducing speed (as mission or circumstances allow) when maneuvering to avoid marine mammals, though this modified measure does not require reduction of vessel speed for reasons explained in Chapter 5 (*Mitigation*) of the 2018 HSTT FEIS/OEIS, in the Measures Considered but Eliminated section (*i.e.,* requirements to reduce vessel speeds would have significant direct negative effects on mission effectiveness).

This proposed rule also requires that Navy personnel must send alerts to Navy vessels of increased risk of strike following any reported Navy vessel strike in the HSTT Study Area.

Further, the 2020 HSTT final rule included a requirement for Navy personnel to issue seasonal awareness notification messages to alert ships and aircraft to the possible presence of blue whales (June–October), humpback whales (November–April), gray whales (November–March), or fin whales (November–May). These messages assist in maintaining safety of navigation and in avoiding interactions with large whales during transits. Platforms must use the information from the awareness notification messages to assist their visual observation of applicable mitigation zones during training and testing activities and to aid in the implementation of procedural mitigation. This proposed rule requires the Navy to re-title the spring blue whale message (released in June) to a large whale awareness message inclusive of typical spring-summer large whales in southern California (mainly blue, fin, and humpback whales). Furthermore, rather than tying the message release to a specific month, the message would be for a period based on predicted oceanographic conditions for a given year (*e.g.,* May–November, April–November, *etc.*). The Navy will also evaluate information obtained from NMFS' Southwest Fisheries Science Center scientists, soon to be promulgated revised West Coast BIAs, and other oceanographic or predictive models for guiding message text descriptions of whale occurrence in Southern California. The improvement will emphasize that when a marine mammal is spotted, this may be an indicator that additional marine mammals are present and nearby, and increased vigilance and awareness of Navy personnel is warranted.

The proposed rule also contains a new mitigation measure in which Navy personnel would issue real-time notifications to Navy vessels of large whale aggregations (four or more whales) within 1 nmi (1.9 km) of a Navy vessel in a select area of SOCAL (Of note, the four whales do not have to be the same species and do not have to be part of the same group (*e.g.,* two whales of one species sighted at a distance off the port side at 500 yd (457.2 m) and two more whales of another species sighted off the starboard side at 500 yd (457.2 m) would be considered an aggregation under this measure)). This measure would apply to the area between 32–33 degrees North and 117.2–119.5 degrees West, which includes the locations where recent (2009, 2021, 2023) strikes occurred, and historic locations where strikes occurred when precise latitude and longitude were known.

Of note, in order to improve mitigation effectiveness, in fall 2022 the Navy made several changes to its Lookout training. The Navy revised its basic Lookout training materials to improve marine mammal awareness and spotting techniques through updates to the Marine Mammal chapter of the Navy's September 2022 Lookout Training Handbook. Further, the Navy integrated improved Lookout training into a new generation of a shipboard simulator at its recruit training center in the Great Lakes. This simulator enhances new sailor knowledge and skill under realistic training scenarios. Last, the Navy will evaluate future revisions to online or DVD Marine Species Awareness Training video training to emphasize that when a protected species is spotted, this may be an indicator that additional marine mammals are present and nearby, and the vessel should take this into consideration when transiting.

In addition to Lookouts required under this proposed rule, the Navy mandates the number of Lookouts on underway vessels per internal policy documents, including the Surface Ship NAVDORM. As described in the *Standard Operating Procedures* section, in 2021, NAVDORM policy changed to require three Lookouts on most classes of surface ship, including destroyers and cruisers. However, the Navy asserts that always including three Lookouts on these vessels in the future as a required mitigation measure is not practicable because lookout numbers are subject to change based on national security needs, including manning and staffing requirements. As such, although the Navy describes these additional Lookouts in its application under the mitigation section, NMFS has not considered the potential presence of two additional lookouts when considering Navy's mitigation effectiveness. Please see the Proposed Reporting section for additional detail on this proposed requirement.

With the exception of Oedekoven and Thomas (2022) described above, there is no new information that affects NMFS' assessment of the applicability or effectiveness of the measures included in the 2018 HSTT final rule over the remainder of the 7-year period. As stated above in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section, while (Oedekoven and Thomas, 2022) suggests that detection of marine mammals is less certain than previously assumed at certain distances, model assumptions may still underestimate Lookout effectiveness in some cases. Additionally, maneuvering data summarized above demonstrates that Navy vessels are successfully maneuvering to avoid striking sighted marine mammals in most cases, despite the Oedekoven and Thomas (2022) results. Further, as described above, Navy and NMFS have developed modified or new mitigation in this proposed rule which are anticipated to further reduce the risk of vessel strike of large whales.

In summary, and as described in more detail above regarding vessel strike, the Navy has agreed to procedural mitigation measures that will reduce the probability and/or severity of impacts expected to result from acute exposure to acoustic sources or explosives, vessel strike, and impacts to marine mammal habitat. Specifically, the Navy will use a combination of delayed starts, powerdowns, and shutdowns to minimize or avoid M/SI and minimize the likelihood or severity of PTS or other injury, and reduce instances of TTS or more severe behavioral disturbance caused by acoustic sources or explosives. The Navy will also implement multiple time/area restrictions (several of which were added in the 2018 HSTT final rule since the previous HSTT MMPA incidental take rule) that would reduce take of marine mammals in areas or at times where they are known to engage in important behaviors, such as feeding or calving, where the disruption of those behaviors would have a higher probability of resulting in impacts on reproduction or survival of individuals that could lead to population-level impacts. Table 8 provides the Navy's required procedural mitigation measures for environmental awareness and education and vessel movement as well as summaries of the Navy's procedural mitigation measures for other activities. Table 9 provides summaries of mitigation areas for the HSTT Study Area.

NMFS and the Navy considered mitigation areas to protect marine mammals, including odontocetes with small or resident populations in the HSTT Study Area. This included consideration of new mitigation areas based on newly identified BIAs in Hawaii (Kratofil *et al.* 2023). Including additional mitigation areas beyond that included in the 2020 HSTT final rule is impracticable given overlap with critical Navy training areas in the HRC. However, many of the BIAs identified in Kratofil *et al.* 2023 partially or fully overlap the mitigation areas included in the 2020 HSTT final rule and proposed herein.

TABLE 8—SUMMARY OF PROCEDURAL MITIGATION

Stressor or activity	Mitigation zone sizes and other requirements
Environmental Awareness and Education	• This mitigation applies to all training and testing activities, as applicable. • Mitigation Requirements: ○ Appropriate Navy personnel (including civilian personnel) involved in mitigation and training or testing activity reporting under the specific activities must complete one or more modules of the U.S. Navy Afloat Environmental Compliance Training Series, as identified in their career path training plan. Modules include: ▪ Introduction to the U.S. Navy Afloat Environmental Compliance Training Series. The introductory module provides information on environmental laws (e.g., ESA, MMPA) and the corresponding responsibilities that are relevant to Navy training and testing activities. The material explains why environmental compliance is important in supporting the Navy's commitment to environmental stewardship. ▪ Marine Species Awareness Training. All bridge watch personnel, Commanding Officers, Executive Officers, maritime patrol aircraft aircrews, anti-submarine warfare and mine warfare rotary-wing aircrews, Lookouts, and equivalent civilian personnel must successfully complete the Marine Species Awareness Training prior to standing watch or serving as a Lookout. The Marine Species Awareness Training provides information on sighting cues, visual observation tools and techniques, and sighting notification procedures. Navy biologists developed Marine Species Awareness Training to improve the effectiveness of visual observations for biological resources, focusing on marine mammals and sea turtles, and including floating vegetation, jellyfish aggregations, and flocks of seabirds. ▪ U.S. Navy Protective Measures Assessment Protocol. This module provides the necessary instruction for accessing mitigation requirements during the event planning phase using the Protective Measures Assessment Protocol software tool. ▪ U.S. Navy Sonar Positional Reporting System and Marine Mammal Incident Reporting. This module provides instruction on the procedures and activity reporting requirements for the Sonar Positional Reporting System and marine mammal incident reporting.
Active Sonar	Depending on sonar source:

TABLE 8—SUMMARY OF PROCEDURAL MITIGATION—Continued

Stressor or activity	Mitigation zone sizes and other requirements
	• 1,000 yd (914.4 m) power down, 500 yd (457.2 m) power down, and 200 yd (182.9 m) shut down • 200 yd (182.9 m) shut down.
Air Guns	• 150 yd (137.2 m).
Pile Driving	• 100 yd (91.4 m).
Weapons Firing Noise	• 30 degrees on either side of the firing line out to 70 yd (64 m).
Explosive Sonobuoys	• 600 yd (548.6 m).
Explosive Torpedoes	• 2,100 yd (1,920.2 m).
Explosive Medium-Caliber and Large-Caliber Projectiles	• 1,000 yd (914.4 m; large-caliber projectiles). • 600 yd (548.6 m; medium-caliber projectiles during surface-to-surface activities). • 200 yd (182.9 m; medium-caliber projectiles during air-to-surface activities).
Explosive Missiles and Rockets	• 2,000 yd (1,828.8 m; 21–500 lb. net explosive weight). • 900 yd (823 m; 0.6–20 lb. net explosive weight).
Explosive Bombs	• 2,500 yd (2,286 m).
Sinking Exercises	• 2.5 nmi (4.6 km).
Explosive Mine Countermeasure and Neutralization Activities	• 2,100 yd (1,929.2 m; 6–650 lb net explosive weight). • 600 yd (548.6 m; 0.1–5 lb net explosive weight).
Explosive Mine Neutralization Activities Involving Navy Divers	• 1,000 yd (914.4 m; 21–60 lb net explosive weight for positive control charges and charges using time-delay fuses). • 500 yd (457.2 m; 0.1–20 lb net explosive weight for positive control charges).
Underwater Demolition Multiple Charge—Mat Weave and Obstacle Loading	• 700 yd (640.1 m).
Maritime Security Operations—Anti-Swimmer Grenades	• 200 yd (182.9 m).
Vessel Movement	• The mitigation must not be applied if: (1) The vessel's safety is threatened, (2) the vessel is restricted in its ability to maneuver (e.g., during launching and recovery of aircraft or landing craft, during towing activities, when mooring), (3) the vessel is operated autonomously, or (4) when impractical based on mission requirements (e.g., during Amphibious Assault—Battalion Landing exercises). • Number of Lookouts and Observation Platform: ○ 1 Lookout must be on the vessel that is underway.[1] • Mitigation Requirements: ○ Mitigation zones:—500 yd (457.2 m) around whales.—200 yd (182.9 m) around other marine mammals (except bow-riding dolphins and pinnipeds hauled out on man-made navigational structures, port structures, and vessels). ○ During the activity:—When underway, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must maneuver (which may include reducing speed as the mission or circumstances allow) to maintain distance. • Additional requirements: ○ If a marine mammal vessel strike occurs, Navy personnel must follow the established incident reporting procedures. Navy personnel must also send alerts to Navy vessels of increased risk of strike following any reported Navy vessel strike in the HSTT Study Area. ○ Navy personnel must issue real-time notifications to Navy vessels of large whale aggregations (four or more whales) within 1 nmi (1.9 km) of a Navy vessel in the area between 32–33 degrees North and 117.2–119.5 degrees West.
Towed In-Water Devices	• 250 yd (228.6 m; marine mammals).
Small-, Medium-, and Large-Caliber Non-Explosive Practice Munitions	• 200 yd (182.9 m).
Non-Explosive Missiles and Rockets	• 900 yd (823 m).
Non-Explosive Bombs and Mine Shapes	• 1,000 yd (914.4 m).

Note: lb: pounds; nmi: nautical miles; yd: yards; m: meters.

[1] Underway vessels will maintain at least one Lookout. For ship classes required to maintain more than one Lookout, the specific requirement is subject to change over time in accordance with Navy navigation instruction (*e.g.,* the Surface Ship NAVDORM). Navy personnel will notify NMFS as soon as practicable should its Lookout policies change, including in the NAVDORM.

TABLE 9—SUMMARY OF MITIGATION AREAS FOR MARINE MAMMALS

Summary of mitigation area requirements
Hawaii Island Mitigation Area (year-round): • Navy personnel must not conduct more than 300 hours of MF1 surface ship hull-mounted mid-frequency active sonar or 20 hours of MF4 dipping sonar, or use explosives that could potentially result in takes of marine mammals during training and testing.[1]
4-Islands Region Mitigation Area (November 15–April 15 for active sonar; year-round for explosives): • Navy personnel must not use MF1 surface ship hull-mounted mid-frequency active sonar or explosives that could potentially result in takes of marine mammals during training and testing.[1]
Humpback Whale Special Reporting Areas (December 15–April 15): • Navy personnel must report the total hours of surface ship hull-mounted mid-frequency active sonar used in the special reporting areas in its annual training and testing activity reports submitted to NMFS.
San Diego Arc, San Nicolas Island, and Santa Monica/Long Beach Mitigation Areas (June 1–October 31): • Navy personnel must not conduct more than a total of 200 hours of MF1 surface ship hull-mounted mid-frequency active sonar in the combined areas, excluding normal maintenance and systems checks, during training and testing.[1] • Within the San Diego Arc Mitigation Area, Navy personnel must not use explosives that could potentially result in the take of marine mammals during large-caliber gunnery, torpedo, bombing, and missile (including 2.75″ rockets) activities during training and testing.[1] • Within the San Nicolas Island Mitigation Area, Navy personnel must not use explosives that could potentially result in the take of marine mammals during mine warfare, large-caliber gunnery, torpedo, bombing, and missile (including 2.75″ rockets) activities during training.[1] • Within the Santa Monica/Long Beach Mitigation Area, Navy personnel must not use explosives that could potentially result in the take of marine mammals during mine warfare, large-caliber gunnery, torpedo, bombing, and missile (including 2.75″ rockets) activities during training and testing.[1]
Santa Barbara Island Mitigation Area (year-round):

TABLE 9—SUMMARY OF MITIGATION AREAS FOR MARINE MAMMALS—Continued

Summary of mitigation area requirements
• Navy personnel must not use MF1 surface ship hull-mounted mid-frequency active sonar during training and testing, or explosives that could potentially result in the take of marine mammals during medium-caliber or large-caliber gunnery, torpedo, bombing, and missile (including 2.75″ rockets) activities during training.[1]
Awareness Notification Message Areas (seasonal according to species):
• Navy personnel must issue awareness notification messages to alert ships and aircraft to the possible presence of large whales during a period based on predicted oceanographic conditions for a given year. The message must emphasize that when a marine mammal is spotted, this may be an indicator that additional marine mammals are present and nearby, and increased vigilance and awareness of Navy personnel is warranted. Navy personnel must also issue awareness notification messages to alert ships and aircraft to the possible presence of gray whales (November–March) and fin whales (November–May).

[1] If Naval units need to conduct more than the specified amount of training or testing, they will obtain permission from the appropriate designated Command authority prior to commencement of the activity. The Navy will provide NMFS with advance notification and include the information in its annual activity reports submitted to NMFS.

Mitigation Conclusions

NMFS has carefully evaluated the Navy's mitigation measures from the 2020 rule—many of which were developed with NMFS' input during the previous phases of Navy training and testing authorizations and none of which have changed since our evaluation during the 2018 HSTT rulemaking, with the exception of the changes described herein—and considered a broad range of other measures (*i.e.,* the measures considered but eliminated in the 2018 HSTT FEIS/OEIS, which reflect many of the comments that have arisen via NMFS or public input in past years) in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: the manner in which, and the degree to which, the successful implementation of the mitigation measures is expected to reduce the likelihood and/or magnitude of adverse impacts to marine mammal species and stocks and their habitat; the proven or likely efficacy of the measures; and the practicability of the measures for applicant implementation, including consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. After considering all new information, including consideration of new information regarding vessel strike, NMFS proposes two additional mitigation measures and revision of two existing mitigation measures as described above.

Based on our evaluation of the Navy's current mitigation measures (which are being implemented under the 2020 HSTT regulations), as well as modified and new measures described above, NMFS has preliminarily determined that the proposed mitigation measures are appropriate means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and considering specifically personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Additionally, as described in more detail below, the 2020 HSTT final rule includes an adaptive management provision, which the Navy proposes to extend, which ensures that mitigation is regularly assessed and provides a mechanism to improve the mitigation, based on the factors above, through modification as appropriate.

The proposed rule comment period provides the public an opportunity to submit recommendations, views, and/or concerns regarding the Navy's activities and the proposed mitigation measures. While NMFS has preliminarily determined that the proposed mitigation measures would effect the least practicable adverse impact on the affected species or stocks and their habitat, NMFS will consider all public comments to help inform our final decision. Consequently, the proposed mitigation measures may be refined, modified, removed, or added to prior to the issuance of the final rule based on public comments received, and where appropriate, further analysis of any additional mitigation measures.

Proposed Monitoring

Section 101(a)(5)(A) of the MMPA states that in order to authorize incidental take for an activity, NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

In its 2022 application, the Navy proposes no changes to the monitoring described in the 2018 HSTT final rule and 2020 HSTT final rule. They would continue implementation of the robust Integrated Comprehensive Monitoring Program and Strategic Planning Process described in the 2018 HSTT final rule. The Navy's monitoring strategy, currently required by the 2018 HSTT regulations, is well-designed to work across Navy ranges to help better understand the impacts of the Navy's activities on marine mammals and their habitat by focusing on learning more about marine mammal occurrence in different areas and exposure to Navy stressors, marine mammal responses to different sound sources, and the consequences of those exposures and responses on marine mammal populations. Similarly, these proposed modified regulations would include identical adaptive management provisions and reporting requirements as the 2018 HSTT regulations. There is no new information that would indicate that the monitoring measures put in place under the 2018 HSTT final rule would not remain applicable and appropriate for the 7-year period of this proposed rule. See the *Monitoring* section of the 2018 HSTT final rule for more details on the monitoring program that would be required under this rule. In addition, please see the 2019 Navy application, which references Chapter 13 of the 2017 Navy application for full details on the monitoring and reporting proposed by the Navy.

Within the SOCAL portion of HSTT, the Navy has been primarily focused on beaked whale monitoring since 2018 through two separate ongoing projects that are expected to continue until 2025. These projects use passive acoustic devices, visual surveys, satellite tagging, genetic analysis, photoID, and response to anthropogenic sounds to refine population status of beaked whales in SOCAL. There is also one concurrent project with fin whales using visual surveys, satellite tagging, and photoID to gather additional data on fin whale

populations in Southern California. Finally, the Navy continues to fund marine mammal sighting data collected during California Cooperative Oceanic Fisheries Investigations (CALCOFI) *https://calcofi.org/*. These data are collected on a much more frequent basis than NMFS' West Coast visual survey which typically occur once every 5 years in the summer. CALCOFI surveys occur quarterly every year to include winter and spring seasons NMFS does not survey. Sufficient marine mammal sightings have been accumulated since the Navy started funding in 2004 for the data to be incorporated into ongoing NMFS spatial habitat models, including new models for select species. The Navy also annually funds continued NMFS spatial habitat model improvements as new data and techniques become available. These models benefit the Navy and other Federal partners such as the Bureau of Ocean Energy Management and NMFS, for use in future regional marine mammal density derivation. For additional information, please see the Navy's Marine Species Monitoring program website, *https://www.navymarinespeciesmonitoring.us/regions/pacific/current-projects/*.

Adaptive Management

The 2020 HSTT regulations governing the take of marine mammals incidental to Navy training and testing activities in the HSTT Study Area contain an adaptive management component. Our understanding of the effects of Navy training and testing activities (*e.g.,* acoustic and explosive stressors) on marine mammals continues to evolve, which makes the inclusion of an adaptive management component both valuable and necessary within the context of 7-year regulations. The 2022 Navy application proposes no changes to the adaptive management component included in the 2020 HSTT final rule.

The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider whether any changes to existing mitigation and monitoring requirements are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring and if the measures are practicable. If the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of the planned LOA in the **Federal Register** and solicit public comment.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from monitoring and exercises reports, as required by MMPA authorizations; (2) compiled results of Navy funded R&D studies; (3) results from specific stranding investigations; (4) results from general marine mammal and sound research; and (5) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs. The results from monitoring reports and other studies may be viewed at *https://www.navymarinespeciesmonitoring.us*.

Proposed Reporting

In order to issue incidental take authorization for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring. Reports from individual monitoring events, results of analyses, publications, and periodic progress reports for specific monitoring projects will be posted to the Navy's Marine Species Monitoring web portal: *http://www.navymarinespeciesmonitoring.us*. The 2019 Navy application and 2022 Navy application proposed no changes to the reporting requirements, though as noted above, the Navy has since proposed to report changes to Lookout SOPs to NMFS. Except as discussed below, reporting requirements would remain identical to those described in the 2018 HSTT final rule and 2020 HSTT final rule, and there is no new information that would indicate that the reporting requirements put in place under the 2020 HSTT final rule would not remain applicable and appropriate for the remaining duration of the 7-year period of this proposed rule. See the *Reporting* section of the 2018 HSTT final rule for more details on the reporting that would be required under this rulemaking. In addition, the 2018 HSTT proposed and final rules unintentionally failed to include the requirement for the Navy to submit a final activity ''close out'' report at the end of the regulatory period. That oversight was corrected through the 2020 HSTT final rule. Please see the 2020 HSTT final rule for the detailed requirements for that report.

In addition to the reporting requirements included in the 2020 HSTT final rule, the Navy must report changes in its Lookout policies to NMFS as soon as practicable after a change is made.

Preliminary Analysis and Negligible Impact Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). While this proposed rule consists of a modification of take by M/SI by vessel strike, NMFS considers the impacts of the entire specified activity and the total taking in the negligible impact determination. An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be taken through mortality, serious injury, and Level A or Level B harassment (as presented in tables 11 and 12 of the 2020 HSTT final rule), NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities (including foreign military activities) are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, other ongoing sources of human-caused mortality, ambient noise levels, and specific consideration of take by Level A harassment or M/SI previously authorized for other NMFS activities).

In the *Estimated Take of Marine Mammals* sections of this proposed rule and the 2020 HSTT final rule (where the activities, species and stocks, potential effects, and mitigation measures are the same as for this rulemaking), we

identified the subset of potential effects that would be expected to rise to the level of takes both annually and over the 7-year period covered by this rulemaking and then identified the number of each of those mortality takes that we believe could occur or the maximum number of harassment takes that are reasonably expected to occur based on the methods described. The impact that any given take will have is dependent on many case-specific factors that need to be considered in the negligible impact analysis (*e.g.,* the context of behavioral exposures such as duration or intensity of a disturbance, the health of impacted animals, the status of a species that incurs fitness-level impacts to individuals, *etc.*). For this proposed rule, we evaluated the likely impacts of the enumerated maximum number of harassment takes that are reasonably expected to occur and proposed for authorization, in the context of the specific circumstances surrounding these predicted takes. We also assessed M/SI takes that could occur, as well as considering the traits and statuses of the affected species and stocks. Last, we collectively evaluated this information, as well as other more taxa-specific information and mitigation measure effectiveness, in group-specific assessments that support our negligible impact conclusions for each stock or species. Because all of the Navy's specified activities would occur within the ranges of the marine mammal stocks identified in the rule, all negligible impact analyses and determinations are at the stock level (*i.e.,* additional species-level determinations are not needed).

The Navy proposes no changes to the nature or level of the specified activities or the boundaries of the HSTT Study Area, and therefore, the training and testing activities (*e.g.,* equipment and sources used, exercises conducted) are the same as those analyzed in the 2020 HSTT final rule. In addition, the mitigation, monitoring, and nearly all reporting measures are identical to those described and analyzed in the 2018 HSTT final rule with the exception of changes to mitigation measures described previously and the additional reporting requirement for Navy to report changes in its Lookout policies to NMFS as soon as practicable after a change is made. There is no new information since the publication of the 2020 HSTT final rule regarding the impacts of the specified activities on marine mammals, the status and distribution of any of the affected marine mammal species or stocks, or the effectiveness of the mitigation and monitoring measures that would change the content of our analyses, with the exception of that described below. First, naval vessel strikes have occurred in the HSTT and Atlantic Fleet Training and Testing (AFTT) Study Areas since publication of the 2020 HSTT final rule (one fin or sei whale struck by the U.S. Navy in the HSTT Study Area (2023), two unidentified large whales struck by the U.S. Navy in the HSTT Study Area (2021), two fin whales struck by a foreign navy in the HSTT Study Area (2021), and one dolphin struck by the U.S. Navy in the AFTT Study Area (2021)). Second, for gray whales, we have considered the latest effects of the UME on the west coast of North America along with the effects of the Navy's activities in the negligible impact analysis. Third, a new study suggests that Lookout detection of marine mammals is less certain than previously assumed (Oedekoven and Thomas, 2022). Fourth, stock assessments have been updated for multiple stocks in the 2022 Pacific and Alaska SARs (Carretta *et al.* 2023; Young *et al.* 2023).

As described above and in the 2022 Navy application, a number of additional studies have been published, including several studies associated with TTS in harbor porpoises and seals (*e.g.,* Kastelein *et al.* 2020d; Kastelein *et al.* 2021a and 2021b; Sills *et al.* 2020). NMFS is aware of these recent papers and is currently working with the Navy to update NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing Version 2.0 (Acoustic Technical Guidance; NMFS 2018) to reflect relevant papers that have been published since the 2018 update on our 3–5 year update schedule in the Acoustic Technical Guidance. We note that the recent peer-reviewed, updated marine mammal noise exposure criteria by Southall *et al.* (2019) provide identical PTS and TTS thresholds and weighting functions to those provided in NMFS' Acoustic Technical Guidance. NMFS will continue to review and evaluate new relevant data as it becomes available and consider the impacts of those studies on the Acoustic Technical Guidance to determine what revisions/updates may be appropriate. However, any such revisions must undergo peer and public review before being adopted, as described in the Acoustic Guidance methodology. While some of the relevant data may potentially suggest changes to TTS/PTS thresholds for some species, any such changes would not be expected to change the predicted take estimates in a manner that would change the necessary determinations supporting the issuance of these regulations, and the data and values used in this rulemaking reflect the best available science.

Harassment

As described in the *Estimated Takes of Marine Mammals* section, the annual number of takes proposed for authorization and reasonably expected to occur by Level A harassment and Level B harassment (based on the maximum number of activities per 12-month period) are identical to those presented in tables 41 and 42 in the *Take Requests* section of the 2018 HSTT final rule, with the exception of humpback whale, which are presented in tables 2 and 3 herein. As such, the negligible impact analyses and determinations of the effects of the estimated Level A harassment and Level B harassment takes on annual rates of recruitment or survival for each species and stock are nearly identical to and substantively unchanged from those presented in the 2020 HSTT final rule. The differences in the analysis is our removal of consideration of California Sea Lion UME, which has been closed since publication of the 2020 HSTT final rule, and incorporation of the revised stock structure for humpback whales. This does not affect the results of the analyses or our determinations. For detailed discussion of the impacts that affected individuals may experience given the specific characteristics of the specified activities and required mitigation (*e.g.,* from behavioral disruption, masking, and temporary or permanent threshold shift), along with the effects of the expected Level A harassment and Level B harassment take on reproduction and survival, see the applicable subsections in the *Analysis and Negligible Impact Determination* section of the 2018 HSTT final rule (83 FR 66977–67018; also incorporated by reference in the 2020 HSTT final rule).

Serious Injury or Mortality

Based on the information and methods discussed in the *Estimated Take of Marine Mammals* section (which are identical to those used in the 2018 HSTT final rule for explosives and revised for vessel strike), NMFS is proposing to authorize five mortalities of large whales due to vessel strike over the 7-year period of this rulemaking, two more strikes than what was authorized in the 2018 HSTT final rule and 2020 HSTT final rule. Across the 7-year duration of the rule, take of an annual average of 0.57 gray whales (Eastern North Pacific stock) and fin

whales (CA/OR/WA stock), an annual average of 0.29 humpback whales (Hawaii stock) and an annual average of 0.14 blue whales (Eastern North Pacific stock), sei whales (Eastern North Pacific stock) and humpback whales (Mainland Mexico-CA/OR/WA stock, Mexico DPS), as described in table 8 (*i.e.,* one, two, or four take(s) over 7 years divided by seven to get the annual number) could occur and are proposed for authorization.

TABLE 10—SUMMARY INFORMATION RELATED TO MORTALITIES REQUESTED FOR VESSEL STRIKE
[2018–2025]

Species (stock)	Stock abundance (Nbest) *	Annual authorized take by serious injury or mortality [1]	Total annual M/SI * [2]	Fisheries interactions (Y/N); annual rate of M/SI from fisheries interactions *	Annual rate of M/SI from vessel collision *	Potential biological removal (PBR) *	Residual PBR (PBR minus annual M/SI) [3]	Stock trend * [4]	Recent UME (Y/N); number and year (since 2007)
Fin whale (CA/OR/WA stock).	11,065	0.57	≥43.6	Y; ≥0.64	Y, 43	80	36.4	↑	N.
Gray whale (Eastern North Pacific stock).	26,960	0.57	131	Y, 9.3	Y, 1.8	801	670	[5] ↑	Y; 674; 2019 (as of June 25, 2023).
Humpback whale (Mainland Mexico-CA/OR/WA stock, Mexico DPS).	3,477	0.14	22	Y; 11.4	Y, 10.15	65	[6] 43	Unknown	N.
Humpback whale (Hawaii stock).	11,278	0.29	27.09	Y; 8.39	[7] Y, 10.59	127	99.91	Unknown	Y; 2015; 52.]
Blue whale (Eastern North Pacific Stock).	1,898	0.14	≥19.5	Y; ≥1.54	Y, 0.8	4.1	-15.4	Unknown	Y; 3, 2007.
Sei whale (Eastern North Pacific Stock).	519	0.14	≥0.2	N; 0	Y, 0.2	0.75	0.55	Unknown	N.

* Presented in the 2022 final SARs.
[1] This column represents the annual take by serious injury or mortality (M/SI) by vessel collision and was calculated by the number of mortalities proposed for authorization divided by 7 years (the length of the rule and LOAs).
[2] This column represents the total number of incidents of M/SI that could potentially accrue to the specified species or stock. This number comes from the SAR, but deducts the takes accrued from either Navy strikes or NMFS' Southwest Fisheries Science Center (SWFSC) takes in the SARs to ensure not double-counted against PBR. However, for these species, there were no takes from either other Navy activities or SWFSC in the SARs to deduct that would be considered double-counting.
[3] This value represents the calculated PBR less the average annual estimate of ongoing anthropogenic mortalities (*i.e.,* total annual human-caused M/SI, which is presented in the SARs).
[4] See relevant SARs for more information regarding stock status and trends.
[5] The Pacific 2022 SAR indicates that the stock trend is increasing. However, recent (2021–2022) surveys conducted by NMFS' Southwest Fisheries Science Center estimated that the population has declined to 16,650 whales, though the authors note that this stock has historically shown a pattern of population growth and decline that has not impacted the population in the long term (Eguchi et al. 2022).
[6] Vessel strike of the Mainland Mexico-CA/OR/WA stock was calculated by applying a prorated portion of humpback whale strikes modeled by Rockwood et al. (2017) to this stock.
[7] For this stock, PBR is currently set at 43 for U.S. waters and 65 for the stock's entire range. As the HSTT Study Area extends beyond U.S. waters and activities have the potential to impact the entire stock, we present the analysis using the PBR for the stock's entire range.
[8] Annual vessel strike for this stock reported in the 2022 final SAR was calculated by summing vessel strike data from Hawaii, Alaska, and Washington. All observed strikes in Hawaii were assigned to the Hawaii stock, and a portion of observed strikes in Alaska were assigned to the Hawaii stock. Vessel strike of the Hawaii stock in Washington waters was calculated by applying a prorated portion of humpback whale strikes modeled by Rockwood et al. (2017) to the Hawaii stock.

The Navy also requested a small number of takes by M/SI from explosives in the 2017 Navy application. To calculate the annual average of mortalities for explosives in table 11, we used the same method as described for vessel strikes. The annual average is the total number of takes over 7 years divided by seven. Specifically, NMFS is proposing to authorize the following M/SI takes from explosives: five California sea lions and eight short-beaked common dolphins over the 7-year period (therefore 0.71 mortalities annually for California sea lions and 1.14 mortalities annually for short-beaked common dolphin), as described in table 11. As this annual number is the same as that analyzed and authorized in the 2020 HSTT final rule, and no other relevant information about the status, abundance, or effects of mortality on each species or stock has changed, the analysis of the effects of explosives is identical to that presented in the 2020 HSTT final rule.

TABLE 11—SUMMARY INFORMATION RELATED TO MORTALITIES FROM EXPLOSIVES
[2018–2025]

Species (stock)	Stock abundance (Nbest) *	Annual authorized take by serious injury or mortality [1]	Total annual M/SI * [2]	Fisheries interactions (Y/N); annual rate of M/SI from fisheries interactions *	PBR *	SWFSC authorized take (annual) [3]	Residual PBR—PBR minus annual M/SI and SWFSC [4]	Stock trend * [5]	UME (Y/N); number and year
California sea lion (U.S. stock)	257,606	0.71	≥321	Y; ≥197	14,011	6	13,684	↑	N
Short-beaked common dolphin (CA/OR/WA stock).	1,056,308	1.14	≥30.5	Y; ≥30.5	8,889	2.8	8,855.7	?	N

* Presented in the 2022 draft SARs or most recent SAR.
[1] This column represents the annual take by serious injury or mortality (M/SI) during explosive detonations and was calculated by the number of mortalities planned for authorization divided by 7 years (the length of the rule and LOAs).
[2] This column represents the total number of incidents of M/SI that could potentially accrue to the specified species or stock. This number comes from the SAR.
[3] This column represents annual take authorized through NMFS' SWFSC rulemaking/LOAs (86 FR 3840; January 15, 2021).
[4] This value represents the calculated PBR less the average annual estimate of ongoing anthropogenic mortalities (*i.e.,* total annual human-caused M/SI column and the annual authorized take from the SWFSC column. In the case of California sea lion the M/SI column (321) and the annual authorized take from the SWFSC (6) were subtracted from the calculated PBR of 14,011. In the case of short-beaked common dolphin the M/SI column (30.5) and the annual authorized take from the SWFSC (2.8) were subtracted from the calculated PBR of 8,889.
[5] See relevant SARs for more information regarding stock status and trends.

See the *Serious Injury or Mortality* subsection in the *Analysis and Negligible Impact Determination* section of the 2018 HSTT final rule (83 FR 66985–66993) for detailed discussions of the impacts of M/SI, including a description of how the agency uses the PBR metric and other factors to inform our analysis and an analysis of the impacts on each species and stock for which M/SI is proposed for authorization, including the relationship of potential mortality for each species to the insignificance threshold and residual PBR, except as updated below.

Stocks With M/SI Below the Insignificance Threshold

As noted in the *Serious Injury or Mortality* subsection of the *Negligible Impact Analysis and Determination* section in the 2018 HSTT final rule and 2020 HSTT final rule, for a species or stock with incidental M/SI less than 10 percent of residual PBR, we consider M/SI from the specified activities to represent an insignificant incremental increase in ongoing anthropogenic M/SI that alone (*i.e.,* in the absence of any other take and barring any other unusual circumstances) will clearly not adversely affect annual rates of recruitment and survival. In this case, as shown in table 10 and table 11, the following species or stocks have potential or estimated M/SI from vessel strike and explosive takes, respectively, and proposed for authorization below their insignificance threshold: fin whale (CA/OR/WA stock), gray whale (Eastern North Pacific stock), humpback whale (Hawaii stock and Mainland Mexico-CA/OR/WA stock), California sea lion (U.S stock), and short-beaked common dolphin (CA/OR/WA stock). While the proposed authorized M/SI of gray whales (Eastern North Pacific stock) is below the insignificance threshold, because of the recent UME, we further address how the proposed authorized M/SI and the UME inform the negligible impact determination immediately below. For the other four stocks with proposed authorized M/SI below the insignificance threshold, there are no other known factors, information, or unusual circumstances that indicate anticipated M/SI below the insignificance threshold could have adverse effects on annual rates of recruitment or survival and they are not discussed further. For the remaining stocks with anticipated potential M/SI above the insignificance threshold, how that M/SI compares to residual PBR, as well as additional factors, as appropriate, are discussed below as well.

Gray Whales (Eastern North Pacific Stock)

Since January 2019, gray whale strandings along the west coast of North America have been significantly higher than the previous 18-year averages. Preliminary findings from necropsies have shown evidence of emaciation. These findings are not consistent across all of the whales examined, so more research is needed. The seasonal pattern of elevated strandings in the spring and summer months is similar to that of the previous gray whale UME in 1999–2000. If strandings continue to follow a similar pattern, we would anticipate a decrease in strandings in late summer and fall. However, combined with other annual human-caused mortalities and viewed through the PBR lens (for human-caused mortalities), total human-caused mortality would still fall below residual PBR. Given the small number of takes by serious injury or mortality proposed for authorization, the proposed takes are not anticipated to exacerbate the ongoing UME.

Stocks With M/SI Above the Insignificance Threshold

Blue Whale (Eastern North Pacific Stock)

For blue whales (Eastern North Pacific stock), PBR is currently set at 4.1 and the total annual M/SI is estimated at greater than or equal to 19.5, yielding a residual PBR of −15.4. This is slightly higher than the 2020 HSTT final rule (was −16.7). NMFS proposes to authorize one M/SI for the Navy over the 7-year duration of the rule (indicated as 0.14 annually for the purposes of comparing to PBR and evaluating overall effects on annual rates of recruitment and survival), which means that residual PBR is exceeded by 15.54. However, as described in the 2018 and 2020 rules, given that the negligible impact determination is based on the assessment of take of the activity being analyzed, when total annual mortality from human activities is higher, but the impacts from the specific activity being analyzed are very small, NMFS may still find the impact of the proposed authorized take from a specified activity to be negligible even if total human-caused mortality exceeds PBR if the proposed authorized mortality is less than 10 percent of PBR and management measures are being taken to address serious injuries and mortalities from the other activities causing mortality (*i.e.,* other than the specified activities covered by the incidental take authorization in consideration). When those considerations are applied here, the authorized lethal take (0.14 annually) of blue whales from the Eastern North Pacific stock is less than 10 percent of PBR (which is 4.1), and there are management measures in place to address M/SI from activities other than those the Navy is conducting (as discussed below). Perhaps more importantly, the available data suggests that the current number of vessel strikes is not likely to have an adverse impact on the population, despite the fact that it exceeds PBR, with the Navy's minimal additional mortality of one whale in the 7 years not creating the likelihood of adverse impact. Immediately below, we explain the information that supports our finding that the Navy's proposed authorized M/SI is not expected to result in more than a negligible impact on this stock. As described previously, NMFS must also ensure that impacts by the applicant on the species or stock from other types of take (*i.e.,* harassment) do not combine with the impacts from mortality to adversely affect the species or stock via impacts on annual rates of recruitment or survival, which occurs further below in the stock-specific conclusion sections.

As discussed in the 2018 HSTT final rule and the 2020 HSTT final rule, the 2018 draft SAR and the more recent SARs rely on a new method to estimate annual deaths by vessel strike utilizing an encounter theory model that combined species distribution models of whale density, vessel traffic characteristics, and whale movement patterns obtained from satellite-tagged animals in the region to estimate encounters that would result in mortality (Rockwood *et al.* 2017). The model predicts 18 annual mortalities of blue whales from vessel strikes, which, with the additional M/SI of 1.54 from fisheries interactions, results in the current estimate of residual PBR being −15.4. Although NMFS' Permits and Conservation Division in the Office of Protected Resources has independently reviewed the vessel strike model and its results and agrees that it is appropriate for estimating blue whale mortality by vessel strike on the U.S. West Coast, for analytical purposes we also note that if the historical method were used to predict vessel strike (*i.e.,* using observed mortality by vessel strike, or 0.8, instead of 18), then total human-caused mortality including the Navy's potential take would not exceed PBR. We further note that the authors (Rockwood *et al.* 2017) do not suggest that vessel strike suddenly increased to 18 recently. In fact, the model is not specific to a year, but rather offers a generalized

prediction of vessel strike off the U.S. West Coast. Therefore, if the Rockwood *et al.* (2017) model is an accurate representation of vessel strike, then similar levels of vessel strike have been occurring in past years as well. Put another way, if the model is correct, for some number of years total-human-caused mortality has been significantly underestimated and PBR has been similarly exceeded by a notable amount, and yet, the Eastern North Pacific stock of blue whales remains stable nevertheless.

NMFS' 2022 final SAR states that the current population trend is unknown, though there may be evidence of a population size increase since the 1990s. The SAR further cites to Monnahan *et al.* (2015), which used a population dynamics model to estimate that the Eastern North Pacific blue whale population was at 97 percent of carrying capacity in 2013 and to suggest that the observed lack of a population increase since the early 1990s was explained by density dependence, not impacts from vessel strike. This would mean that this stock of blue whales shows signs of stability and is not increasing in population size because the population size is at or nearing carrying capacity for its available habitat. In fact, we note that this population has maintained this status throughout the years that the Navy has consistently tested and trained at similar levels (with similar vessel traffic) in areas that overlap with blue whale occurrence, which would be another indicator of population stability.

Monnahan *et al.* (2015) modeled vessel numbers, vessel strikes, and the population of the Eastern North Pacific blue whale population from 1905 out to 2050 using a Bayesian framework to incorporate informative biological information and assign probability distributions to parameters and derived quantities of interest. The authors tested multiple scenarios with differing assumptions, incorporated uncertainty, and further tested the sensitivity of multiple variables. Their results indicated that there is no immediate threat (*i.e.,* through 2050) to the population from any of the scenarios tested, which included models with 10 and 35 strike mortalities per year. Broadly, the authors concluded that, unlike other blue whale stocks, the Eastern North Pacific blue whales have recovered from 70 years of whaling and are in no immediate threat from vessel strikes. They further noted that their conclusion conflicts with the depleted and strategic designation under the MMPA as well as PBR specifically.

As discussed, we also take into consideration management measures in place to address M/SI caused by other activities. The Channel Islands NMS staff coordinates, collects, and monitors whale sightings in and around the Vessel Speed Reduction (VSR) zones and the Channel Islands NMS region. Redfern *et al.* (2013) note that the most risky area for blue whales is the Santa Barbara Channel, where shipping lanes intersect with common feeding areas. The seasonally established Southern California VSR zone spans from Point Arguello to Dana Point, including the Traffic Separation Schemes in the Santa Barbara Channel and San Pedro Channel. Vessels transiting the area from May 1 through December 15, 2023 are recommended to exercise caution and voluntarily reduce speed to 10 kn (18.5 km per hour) or less for blue, humpback, and fin whales. (Note this is an expanded timeframe from the Whale Advisory Zone discussed in the 2020 HSTT final rule, which spanned June through November, though the effective period could change in future years.) Channel Island NMS observers collect information from aerial surveys conducted by NOAA, the U.S. Coast Guard, California Department of Fish and Game, and U.S. Navy chartered aircraft. Information on seasonal presence, movement, and general distribution patterns of large whales is shared with mariners, NMFS Office of Protected Resources, U.S. Coast Guard, California Department of Fish and Game, the Santa Barbara Museum of Natural History, the Marine Exchange of Southern California, and whale scientists. Real time and historical whale observation data collected from multiple sources can be viewed on the Point Blue Whale Database.

In this case, 0.14 M/SI means one mortality in 1 of the 7 years and zero mortalities in 6 of those 7 years. Therefore, the Navy would not be contributing to the total human-caused mortality at all in 6 of the 7, or 85.7 percent, of the years covered by this rulemaking. That means that even if a blue whale were to be struck, in 6 of the 7 years there could be no effect on annual rates of recruitment or survival from Navy-caused M/SI. Additionally, the loss of a male would have far less, if any, effect on population rates and absent any information suggesting that one sex is more likely to be struck than another, we can reasonably assume that there is a 50 percent chance that the single strike authorized by this rulemaking would be a male, thereby further decreasing the likelihood of impacts on the population rate. In situations like this where potential M/SI is fractional, consideration must be given to the lessened impacts anticipated due to the absence of M/SI in 6 of the 7 years and the fact that the single strike could be a male. Lastly, we reiterate that PBR is a conservative metric and also not sufficiently precise to serve as an absolute predictor of population effects upon which mortality caps would appropriately be based. This is especially important given the minor difference between zero and one across the 7-year period covered by this rulemaking, which is the smallest distinction possible when considering mortality. As noted above, Wade *et al.* (1998), authors of the paper from which the current PBR equation is derived, note that ''Estimating incidental mortality in 1 year to be greater than the PBR calculated from a single abundance survey does not prove the mortality will lead to depletion; it identifies a population worthy of careful future monitoring and possibly indicates that mortality-mitigation efforts should be initiated.'' The information included here indicates that the current population trend of this blue whale stock is unknown but likely approaching carrying capacity and has leveled off because of density-dependence, not human-caused mortality, in spite of what might be otherwise indicated from the calculated PBR. Further, potential (and proposed for authorization) M/SI is below 10 percent of PBR and management actions are in place to minimize vessel strike from other vessel activity in one of the highest-risk areas for strikes. Based on the presence of the factors described above, we do not expect lethal take from Navy activities, alone, to adversely affect Eastern North Pacific blue whales through effects on annual rates of recruitment or survival. Nonetheless, the fact that total human-caused mortality exceeds PBR necessitates close attention to the remainder of the impacts (*i.e.,* harassment) on the Eastern North Pacific stock of blue whales from the Navy's activities to ensure that the total authorized takes have a negligible impact on the species or stock. Therefore, this information will be considered in combination with our assessment of the impacts of proposed harassment takes in the *Group and Species-Specific Analyses* section that follows.

Sei Whale (Eastern North Pacific Stock)

For sei whales (Eastern North Pacific stock), PBR is currently set at 0.75. The total annual M/SI is estimated at greater than or equal to 0.2 in the 2022 final SAR, which reflects one strike over 5

years, yielding a residual PBR of 0.55. However, more recent information suggests that the total annual M/SI reflected in the SAR may be overestimated because the one mortality considered in the calculation may not have been caused by a vessel strike. Carretta *et al.* (2021) elected to omit this strike from its report summarizing sources of human-related injury and mortality for U.S. Pacific west coast marine mammal stock assessments after reviewing the stranding narrative. The narrative indicated that the strike likely occurred post-mortem, evidenced by a lack of hemorrhaging in the whale's tissues. NMFS proposes to authorize one M/SI for the Navy over the 7-year duration of the rule (indicated as 0.14 annually for the purposes of comparing to PBR and evaluating overall effects on annual rates of recruitment and survival), which means that residual PBR is 0.41 with the conservative inclusion of the likely post-mortem strike discussed above.

We acknowledge that the 2023 vessel strike by the U.S. Navy could have been of a sei whale or a CA/OR/WA fin whale, and this strike is not quantitatively included in this PBR analysis (nor is it quantitatively included in the PBR analysis for CA/OR/WA fin whale if both of the 2021 U.S. Navy strikes were fin whales) which rely on the 2022 final SARs. However, consideration of the 2023 strike would not change the total M/SI which NMFS compares to PBR, as the single strike from 2012–2016 used to calculate the vessel strike rate in the 2022 final SAR occurred in 2015 (which, as noted above, likely occurred post-mortem, and therefore, inclusion of this strike in the annual total M/SI is inherently conservative), and the 2023 U.S. Navy strike occurred outside of the 2012–2016 time period. Therefore, while we acknowledge the 2023 U.S. Navy strike, in the quantitative analysis it is treated the same as other non-U.S. Navy strikes that occurred outside of the timeframe reflected in the total M/SI (2012–2016).

Immediately below, we explain the information that supports our finding that the Navy's proposed authorized M/SI is not expected to result in more than a negligible impact on this stock. As described previously, NMFS must also ensure that impacts by the applicant on the species or stock from other types of take (*i.e.,* harassment) do not combine with the impacts from mortality to adversely affect the species or stock via impacts on annual rates of recruitment or survival, which occurs further below in the stock-specific conclusion sections.

Of note, management measures are in place to address M/SI caused by other activities. The Channel Islands NMS staff coordinates, collects, and monitors whale sightings in and around the Vessel Speed Reduction (VSR) zones and the Channel Islands NMS region. The seasonally established Southern California VSR zone spans from Point Arguello to Dana Point, including the Traffic Separation Schemes in the Santa Barbara Channel and San Pedro Channel. Vessels transiting the area from May 1 through December 15, 2023 are recommended to exercise caution and voluntarily reduce speed to 10 kn (18.5 km per hour) or less. While the VSR zone is aimed at reducing risk of fatal vessel strike of blue, humpback, and fin whales, this measure is also anticipated to reduce risk to sei whales (note, this is an expanded timeframe from the Whale Advisory Zone discussed in the 2020 HSTT final rule, which spanned June through November, though the effective period could change in future years). Channel Island NMS observers collect information from aerial surveys conducted by NOAA, the U.S. Coast Guard, California Department of Fish and Game, and U.S. Navy chartered aircraft. Information on seasonal presence, movement, and general distribution patterns of large whales is shared with mariners, NMFS Office of Protected Resources, U.S. Coast Guard, California Department of Fish and Game, the Santa Barbara Museum of Natural History, the Marine Exchange of Southern California, and whale scientists. Real time and historical whale observation data collected from multiple sources can be viewed on the Point Blue Whale Database.

Further, as stated in the 2022 final SAR, the California swordfish drift gillnet fishery is the most likely U.S. fishery to interact with Eastern North Pacific sei whales, though there are zero estimated annual takes from this fishery given no observed entanglements from 1990–2016 across 8,845 monitored fishing sets (Carretta *et al.* (2018b)). NMFS established the Pacific Offshore Cetacean Take Reduction Team in 1996 and prepared an associated Plan (PCTRP) to reduce the risk of M/SI via fisheries interactions. In 1997, NMFS published final regulations formalizing the requirements of the PCTRP, including the use of pingers following several specific provisions and the employment of Skipper education workshops.

In this case, 0.14 M/SI means one authorized mortality in 1 of the 7 years and zero authorized mortalities in 6 of those 7 years. Therefore, the Navy's authorized take would not be contributing to the total human-caused mortality at all in 6 of the 7, or 85.7 percent, of the years covered by this rulemaking. That means that even if a sei whale were to be struck, in 6 of the 7 years there could be no effect on annual rates of recruitment or survival from Navy-caused M/SI. Additionally, the loss of a male would have far less, if any, effect on population rates and absent any information suggesting that one sex is more likely to be struck than another, we can reasonably assume that there is a 50 percent chance that the single strike authorized by this rulemaking would be a male, thereby further decreasing the likelihood of impacts on the population rate. In situations like this where potential M/SI is fractional, consideration must be given to the lessened impacts anticipated due to the absence of M/SI in 6 of the 7 years and the fact that the single strike could be a male.

Lastly, we reiterate that PBR is a conservative metric and also not sufficiently precise to serve as an absolute predictor of population effects upon which mortality caps would appropriately be based. This is especially important given the minor difference between zero and one across the 7-year period covered by this rulemaking, which is the smallest distinction possible when considering mortality. As noted above, Wade *et al.* (1998), authors of the paper from which the current PBR equation is derived, note that ''Estimating incidental mortality in 1 year to be greater than the PBR calculated from a single abundance survey does not prove the mortality will lead to depletion; it identifies a population worthy of careful future monitoring and possibly indicates that mortality-mitigation efforts should be initiated.'' Even after qualitatively considering the possibility that the whale struck by Navy in 2023 was a sei whale, and based on the presence of the factors described above, we do not expect one authorized lethal take from Navy activities, alone, to adversely affect Eastern North Pacific sei whales through effects on annual rates of recruitment or survival. This information will be considered in combination with our assessment of the impacts of proposed harassment takes in the *Group and Species-Specific Analyses* section that follows.

Group and Species-Specific Analyses

In addition to broader analyses of the impacts of the Navy's activities on mysticetes, odontocetes, and pinnipeds, the 2018 HSTT final rule contained detailed analyses of the effects of the

Navy's activities in the HSTT Study Area on each affected species and stock and was updated, as appropriate, in the 2020 HSTT final rule. All of that information and analyses remain applicable and valid for our analyses of the effects of the same Navy activities on the same species and stocks, with the exception of humpback whale, for which the stock structure has been revised, and NMFS has updated its analyses accordingly for this proposed rule. See the *Group and Species-Specific Analyses* subsection in the *Analysis and Negligible Impact Determination* section of the 2018 HSTT final rule (83 FR 66993–67018). In addition, apart from the additional proposed incidental take by vessel strike of two large whales, the resulting changes to the average annual mortality estimates discussed above, and the revised humpback whale stock structure, no new information has been received since the publication of the 2020 HSTT final rule that significantly changes the analyses of the effects of the Navy's activities on each species and stock presented in the 2020 HSTT final rule (new information regarding vessel strike, the potential impact of the new gray whale UME, and the revised humpback whale stock structure were discussed earlier in the rule).

In the discussions below, the estimated Level B harassment takes represent instances of take, not the number of individuals taken (the much lower and less frequent Level A harassment takes are far more likely to be associated with separate individuals), and in many cases, some individuals are expected to be taken more than one time while in other cases, a portion of individuals will not be taken at all. Below, we compare the total take numbers (including PTS, TTS, and behavioral disturbance) for species or stocks to their associated abundance estimates to evaluate the magnitude of impacts across the species or stock and to individuals. Specifically, when an abundance percentage comparison is below 100, it means that percentage or less of the individuals in the stock will be affected (*i.e.,* some individuals will not be taken at all), that the average for those taken is 1 day per year, and that we would not expect any individuals to be taken more than a few times in a year. When it is more than 100 percent, it means there will definitely be some number of repeated takes of individuals. For example, if the percentage is 300, the average would be each individual is taken on 3 days in a year if all were taken, but it is more likely that some number of individuals will be taken more than three times and some number of individuals fewer times or not at all. While it is not possible to know the maximum number of days across which individuals of a stock might be taken, in acknowledgement of the fact that it is more than the average, for the purposes of this analysis, we assume a number approaching twice the average. For example, if the percentage of take compared to the abundance is 800, we estimate that some individuals might be taken as many as 16 times. Those comparisons are included in the sections below. For some stocks, these numbers have been adjusted slightly (with these adjustments being in the single digits) so as to more consistently apply this approach, but these minor changes did not change the analysis or findings.

To assist in understanding what this analysis means, we clarify a few issues related to estimated takes and the analysis here. An individual that incurs a PTS or TTS take may sometimes, for example, also be subject to behavioral disturbance at the same time. As described in the *Harassment* subsection of the *Analysis and Negligible Impact Determination* section of the 2018 HSTT final rule, the degree of PTS, and the degree and duration of TTS, expected to be incurred from the Navy's activities are not expected to impact marine mammals such that their reproduction or survival could be affected. Similarly, data do not suggest that a single instance in which an animal accrues PTS or TTS and is also subjected to behavioral disturbance would result in impacts to reproduction or survival. Alternately, we recognize that if an individual is subjected to behavioral disturbance repeatedly for a longer duration and on consecutive days, effects could accrue to the point that reproductive success is jeopardized (as discussed below in the stock-specific summaries). Accordingly, in analyzing the number of takes and the likelihood of repeated and sequential takes (which could result in reproductive impacts), we consider the total takes, not just the Level B harassment takes by behavioral disturbance, so that individuals potentially exposed to both threshold shift and behavioral disturbance are appropriately considered. We note that the same reasoning applies with the potential addition of behavioral disturbance to tissue damage from explosives, the difference being that we do already consider the likelihood of reproductive impacts whenever tissue damage occurs. Further, the number of Level A harassment takes by either PTS or tissue damage are so low compared to abundance numbers that it is considered highly unlikely that any individual would be taken at those levels more than once.

Having considered all of the information and analyses previously presented in the 2018 HSTT final rule, including the *Group and Species-Specific Analyses* discussions organized by the different groups and species, below we present tables showing instances of total take as a percentage of stock abundance for each group, updated with the new vessel strike calculations and humpback stock structure. We then summarize the information for each species or stock, considering the analysis from the 2018 HSTT final rule, 2020 HSTT final rule, and any new analysis. The analyses below in some cases address species collectively if they occupy the same functional hearing group (*i.e.,* low, mid, and high-frequency cetaceans and pinnipeds in water), share similar life history strategies, and/or are known to behaviorally respond similarly to acoustic stressors. Because some of these groups or species share characteristics that inform the impact analysis similarly, it would be duplicative to repeat the same analysis for each species or stock. In addition, animals belonging to each stock within a species typically have the same hearing capabilities and behaviorally respond in the same manner as animals in other stocks within the species.

Mysticetes

In table 12 and table 13 below for mysticetes, we indicate the total annual mortality, Level A harassment, and Level B harassment, and a number indicating the instances of total take as a percentage of abundance. Table 12 and table 13 have been updated from tables 18 and 19 in the 2020 HSTT final rule, as appropriate, with the 2022 final SARs and updated information on mortality, as discussed above. For additional information and analysis supporting the negligible-impact analysis, see the *Mysticetes* discussion in the *Group and Species-Specific Analyses* section of the 2018 HSTT final rule, all of which remains applicable to this proposed rule unless specifically noted.

TABLE 12—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR MYSTICETES IN THE HRC PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes [a]		Abundance		Instance of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality [b]	Total takes (entire study area)	Takes (within Navy EEZ)	Total Navy abundance inside and outside of EEZ (HRC)	Within EEZ Navy abundance (HRC)	Total take as percentage of total Navy abundance (HRC)	EEZ take as percentage of Navy EEZ abundance (HRC)
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage							
Blue whale	Central North Pacific.	15	33	0	0	0	48	40	43	33	112	121
Bryde's whale.	Hawaii	40	106	0	0	0	146	123	108	89	135	138
Fin whale	Hawaii	21	27	0	0	0	48	41	52	40	92	103
Humpback whale.	Hawaii	2,837	6,289	3	0	0.29	9,129	7,389	5,078	4,595	180	161
Minke whale.	Hawaii	1,233	3,697	2	0	0	4,932	4,030	3,652	2,835	135	142
Sei whale	Hawaii	46	121	0	0	0	167	135	138	107	121	126

Note: For the Hawaii take estimates, we compare predicted takes to abundance estimates generated from the same underlying density estimates (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule), both in and outside of the U.S. EEZ. Because the portion of the Navy's study area inside the U.S. EEZ is generally concomitant with the area used to generate the abundance estimates in the SARs, and the abundance predicted by the same underlying density estimates is the preferred abundance to use, there is no need to separately compare the take to the SARs abundance estimate.

[a] Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

[b] The annual mortality of 0.29 is the result of no more than two mortalities over the course of 7 years from vessel strikes as described above in the *Estimated Take of Marine Mammals* section.

TABLE 13—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR MYSTICETES IN THE SOCAL PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes [a]	Abundance		Instance of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality [b]	Total takes (entire study Area)	Navy abundance in action area (SOCAL)	NMFS SARS abundance	Total take as percentage of total Navy abundance in action area	Total take as percentage of total SAR abundance
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage						
Blue whale	Eastern North Pacific.	792	1,196	1	0	0.14	1,989	785	1,898	253	105
Bryde's whale	Eastern Tropical Pacific.	14	27	0	0	0	41	1.3	unknown	3,154	unknown
Fin whale	CA/OR/WA	835	1,390	1	0	0.57	2,227	363	11,065	613	20
Humpback whale	Central America/ Southern Mexico-CA/OR/WA.	282	594	0	0	0	876	[c] 74	1,496	1,184	59
	Mainland Mexico- CA/ OR/WA.	198	920	1	0	0.14	1,119	[c] 173	3,477	647	32
Minke whale	CA/OR/WA	259	666	1	0	0	926	163	915	568	101
Sei whale	Eastern North Pacific.	27	52	0	0	0.14	79	3	519	2,633	15
Gray whale	Eastern North Pacific.	1,316	3,355	7	0	0.57	4,679	193	26,960	2,424	17
Gray whale	Western North Pacific.	2	4	0	0	0	6	0	290	0	2

Note: For the SOCAL take estimates, because of the manner in which the Navy study area overlaps the ranges of many MMPA stocks (*i.e.,* a stock may range far north to Washington state and beyond and abundance may only be predicted within the U.S. EEZ, while the Navy study area is limited to Southern California and northern Mexico, but extends beyond the U.S. EEZ), we compare predicted takes to both the abundance estimates for the study area, as well as the SARs (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule).

[a] Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

[b] The annual mortality of 0.14 is the result of no more than one mortality over the course of 7 years from vessel strikes as described above in the *Estimated Take of Marine Mammals* section. The annual mortality of 0.57 is the result of no more than four mortalities over the course of 7 years from vessel strikes.

[c] In the 2020 HSTT final rule, NMFS reported a Navy abundance in Action Area (SOCAL) of 247 CA/OR/WA humpback whales. As explained in more detail in the Estimated Take from Vessel Strikes and Explosives by Serious Injury or Mortality, NMFS estimates that approximately 30 percent of the humpback whales off the coast of California may be from the Central America DPS with the remaining 70 percent are expected to be from the Mexico DPS. Therefore, of the estimated 247 humpback whales in SOCAL, NMFS anticipates that 74 would be of the Central America/Southern Mexico-CA/OR/WA stock (Central America DPS), and 173 would be of the Mainland Mexico-CA/OR/WA stock (Mexico DPS).

Below we compile and summarize the information that supports our preliminary determination that the Navy's activities would not adversely affect any species or stocks through effects on annual rates of recruitment or survival for any of the affected mysticete species and stocks.

Blue Whale (Eastern North Pacific Stock)

Blue whales are listed as endangered under the ESA, and the current population trend for the Eastern North Pacific stock is unknown. We further note that this stock was originally listed under the ESA as a result of the impacts from commercial whaling, which is no longer affecting the species. NMFS proposes to authorize one mortality over the 7 years covered by this rulemaking or 0.14 mortality annually. With the addition of this 0.14 annual mortality, residual PBR is exceeded, resulting in the total human-caused mortality exceeding PBR by 15.54. However, as described in more detail in the *Serious Injury or Mortality* section above, when total human-caused mortality exceeds PBR, we consider whether the incremental addition of a small amount of authorized mortality from the specified activity may still result in a negligible impact, in part by identifying whether it is less than 10 percent of PBR. In this case, the authorized mortality is well below 10 percent of PBR, management measures are in place to reduce mortality from other sources, and the incremental addition of a single mortality over the course of the 7-year Navy rule is not expected to, alone, lead to adverse impacts on the stock through effects on annual rates of recruitment or survival.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 253 and 105 percent, respectively (table 13). Given the range of blue whales, this information suggests that only some portion of individuals in the stock are likely impacted, but that there will likely be some repeat exposure (maybe 5 or 6 days within a year) of some subset of individuals that spend extended time within SOCAL. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Additionally, the Navy implements time/area mitigation in SOCAL in the majority of the BIAs, which will reduce the severity of impacts to blue whales by reducing interference in feeding that could result in lost feeding opportunities or necessitate additional energy expenditure to find other good opportunities. Regarding the severity of TTS takes, we have explained in the 2018 HSTT final rule that they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with blue whale communication or other important low-frequency cues—and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For similar reasons (as described in the 2018 HSTT final rule) the single estimated Level A harassment take by PTS for this stock is unlikely to have any effect on the reproduction or survival of that one individual, even if it were to be experienced by an animal that also experiences one or more Level B harassment takes by behavioral disturbance.

Altogether, only a small portion of the stock is anticipated to be impacted and any individual blue whale is likely to be disturbed at a low-moderate level, with likely many animals exposed only once or twice and a subset potentially disturbed across 5 or 6 days but minimized in biologically important areas. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals and, therefore, when combined with the proposed authorized mortality (which our earlier analysis indicated would not, alone, have more than a negligible impact on this stock of blue whales), the total take is not expected to adversely affect this stock through impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Eastern North Pacific stock of blue whales.

Bryde's Whale (Eastern Tropical Pacific Stock)

Little is known about this stock or its status, and it is not listed under the ESA. No mortality or Level A harassment is anticipated or proposed to be authorized. Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 3,154 percent; however, the abundance upon which this percentage is based (1.3 whales from the Navy estimate, which is extrapolated from density estimates based on very few sightings) is clearly erroneous and the SAR does not include an abundance estimate because all of the survey data is outdated (table 13). However, the abundance in the early 1980s was estimated as 22,000 to 24,000, a portion of the stock was estimated at 13,000 in 1993, and the minimum number in the Gulf of California was estimated at 160 in 1990. Given this information and the fact that 41 total takes of Bryde's whales were estimated, this information suggests that only a small portion of the individuals in the stock are likely impacted, and few, if any, are likely taken over more than 1 day. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with Bryde's whale communication or other important low-frequency cues. Any associated lost opportunities and capabilities are not at a level that would impact reproduction or survival.

Altogether, only a small portion of the stock is anticipated to be impacted and any individual Bryde's whale is likely to be disturbed at a low-moderate level, with few, if any, individuals exposed over more than 1 day in the year. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, much less annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Eastern Tropical Pacific stock of Bryde's whales.

Fin Whale (CA/OR/WA Stock)

The SAR identifies this stock as ''increasing,'' even though the larger species is listed as endangered under the ESA. NMFS proposes to authorize four mortalities over the 7 years covered by this rulemaking, or 0.57 mortality annually. The addition of this 0.57 annual mortality still leaves the total human-caused mortality well under residual PBR.

We acknowledge the 2021 vessel strike of two fin whales by the Royal Australian Navy, and that the 2021 and 2023 vessel strikes by the U.S. Navy could have been CA/OR/WA fin whales. While the Royal Australian Navy strikes are not quantitatively included in the estimated take by vessel strike, even if they were, and if we presumed that the 2021 and 2023 U.S. Navy strikes were all fin whales, M/SI of this stock would still fall well below PBR (80).

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 613 and 20 percent, respectively (table 13). This information suggests that only some portion (less than 25 percent) of individuals in the stock are likely impacted but that there is likely some repeat exposure (perhaps up to 12 days within a year) of some subset of individuals that spend extended time within the SOCAL complex. Some of these takes could occur on a few sequential days for some small number of individuals, for example, if they resulted from a multi-day exercise on a range while individuals were in the area for multiple days feeding. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Additionally, while there are no known BIAs for fin whales in the SOCAL range, the Navy implements time/area mitigation in SOCAL in blue whale BIAs, and fin whales are known to sometimes feed in some of the same areas, which means they could potentially accrue some benefits from the mitigation. Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with fin whale communication or other important low-frequency cues—and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For similar reasons (as described in the 2018 HSTT final rule) the single estimated Level A harassment take by PTS for this stock is unlikely to have any effects on the reproduction or survival of that one individual.

Altogether, this population is increasing, only a small portion of the stock is anticipated to be impacted, and any individual fin whale is likely to be disturbed at a low-moderate level, with the taken individuals likely exposed between 1 and 12 days, with a few individuals potentially taken on a few sequential days. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, and therefore, when combined with the proposed authorized mortality (which our earlier analysis indicated would not, alone, have more than a negligible impact on this stock of fin whales), the total take is not expected to adversely affect this stock through impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the CA/OR/WA stock of fin whales.

Humpback Whale (Central America/ Southern Mexico-CA/OR/WA Stock)

The SAR identifies this stock as increasing, though the growth rate is uncertain. Animals in this stock are of the Central America DPS which is designated as endangered under the ESA.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 1,184 and 59 percent, respectively (table 11). Given the range of humpback whales, this information suggests that only some portion of individuals in the stock are likely impacted but that there is likely some repeat exposure (perhaps up to 23 days within a year) of some subset of individuals that spend extended time within the SOCAL complex. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Some of these takes could occur on several sequential days for some small number of individuals, for example, if they resulted from a multi-day exercise on a range while individuals were in the area for multiple days feeding. However, in these amounts, it would still not be expected to adversely impact reproduction or survival of any individuals.

Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with humpback whale communication or other important low-frequency cues—and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. Altogether, only a small portion of the stock is anticipated to be impacted and any individual humpback whale is likely to be disturbed at a low-moderate level, with likely many animals exposed only once or twice and a subset potentially disturbed up to 23 days, but with no reason to think that more than a few of those days would be sequential. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals and, therefore, the total take is not expected to adversely affect this stock through impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Central America/Southern Mexico-CA/OR/WA stock of humpback whales.

Humpback Whale (Mainland Mexico-CA/OR/WA Stock)

The status of this stock is unknown. Animals in this stock are of the Mexico DPS which is designated as threatened under the ESA. NMFS proposes to authorize one mortality over the 7 years covered by this rulemaking, or 0.14 mortality annually. The addition of this 0.14 annual mortality still leaves the total human-caused mortality well under residual PBR.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 647 and 32 percent, respectively (table 13). Given the range of humpback whales, this information suggests that only some portion of individuals in the stock are likely impacted but that there is likely some repeat exposure (perhaps up to 13 days within a year) of some subset of individuals that spend extended time within the SOCAL complex. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178

dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Some of these takes could occur on several sequential days for some small number of individuals, for example, if they resulted from a multi-day exercise on a range while individuals were in the area for multiple days feeding. However, in these amounts, it would still not be expected to adversely impact reproduction or survival of any individuals.

Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with humpback whale communication or other important low-frequency cues—and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For similar reasons (as described in the 2018 HSTT final rule) the single estimated Level A harassment take by PTS for this stock is unlikely to have any effects on the reproduction or survival of that one individual.

Altogether, only a small portion of the stock is anticipated to be impacted and any individual humpback whale is likely to be disturbed at a low-moderate level, with likely many animals exposed only once or twice and a subset potentially disturbed up to 13 days, but with no reason to think that more than a few of those days would be sequential. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals and, therefore, when combined with the proposed authorized mortality (which our earlier analysis indicated would not, alone, have more than a negligible impact on this stock of humpback whales), the total take is not expected to adversely affect this stock through impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the CA/OR/WA stock of humpback whales.

Minke Whale (CA/OR/WA Stock)

The status of this stock is unknown and it is not listed under the ESA. No mortality from vessel strike or tissue damage from explosive exposure is anticipated or proposed for authorization for this species. Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 568 and 101 percent, respectively (table 11). Based on the behaviors of minke whales, which often occur along continental shelves and sometimes establish home ranges along the West Coast, this information suggests that only a portion of individuals in the stock are likely impacted but that there is likely some repeat exposure (perhaps up to 11 days within a year) of some subset of individuals that spend extended time within the SOCAL complex. Some of these takes could occur on a few sequential days for some small number of individuals, for example, if they resulted from a multi-day exercise on a range while individuals were in the area for multiple days feeding. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with minke whale communication or other important low-frequency cues—and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For similar reasons (as described in the 2018 HSTT final rule) the single estimated Level A harassment take by PTS for this stock is unlikely to have any effects on the reproduction or survival of that individual.

Altogether, only a portion of the stock is anticipated to be impacted and any individual minke whale is likely to be disturbed at a low-moderate level, with the taken individuals likely exposed between 1 and 11 days, with a few individuals potentially taken on a few sequential days. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, much less annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the CA/OR/WA stock of minke whales.

Sei Whale (Eastern North Pacific Stock)

The status of this stock is unknown, and sei whales are listed under the ESA. NMFS proposes to authorize one mortality over the 7 years covered by this rulemaking or 0.14 mortality annually. The addition of this 0.14 annual mortality still leaves the total human-caused mortality under residual PBR. After additionally considering several qualitative factors described above, including that the 2023 strike could have been a sei whale (or fin whale), we do not expect one authorized lethal take from Navy activities, alone, to adversely affect Eastern North Pacific sei whales through effects on annual rates of recruitment or survival. No Level A harassment is anticipated or proposed for authorization.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 2,633 and 15 percent, respectively (table 13), however, the abundance upon which the Navy percentage is based (3 from the Navy estimate, which is extrapolated from density estimates based on very few sightings) is likely an underestimate of the number of individuals in the HSTT study Area, resulting in an overestimated percentage. Given this information and the large range of sei whales, and the fact that only 79 total Level B harassment takes of sei whales were estimated, it is likely that some very small number of sei whales would be taken repeatedly, potentially up to 15 days in a year (typically 2,633 percent would lead to the estimate of 52 days/year, however, given that there are only 79 sei whale total takes, we used the conservative assumption that five individuals might be taken up to 15 times, with the few remaining takes distributed among other individuals). Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Some of these takes could occur on a few sequential days for some small number of individuals, for example, if they resulted from a multi-day exercise on a range while individuals were in the area for multiple days feeding, however, in these amounts it would still not be expected to adversely impact reproduction or survival of any individuals. Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with sei whale

communication or other important low-frequency cues—and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival.

Altogether, only a small portion of the stock is anticipated to be impacted and any individual sei whale is likely to be disturbed at a low-moderate level, with only a few individuals exposed over one to 15 days in a year, with no more than a few sequential days. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, and therefore, when combined with the proposed authorized mortality (which our earlier analysis indicated would not, alone, have more than a negligible impact on this stock of sei whales), the total take is not expected to adversely affect this stock through impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Eastern North Pacific stock of sei whales.

Gray Whale (Eastern North Pacific Stock)

The Eastern North Pacific stock of gray whale is not ESA-listed and the SAR indicates that the stock is increasing. However, recent (2021–2022) surveys conducted by NMFS' Southwest Fisheries Science Center estimated that the population has declined to 16,650 whales, though the authors note that this stock has historically shown a pattern of population growth and decline that has not impacted the population in the long term (Eguchi *et al.* 2022). NMFS is proposing to authorize four mortalities over the 7 years covered by this rulemaking, or 0.57 mortality annually. The addition of this 0.57 annual mortality still leaves the total human-caused mortality well under the insignificance threshold of residual PBR (670). On May 31, 2019, NMFS declared the unusual spike in strandings of gray whales along the west coast of North America since January 1, 2019 an UME. As of June 25, 2023, 674 gray whales have stranded along the west coast of North America (in the U.S., Canada, and Mexico) under this UME. Given the small number of takes by serious injury or mortality proposed for authorization, the proposed takes are not anticipated to exacerbate the ongoing UME.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 2,424 and 16 percent, respectively (table 13). (Note that in comparison to the recent Eguchi *et al.* 2022 abundance estimate, the number of estimated total instances of take compared to the abundance would be 28 percent.) This information suggests that only some small portion of individuals in the stock are likely impacted (less than 17 percent) but that there is likely some level of repeat exposure of some subset of individuals that spend extended time within the SOCAL complex. Typically 2,424 percent would lead to the estimate of 48 days/year, however, given that a large number of gray whales are known to migrate through the SOCAL complex and the fact that there are 4,679 total takes, we believe that it is more likely that a larger number of individuals would be taken one to a few times, while a small number staying in an area to feed for several days may be taken on 5–10 days. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Some of these takes could occur on a couple of sequential days for some small number of individuals; however, in these amounts it would still not be expected to adversely impact reproduction or survival of any individuals.

Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with gray whale communication or other important low-frequency cues and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, at the expected scale the seven estimated Level A harassment takes by PTS for gray whales would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals.

Altogether, we have considered the impacts of the gray whale UME, the Eastern North Pacific stock of gray whales is not endangered or threatened under the ESA. The SAR indicates that the stock is increasing. However, recent (2021–2022) surveys conducted by NMFS' Southwest Fisheries Science Center estimated that the population has declined (Eguchi *et al.* 2022). Only a small portion of the stock is anticipated to be impacted and any individual gray whale is likely to be disturbed at a low-moderate level, with likely many animals exposed only once or twice and a subset potentially disturbed across 5 to 10 days. This low magnitude and severity of harassment effects is not expected to result in impacts to reproduction or survival for any individuals and, therefore, when combined with the proposed authorized mortality of four whales over the 7 year period (which our earlier analysis indicated would not, alone, have more than a negligible impact on this stock of gray whales), the total take is not expected to adversely affect this stock through impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Eastern North Pacific stock of gray whales.

Gray Whale (Western North Pacific stock)

The Western North Pacific stock of gray whales is reported as increasing in the 2022 final SAR but is listed as endangered under the ESA. No mortality or Level A harassment is anticipated or proposed for authorization. This stock is expected to incur the very small number of 6 Level B harassment takes (2 behavioral disruption and 4 TTS) to a stock with a SAR-estimated abundance of 290 (table 11). These takes will likely accrue to different individuals, the behavioral disturbances will be of a low-moderate level, and the TTS instances will be at a low level and short duration. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, much less to adversely affect this stock through impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Western North Pacific stock of gray whales.

Humpback Whale (Hawaii Stock)

The status of this stock is unknown. Animals in this stock are of the Hawaii

DPS which is not listed under the ESA. No Level A harassment by tissue damage is proposed for authorization. NMFS proposes to authorize two mortalities over the 7 years covered by this rulemaking, or 0.29 mortalities annually. The addition of this 0.29 annual mortality still leaves the total human-caused mortality well under the insignificance threshold for residual PBR.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated instances of take compared to the abundance, both throughout the HSTT Study Area and within the U.S. EEZ, respectively, is 180 and 161 percent (table 12). This information and the complicated far-ranging nature of the stock structure suggests that some portion of the stock (but not all) are likely impacted, over 1 to several days per year, with little likelihood of take across sequential days. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Additionally, as noted above, there are two mitigation areas implemented by the Navy that span a large area of the important humpback reproductive area (BIA) and minimize impacts by limiting the use of MF1 active sonar and explosives, thereby reducing both the number and severity of takes of humpback whales. Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with humpback whale communication or other important low-frequency cues, and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, at the expected scale the 3 estimated Level A harassment takes by PTS for humpback whales would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals.

Altogether, this stock's status is unknown and the DPS is not listed as endangered or threatened under the ESA. Only a small portion of the stock is anticipated to be impacted and any individual humpback whale is likely to be disturbed at a low-moderate level, with the taken individuals likely exposed between 1 to several days per year, with little likelihood of take across sequential days. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, and therefore, when combined with the proposed authorized mortality (which our earlier analysis indicated would not, alone, have more than a negligible impact on this stock of humpback whales), the total take is not expected to adversely affect this stock through effects on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Hawaii stock of humpback whales.

Blue Whale (Central North Pacific Stock) and the Hawaii Stocks of Bryde's Whale, Fin Whale, Minke Whale, and Sei Whale

The status of these stocks are not identified in the SARs. Blue whale (Central North Pacific stock) and the Hawaii stocks of fin whale and sei whale are listed as endangered under the ESA; the Hawaii stocks of minke whales and Bryde's whales are not listed under the ESA. No mortality or Level A harassment by tissue damage is anticipated or proposed for authorization for any of these stocks.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated instances of take compared to the abundance, both throughout the HSTT Study Area and within the U.S. EEZ, respectively, is 92–135 and 103–142 percent (table 12). This information suggests that some portion of the stocks (but not all) are likely impacted, over 1 to several days per year, with little likelihood of take across sequential days. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with mysticete communication or other important low-frequency cues—and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For similar reasons (as described in the 2018 HSTT final rule) the two estimated Level A harassment takes by PTS for the Hawaii stock of minke whales are unlikely to have any effects on the reproduction or survival of any individuals.

Altogether, only a portion of these stocks are anticipated to be impacted and any individuals of these stocks are likely to be disturbed at a low-moderate level, with the taken individuals likely exposed between 1 and several days, with little chance that any are taken across sequential days. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, much less have impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on these stocks.

Odontocetes

Sperm Whale, Dwarf Sperm Whale, and Pygmy Sperm Whale

In table 14 and table 15 below for sperm whale, dwarf sperm whale, and pygmy sperm whale, we indicate the total annual mortality (0 for all stocks; the 2020 HSTT final rule included 0.14 annual takes by mortality of the Hawaii stock of sperm whale), Level A and Level B harassment, and a number indicating the instances of total take as a percentage of abundance. Table 14 and table 15 are unchanged from tables 20 and 21 in the 2020 HSTT final rule, except for updated information on mortality for the Hawaii stock of sperm whales, as discussed above. For additional information and analysis supporting the negligible-impact analysis, see the *Odontocetes* discussion as well as the *Sperm Whales, Dwarf Sperm Whales, and Pygmy Sperm Whales* discussion in the *Group and Species-Specific Analyses* section of the 2018 HSTT final rule, all of which remains applicable to this proposed rule unless specifically noted.

TABLE 14—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR SPERM WHALES, DWARF SPERM WHALES, AND PYGMY SPERM WHALES IN THE HRC PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)				Total takes			Abundance		Instances of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality	Total takes (entire study area)	Takes (within NAVY EEZ)	Total Navy abundance inside and outside EEZ (HRC)	Within EEZ Navy abundance (HRC)	Total take as percentage of total Navy abundance (HRC)	EEZ take as percentage of EEZ abundance (HRC)
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage							
Dwarf sperm whale.	Hawaii	5,870	14,550	64	0	0	20,484	15,310	8,218	6,379	249	240
Pygmy sperm whale.	Hawaii	2,329	5,822	29	0	0	8,180	6,098	3,349	2,600	244	235
Sperm whale.	Hawaii	2,466	30	0	0	0	2,496	1,317	1,656	1,317	151	147

Note: For the Hawaii take estimates, we compare predicted takes to abundance estimates generated from the same underlying density estimates (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule), both in and outside of the U.S. EEZ. Because the portion of the Navy's study area inside the U.S. EEZ is generally concomitant with the area used to generate the abundance estimates in the SARs, and the abundance predicted by the same underlying density estimates is the preferred abundance to use, there is no need to separately compare the take to the SARs abundance estimate.
Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

TABLE 15—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR SPERM WHALES, DWARF SPERM WHALES, AND PYGMY SPERM WHALES IN THE SOCAL PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)				Total takes		Abundance		Instances of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality	Total takes (entire study area)	Navy abundance in action area	NMFS SARS abundance	Total take as percentage of total Navy abundance in Action Area	Total take as percentage of total SAR abundance
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage						
Kogia whales ...	CA/OR/WA	2,779	6,353	38	0	0	9,170	757	4,111	1,211	223
Sperm whale ...	CA/OR/WA	2,437	56	0	0	0	2,493	273	1,997	913	125

Note: For the SOCAL take estimates, because of the manner in which the Navy study area overlaps the ranges of many MMPA stocks (*i.e.,* a stock may range far north to Washington state and beyond and abundance may only be predicted within the U.S. EEZ, while the Navy study area is limited to Southern California and northern Mexico, but extends beyond the U.S. EEZ), we compare predicted takes to both the abundance estimates for the study area, as well as the SARs (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule).
Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

Below we compile and summarize the information that supports our preliminary determination that the Navy's activities would not adversely affect any species or stocks through effects on annual rates of recruitment or survival for any of the affected species and stocks addressed in this section.

Sperm Whale, Dwarf Sperm Whale, and Pygmy Sperm Whale (CA/OR/WA Stocks)

The SAR identifies the CA/OR/WA stock of sperm whales as ''stable'', and the species is listed as endangered under the ESA. The status of the CA/OR/WA stocks of pygmy and dwarf sperm whales is unknown and neither are listed under the ESA. Neither mortality nor Level A harassment by tissue damage from exposure to explosives is expected or proposed for authorization for any of these three stocks.

Due to their pelagic distribution, small size, and cryptic behavior, pygmy sperm whales and dwarf sperm whales are rarely sighted during at-sea surveys and are difficult to distinguish between when visually observed in the field. Many of the relatively few observations of *Kogia* spp. off the U.S. West Coast were not identified to species. All at-sea sightings of *Kogia* spp. have been identified as pygmy sperm whales or *Kogia* spp. Stranded dwarf sperm and pygmy sperm whales have been found on the U.S. West Coast, however dwarf sperm whale strandings are rare. NMFS SARs suggest that the majority of *Kogia* sighted off the U.S. West Coast were likely pygmy sperm whales. As such, the stock estimate in the NMFS SAR for pygmy sperm whales is the estimate derived for all *Kogia* spp. in the region (Barlow, 2016), and no separate abundance estimate can be determined for dwarf sperm whales, though some low number likely reside in the U.S. EEZ. Due to the lack of abundance estimate, it is not possible to predict the take of dwarf sperm whales and take estimates are identified as *Kogia* spp. (including both pygmy and dwarf sperm whales). We assume only a small portion of those takes are likely to be dwarf sperm whales as the density and abundance in the U.S. EEZ is thought to be low.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is, respectively, 913 and 125 for sperm whales and 1,211 and 223 for *Kogia* spp., with a large proportion of

these anticipated to be pygmy sperm whales due to the low abundance and density of dwarf sperm whales in the HSTT Study Area. (Table 15). Given the range of these stocks (which extends the entire length of the West Coast, as well as beyond the U.S. EEZ boundary), this information suggests that some portion of the individuals in these stocks will not be impacted but that there is likely some repeat exposure (perhaps up to 24 days within a year for *Kogia* spp. and 18 days a year for sperm whales) of some small subset of individuals that spend extended time within the SOCAL Range. Additionally, while interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options in the relative vicinity. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level and less likely to evoke a severe response). However, some of these takes could occur on a fair number of sequential days for some number of individuals.

Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with sperm whale communication or other important low-frequency cues, and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity (PTS) may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, at the expected scale the estimated Level A harassment takes by PTS for the dwarf and pygmy sperm whale stocks would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals. Thus, the 38 total Level A harassment takes by PTS for these two stocks would be unlikely to affect rates of recruitment and survival for the stocks.

Altogether, most members of the stocks will likely be taken by Level B harassment (at a low to occasionally moderate level) over several days a year, and some smaller portion of the stocks are expected to be taken on a relatively moderate to high number of days (up to 18 or 24) across the year, some of which could be sequential days. Though the majority of impacts are expected to be of a lower to sometimes moderate severity, the larger number of takes for a subset of individuals makes it more likely that a small number of individuals could be interrupted during foraging in a manner and amount such that impacts to the energy budgets of females (from either losing feeding opportunities or expending considerable energy to find alternative feeding options) could cause them to forego reproduction for a year. Energetic impacts to males are generally meaningless to population rates unless they cause death, and it takes extreme energy deficits beyond what would ever be likely to result from these activities to cause the death of an adult marine mammal. As discussed in the 2020 HSTT final rule, however, foregone reproduction (especially for 1 year, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low) has far less of an impact on population rates than mortality and a small number of instances of foregone reproduction would not be expected to adversely affect these stocks through effects on annual rates of recruitment or survival. We also note that residual PBR is 19 for pygmy sperm whales and 1.9 for sperm whales. Both the abundance and PBR are unknown for dwarf sperm whales, however, we know that take of this stock is likely significantly lower in magnitude and severity (*i.e.,* lower number of total takes and repeated takes any individual) than pygmy sperm whales. For these reasons, in consideration of all of the effects of the Navy's activities combined, we have preliminarily determined that the authorized take proposed would have a negligible impact on the CA/OR/WA stocks of sperm whales and pygmy and dwarf sperm whales.

Sperm Whale (Hawaii Stock)

The SAR does not identify a trend for this stock and the species is listed as endangered under the ESA. No mortality or Level A harassment by PTS or tissue damage is expected or proposed for authorization.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated instances of take compared to the abundance, both throughout the HSTT Study Area and within the U.S. EEZ, respectively, is 151 and 147 percent (table 14). This information and the sperm whale stock range suggest that likely only a smaller portion of the stock would be impacted, over 1 to several days per year, with little likelihood of take across sequential days. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level and less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with sperm whale communication or other important low-frequency cues, and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival.

Altogether, a relatively small portion of this stock is anticipated to be impacted and any individuals are likely to be disturbed at a low-moderate level, with the taken individuals likely exposed between 1 and several days, with little chance that any are taken across sequential days. This low magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, much less annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Hawaii stock of sperm whales.

Pygmy and Dwarf Sperm Whales (Hawaii Stocks)

The SAR does not identify a trend for these stocks and the species are not listed under the ESA. No Level A harassment by tissue damage is anticipated or proposed for authorization. Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated instances of take compared to the abundance, both throughout the HSTT Study Area and within the U.S. EEZ, respectively, is 244–249 and 235–240 percent (table 12). This information and the pygmy and dwarf sperm whale stock ranges (at least throughout the U.S. EEZ around the entire Hawaiian Islands) suggest that likely a fair portion of each stock is not impacted, but that a subset of individuals may be taken over one to perhaps 5 days per year, with little likelihood of take across sequential days. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to

be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level and less likely to evoke a severe response). Additionally, as discussed earlier, within the Hawaii Island Mitigation Area, explosives are not used and the use of MF1 and MF4 active sonar is limited, greatly reducing the severity of impacts within the small and resident population BIA for dwarf sperm whales (Kratofil *et al.,* 2023), which is entirely contained within this mitigation area.

Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with sperm whale communication or other important low-frequency cues—and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, at the expected scale, estimated Level A harassment takes by PTS for dwarf and pygmy sperm whales would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals, even if it were to be experienced by an animal that also experiences one or more instances of Level B harassment by behavioral disturbance. Thus the 29 and 64 total Level A harassment takes by PTS for dwarf and pygmy sperm whales, respectively, would be unlikely to affect rates of recruitment and survival for these stocks.

Altogether, a portion of these stocks are likely to be impacted and any individuals are likely to be disturbed at a low-moderate level, with the taken individuals likely exposed between 1 and 5 days, with little chance that any are taken across sequential days. This low magnitude and severity of Level A and Level B harassment effects is not expected to result in impacts on individual reproduction or survival, much less impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the expected and authorized take proposed would have a negligible impact on the Hawaii stocks of pygmy and dwarf sperm whales.

Beaked Whales

In table 16 and table 17 below for beaked whales, we indicate the total annual mortality, Level A and Level B harassment, and a number indicating the instances of total take as a percentage of abundance. Table 16 and table 17 are unchanged from table 22 and table 23 in the 2020 HSTT final rule, with the exception of a correction to a rounding error as noted. For additional information and analysis supporting the negligible-impact analysis, see the *Odontocetes* discussion as well as the *Beaked Whales* discussion in the *Group and Species-Specific Analyses* section of the 2018 HSTT final rule, all of which remains applicable to this proposed rule unless specifically noted.

TABLE 16—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR BEAKED WHALES IN THE HRC PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes		Abundance		Instances of total take as percent of abundance	
		Level B harassment		Level A harassment			Total Takes (entire Study Area)	Takes (within Navy EEZ)	Total Navy abundance inside and outside EEZ (HRC)	Within EEZ Navy abundance (HRC)	Total take as percentage of total Navy abundance (HRC)	EEZ take as percentage of EEZ abundance (HRC)
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage	Mortality						
Blainville's beaked whale.	Hawaii	5,369	16	0	0	0	5,385	4,140	989	768	[a] 544	539
Cuvier's beaked whale.	Hawaii	1,792	4	0	0	0	1,796	1,377	345	268	521	514
Longman's beaked whale.	Hawaii	19,152	81	0	0	0	19,233	14,585	3,568	2,770	539	527

Note: For the Hawaii take estimates, we compare predicted takes to abundance estimates generated from the same underlying density estimates (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule), both in and outside of the U.S. EEZ. Because the portion of the Navy's study area inside the U.S. EEZ is generally concomitant with the area used to generate the abundance estimates in the SARs, and the abundance predicted by the same underlying density estimates is the preferred abundance to use, there is no need to separately compare the take to the SARs abundance estimate.

Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

[a] The 2020 final rule unintentionally presented this percentage as 545. The correct value is provided here. This error does not affect the conclusions in the 2020 HSTT final rule.

TABLE 17—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR BEAKED WHALES IN THE SOCAL PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)				Total takes		Abundance		Instances of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality	Total Takes (entire study area)	Navy abundance in action area	NMFS SARS abundance	Total take as percentage of total Navy abundance in action area	Total take as percentage of total SAR abundance
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage						
Baird's beaked whale.	CA/OR/WA	2,030	14	0	0	0	2,044	74	1,363	2,762	150
Cuvier's beaked whale.	CA/OR/WA	11,373	127	1	0	0	11,501	520	5,454	2,212	211
Mesoplodon species.	CA/OR/WA	6,125	68	1	0	0	6,194	89	3,044	6,960	203

Note: For the SOCAL take estimates, because of the manner in which the Navy study area overlaps the ranges of many MMPA stocks (*i.e.,* a stock may range far north to Washington state and beyond and abundance may only be predicted within the U.S. EEZ, while the Navy study area is limited to Southern California and northern Mexico, but extends beyond the U.S. EEZ), we compare predicted takes to both the abundance estimates for the study area, as well as the SARs (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule).
Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

Below we compile and summarize the information that supports our determination that the Navy's activities would not adversely affect any species or stocks through effects on annual rates of recruitment or survival for any of the affected species or stocks addressed in this section.

Blainville's, Cuvier's, and Longman's Beaked Whales (Hawaii Stocks)

The SAR does not identify a trend for these stocks and the species are not listed under the ESA. No mortality or Level A harassment are expected or proposed for authorization for any of these three stocks. Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated instances of take compared to the abundance, both throughout the HSTT Study Area and within the U.S. EEZ, respectively, is 521–544 and 514–539 percent (table 16). This information and the stock ranges (at least of the small, resident island associated stocks around Hawaii) suggest that likely a fair portion of the stocks (but not all) will be impacted, over 1 to perhaps 11 days per year, with little likelihood of much take across sequential days. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 160 dB, though with beaked whales, which are considered somewhat more sensitive, this could mean that some individuals will leave preferred habitat for a day or 2 (*i.e.,* moderate level takes). However, while interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options nearby. Additionally, as noted earlier, within the Hawaii Island mitigation area (which overlaps a large portion of the BIAs for Cuvier's and Blainville's beaked whales), explosives are not used and the use of MF1 and MF4 active sonar is limited, greatly reducing the severity of impacts within these two small resident populations.

Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with beaked whale communication or other important low-frequency cues, and that the associated lost opportunities and capabilities are not at a level that would impact reproduction or survival.

Altogether, a fair portion of these stocks are anticipated to be impacted and any individuals are likely to be disturbed at a moderate level, with the taken individuals likely exposed between 1 and 11 days, with little chance that individuals are taken across more than a few sequential days. This low, to occasionally moderate, magnitude and severity of harassment effects is not expected to result in impacts on individual reproduction or survival, much less have impacts on annual rates of recruitment or survival. For these reasons, we have preliminarily determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take proposed would have a negligible impact on the Hawaii stocks of beaked whales.

Baird's and Cuvier's Beaked Whales and *Mesoplodon* Species (All CA/OR/WA Stocks)

The species are not listed under the ESA and their populations have been identified as ''increasing,'' ''decreasing,'' and ''increasing,'' respectively. No mortality is expected or proposed for authorization for any of these three stocks and only two takes by Level A harassment (PTS) are proposed for authorization.

No methods are available to distinguish between the six species of *Mesoplodon* beaked whale CA/OR/WA stocks (Blainville's beaked whale (*M. densirostris*), Perrin's beaked whale (*M. perrini*), Lesser beaked whale (*M. peruvianus*), Stejneger's beaked whale (*M. stejnegeri*), Gingko-toothed beaked whale (*M. gingkodens*), and Hubbs' beaked whale (*M. carlhubbsi*)) when observed during at-sea surveys (Carretta *et al.* 2018a). Bycatch and stranding records from the region indicate that the Hubbs' beaked whale is most commonly encountered (Carretta *et al.* 2008, Moore and Barlow, 2013). As indicated in the SAR, no species-specific abundance estimates are available, the abundance estimate includes all CA/OR/WA *Mesoplodon* spp, and the six species are managed as one unit. Due to the lack of species-specific abundance estimates, it is not possible to predict the take of individual species and take estimates are identified as *Mesoplodon* spp.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance for these stocks is 2,762, 2,212, and 6,960 percent (measured against Navy-estimated abundance) and

150, 211, and 203 percent (measured against the SAR) for Baird's beaked whales, Cuvier's beaked whales, and *Mesoplodon* spp., respectively (table 15). Given the ranges of these stocks, this information suggests that some smaller portion of the individuals of these stocks will be taken, and that some subset of individuals within the stock will be taken repeatedly within the year (perhaps up to 20–25 days, and potentially more for Cuvier's)—potentially over a fair number of sequential days, especially where individuals spend extensive time in the SOCAL Range. Note that we predict lower days of repeated exposure for these stocks than their percentages might have suggested because of the number of overall takes—*i.e.,* using the higher percentage would suggest that an unlikely portion of the takes are taken up by a small portion of the stock incurring a very large number of repeat takes, with little room for take resulting from few or moderate numbers of repeats, which is unlikely. While interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options in the relative vicinity. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 160 dB, though with beaked whales, which are considered somewhat more sensitive, this could mean that some individuals will leave preferred habitat for a day or 2 (*i.e.,* of a moderate level). In addition, as noted, some of these takes could occur on a fair number of sequential days for these stocks.

The severity of TTS takes is expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere significantly with conspecific communication, echolocation, or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities would not be expected to impact reproduction or survival. For similar reasons (as described in the 2020 HSTT final rule) the single estimated Level A harassment take by PTS for this stock is unlikely to have any effects on the reproduction or survival of any individuals.

Altogether, a portion of these stocks will likely be taken (at a moderate or sometimes low level) over several days a year, and some smaller portion of the stock is expected to be taken on a relatively moderate to high number of days across the year, some of which could be sequential days. Though the majority of impacts are expected to be of a moderate severity, the repeated takes over a potentially fair number of sequential days for some individuals makes it more likely that a small number of individuals could be interrupted during foraging in a manner and amount such that impacts to the energy budgets of females (from either losing feeding opportunities or expending considerable energy to find alternative feeding options) could cause them to forego reproduction for a year. Energetic impacts to males are generally meaningless to population rates unless they cause death, and it takes extreme energy deficits beyond what would ever be likely to result from these activities to cause the death of an adult marine mammal. As noted previously, however, foregone reproduction (especially for 1 year, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low) has far less of an impact on population rates than mortality and a small number of instances of foregone reproduction would not be expected to adversely affect these stocks through effects on annual rates of recruitment or survival, especially given the residual PBR of these three beaked whale stocks (8.7, 41.9, and 19.9, respectively).

Further, Navy activities have been conducted in SOCAL for many years at similar levels and the SAR considers *Mesoplodon* spp. and Baird's beaked whales as increasing. While NMFS' SAR indicates that Cuvier's beaked whales on the U.S. West Coast are declining based on a Bayesian trend analysis of NMFS' survey data collected from 1991 through 2014, results from passive acoustic monitoring and other research have estimated regional Cuvier's beaked whale densities that were higher than indicated by NMFS' broad-scale visual surveys for the U.S. West Coast (Debich *et al.* 2015a; Debich *et al.* 2015b; Falcone and Schorr, 2012, 2014; Hildebrand *et al.* 2009; Moretti, 2016; Širović *et al.* 2016; Smultea and Jefferson, 2014). Research also indicates higher than expected residency in the Navy's instrumented Southern California Anti-Submarine Warfare Range in particular (Falcone and Schorr, 2012) and photo identification studies in the SOCAL have identified approximately 100 individual Cuvier's beaked whale individuals with 40 percent having been seen in one or more prior years, with re-sightings up to 7 years apart (Falcone and Schorr, 2014). The documented residency by many Cuvier's beaked whales over multiple years suggests that a stable population may exist in that small portion of the stock's overall range (Falcone *et al.* 2009; Falcone and Schorr, 2014; Schorr *et al.* 2017).

For these reasons, in consideration of all of the effects of the Navy's activities combined, we have preliminarily determined that the authorized take proposed would have a negligible impact on the CA/OR/WA stocks of Baird's and Cuvier's beaked whales, as well as all six species included within the *Mesoplodon* spp.

Small Whales and Dolphins

In table 18 and table 19 below for dolphins and small whales, we indicate the total annual mortality, Level A and Level B harassment, and a number indicating the instances of total take as a percentage of abundance. Table 18 and table 19 are updated from tables 24 and 25 in the 2020 HSTT final rule as appropriate with the 2022 final SARs. For additional information and analysis supporting the negligible-impact analysis, see the *Odontocetes* discussion as well as the *Small Whales and Dolphins* discussion in the *Group and Species-Specific Analyses* section of the 2018 HSTT final rule, all of which remains applicable to this proposed rule unless specifically noted.

TABLE 18—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR DOLPHINS AND SMALL WHALES IN THE HRC PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes		Abundance		Instance of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality	Total takes (entire study area)	Takes (within Navy EEZ)	Total Navy abundance inside and outside of EEZ (HRC)	Within EEZ Navy abundance (HRC)	Total take as percentage of total Navy abundance (HRC)	EEZ take as percentage of Navy EEZ abundance (HRC)
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage							
Bottlenose dolphin.	Hawaii Pelagic.	3,196	132	0	0	0	3,328	2,481	1,528	1,442	218	172
Bottlenose dolphin.	Kauai & Niihau.	534	31	0	0	0	565	264	184	184	307	143
Bottlenose dolphin.	Oahu	8,600	61	1	0	0	8,662	8,376	743	743	[a] 1,166	[a] 1,127
Bottlenose dolphin.	4-Island ..	349	10	0	0	0	359	316	189	189	190	167
Bottlenose dolphin.	Hawaii	74	6	0	0	0	80	42	131	131	61	32
False killer whale.	Hawaii Pelagic.	999	42	0	0	0	1,041	766	645	507	161	151
False killer whale.	Main Hawaiian Islands Insular.	572	17	0	0	0	589	476	147	147	[b] 401	324
False killer whale.	Northwestern Hawaiian Islands.	365	16	0	0	0	381	280	215	169	177	166
Fraser's dolphin.	Hawaii	39,784	1,289	2	0	0	41,075	31,120	5,408	18,763	760	166
Killer whale.	Hawaii	118	6	0	0	0	124	93	69	54	180	172
Melon-headed whale.	Hawaii Islands.	3,261	231	0	0	0	3,492	2,557	1,782	1,782	196	143
Melon-headed whale.	Kohala Resident.	341	9	0	0	0	350	182	447	447	78	41
Pantropical spotted dolphin.	Hawaii Island.	3,767	227	0	0	0	3,994	2,576	2,405	2,405	166	107
Pantropical spotted dolphin.	Hawaii Pelagic.	9,973	476	0	0	0	10,449	7,600	5,462	4,637	191	164
Pantropical spotted dolphin.	Oahu	4,284	45	0	0	0	4,329	4,194	372	372	1,164	1,127
Pantropical spotted dolphin.	4-Island ..	701	17	0	0	0	718	634	657	657	109	96
Pygmy killer whale.	Hawaii	8,122	402	0	0	0	8,524	6,538	4,928	3,931	173	166
Pygmy killer whale.	Tropical ..	710	50	0	0	0	760	490	159	23	478	2,130
Risso's dolphin.	Hawaii	8,950	448	0	0	0	9,398	7,318	1,210	4,199	777	174
Rough-toothed dolphin.	Hawaii	6,112	373	0	0	0	6,485	4,859	3,054	2,808	212	173
Short-finned pilot whale.	Hawaii	12,499	433	0	0	0	12,932	9,946	6,433	5,784	201	172
Spinner dolphin.	Hawaii Island.	279	12	0	0	0	291	89	629	629	46	14
Spinner dolphin.	Hawaii Pelagic.	4,332	202	0	0	0	4,534	3,491	2,885	2,229	157	157
Spinner dolphin.	Kauai & Niihau.	1,683	63	0	0	0	1,746	812	604	604	289	134

TABLE 18—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR DOLPHINS AND SMALL WHALES IN THE HRC PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE—Continued

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes		Abundance		Instance of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality	Total takes (entire study area)	Takes (within Navy EEZ)	Total Navy abundance inside and outside of EEZ (HRC)	Within EEZ Navy abundance (HRC)	Total take as percentage of total Navy abundance (HRC)	EEZ take as percentage of Navy EEZ abundance (HRC)
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage							
Spinner dolphin.	Oahu & 4-Island.	1,790	34	1	0	0	1,825	1,708	354	354	516	482
Striped dolphin.	Hawaii	7,379	405	0	0	0	7,784	6,034	4,779	3,646	163	165

Note: For the Hawaii take estimates, we compare predicted takes to abundance estimates generated from the same underlying density estimates (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule), both in and outside of the U.S. EEZ. Because the portion of the Navy's study area inside the U.S. EEZ is generally concomitant with the area used to generate the abundance estimates in the SARs, and the abundance predicted by the same underlying density estimates is the preferred abundance to use, there is no need to separately compare the take to the SARs abundance estimate.

Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

[a] The 2020 final rule unintentionally presented these percentages as 1,169 and 1,130. The correct values are provided here. These errors do not affect the conclusions in the 2020 HSTT final rule.

[b] The 2020 final rule unintentionally presented this percentage as 400. The correct value is provided here. This rounding error does not affect the conclusions in the 2020 HSTT final rule.

TABLE 19—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR DOLPHINS AND SMALL WHALES IN THE SOCAL PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes	Abundance		Instance of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality	Total takes (entire study area)	Navy abundance in action area (SOCAL)	NMFS SARS abundance	Total take as percentage of total Navy abundance in action area	Total take as percentage of total SAR abundance
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage						
Bottlenose dolphin.	California Coastal.	1,771	38	0	0	0	1,809	238	453	760	399
Bottlenose dolphin.	CA/OR/WA Offshore.	51,727	3,695	3	0	0	55,425	5,946	3,477	932	1,594
Killer whale	ENP Offshore	96	11	0	0	0	107	4	300	2,675	36
Killer whale	ENP Transient/West Coast Transient.	179	20	0	0	0	199	30	349	663	57
Long-beaked common dolphin.	California	233,485	13,787	18	2	0	247,292	10,258	83,379	2,411	297
Northern right whale dolphin.	CA/OR/WA	90,052	8,047	10	1	0	98,110	7,705	29,285	1,273	335
Pacific white-sided dolphin.	CA/OR/WA	69,245	6,093	5	0	0	75,343	6,626	34,999	1,137	215
Risso's dolphin	CA/OR/WA	116,143	10,118	9	0	0	126,270	7,784	6,336	1,622	1,993
Short-beaked common dolphin.	CA/OR/WA	1,374,048	118,525	79	10	1.14	1,492,664	261,438	1,056,308	571	141
Short-finned pilot whale.	CA/OR/WA	1,789	124	1	0	0	1,914	208	836	920	229
Striped dolphin	CA/OR/WA	163,640	11,614	3	0	0	175,257	39,862	29,988	440	584

Note: For the SOCAL take estimates, because of the manner in which the Navy study area overlaps the ranges of many MMPA stocks (*i.e.*, a stock may range far north to Washington state and beyond and abundance may only be predicted within the U.S. EEZ, while the Navy study area is limited to Southern California and northern Mexico, but extends beyond the U.S. EEZ), we compare predicted takes to both the abundance estimates for the study area, as well as the SARs (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule).

Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

For mortality takes there is an annual average of 1.14 short-beaked common dolphins (*i.e.,* where eight takes could potentially occur divided by 7 years to get the annual number of mortalities/serious injuries).

Below we compile and summarize the information that supports our determination that the Navy's activities would not adversely affect any species or stocks through effects on annual rates of recruitment or survival for any of the affected species or stocks addressed in this section.

Long-Beaked Common Dolphin (California Stock), Northern Right Whale Dolphin (CA/OR/WA Stock), and Short-Beaked Common Dolphin (CA/OR/WA Stock)

None of these stocks are listed under the ESA and their stock statuses are considered ''increasing,'' ''unknown,'' and ''increasing,'' respectively. Eight mortalities or serious injuries of short-beaked common dolphins are proposed for authorization over the 7-year rule, or 1.14 M/SI annually. The addition of this 1.14 annual mortality still leaves the total human-caused mortality well under the insignificance threshold for residual PBR. The three stocks are expected to accrue 2, 1, and 10 Level A harassment takes from tissue damage resulting from exposure to explosives, respectively. As described in detail in the 2018 HSTT final rule, the impacts of a Level A harassment take by tissue damage could range in impact from minor to something just less than M/SI that could seriously impact fitness. However, given the Navy's procedural mitigation, exposure closer to the source and more severe end of the spectrum is less likely and we cautiously assume some moderate impact for these takes that could lower the affected individual's fitness within the year such that a female (assuming a 50 percent chance of it being a female) might forego reproduction for 1 year. As noted previously, foregone reproduction has less of an impact on population rates than death (especially for only 1 year in 7, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low), and 1 to 10 instances would not be expected to impact annual rates of recruitment or survival for these stocks.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 2,411, 1,273, and 571 percent (respective to the stocks listed in the heading) and 297, 335, and 141 percent (respective to the stocks listed in the heading) (table 19). Given the range of these stocks, this information suggests that likely some portion (but not all or even the majority) of the individuals in the northern right whale dolphin and short-beaked common dolphin stocks are likely impacted while it is entirely possible that most or all of the range-limited long-beaked common dolphin is taken. All three stocks likely will experience some repeat Level B harassment exposure (perhaps up to 48, 25, or 11 days within a year, respective to the stocks listed in the heading) of some subset of individuals that spend extended time within the SOCAL range complex. While interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options in the relative vicinity. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). However, some of these takes could occur on a fair number of sequential days for long-beaked common dolphins or northern right whale dolphins, or even some number of short-beaked common dolphins, given the high number of total takes (*i.e.,* the probability that some number of individuals get taken on a higher number of sequential days is higher, because the total take number is relatively high, even though the percentage is not that high).

The severity of TTS takes is expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere significantly with conspecific communication, echolocation, or other important low-frequency cues, and the associated lost opportunities and capabilities would not be expected to impact reproduction or survival. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, as discussed in the 2020 HSTT final rule, it would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals.

Altogether and as described in more detail above, 1.14 annual lethal takes of short-beaked common dolphins are proposed for authorization, all three stocks may experience a very small number of takes by tissue damage or PTS (relative to the stock abundance and PBR), and a moderate to large portion of all three stocks will likely be taken (at a low to occasionally moderate level) over several days a year, and some smaller portion of these stocks is expected to be taken on a relatively moderate to high number of days across the year, some of which could be sequential days. Though the majority of impacts are expected to be of a lower to sometimes moderate severity, the larger number of takes (in total and for certain individuals) makes it more likely (probabilistically) that a small number of individuals could be interrupted during foraging in a manner and amount such that impacts to the energy budgets of females (from either losing feeding opportunities or expending considerable energy to find alternative feeding options) could cause them to forego reproduction for a year. Energetic impacts to males are generally meaningless to population rates unless they cause death, and it takes extreme energy deficits beyond what would ever be likely to result from these activities to cause the death of an adult marine mammal. As noted previously, however, foregone reproduction (especially for only 1 year out of 7, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low) has far less of an impact on population rates than mortality and a small number of instances of foregone reproduction (including in combination with that which might result from the small number of tissue damage takes) would not be expected to adversely affect the stocks through effects on annual rates of recruitment or survival, especially given the very high residual PBRs of these stocks (638.3, 156.4, and 8,858.5, respectively). For these reasons, in consideration of all of the effects of the Navy's activities combined (mortality, Level A harassment, and Level B harassment), we have preliminarily determined that the authorized take proposed would have a negligible impact on these three stocks of dolphins.

All Other SOCAL Dolphin Stocks (Except Long-Beaked Common Dolphin, Northern Right Whale Dolphin, and Short-Beaked Common Dolphin)

None of these stocks are listed under the ESA and their stock statuses are considered ''unknown,'' except for the bottlenose dolphin (California coastal stock) and killer whale (Eastern North Pacific stock), which are considered ''stable.'' No M/SI or Level A harassment via tissue damage from exposure to explosives is expected or proposed for authorization for these stocks.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the

abundance (measured against both the Navy-estimated abundance and the SAR) is from 440 to 2,675 percent and 36 to 1,993 percent, respectively (table 19). Given the range of these stocks (along the entire U.S. West Coast, or even beyond, with some also extending seaward of the HSTT Study Area boundaries), this information suggests that some portion (but not all or even the majority) of the individuals of any of these stocks will be taken, with the exception that most or all of the individuals of the more range-limited California coastal stock of bottlenose dolphin may be taken. It is also likely that some subset of individuals within most of these stocks will be taken repeatedly within the year (perhaps up to 10–15 days within a year) but with no more than several potentially sequential days, although the CA/OR/WA stocks of bottlenose dolphins, Pacific white-sided dolphins, and Risso's dolphins may include individuals that are taken repeatedly within the year over a higher number of days (up to 57, 22, and 40 days, respectively) and potentially over a fair number of sequential days, especially where individuals spend extensive time in the SOCAL range complex. Note that though percentages are high for the Eastern North Pacific stock of killer whales and short-finned pilot whales, given the low overall number of takes, it is highly unlikely that any individuals would be taken across the number of days their percentages would suggest. While interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options in the relative vicinity. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, or sometimes moderate level, less likely to evoke a severe response). However, as noted, some of these takes could occur on a fair number of sequential days for the three stocks listed earlier.

The severity of TTS takes is expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere significantly with conspecific communication, echolocation, or other important low-frequency cues. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, it would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals.

Altogether, a portion of all of these stocks will likely be taken (at a low to occasionally moderate level) over several days a year, and some smaller portion of CA/OR/WA stocks of bottlenose dolphins, Pacific white-sided dolphins, and Risso's dolphins, specifically, are expected to be taken on a relatively moderate to high number of days across the year, some of which could be sequential days. Though the majority of impacts are expected to be of a lower to sometimes moderate severity, the larger number of takes (in total and for certain individuals) for the CA/OR/WA stocks of bottlenose dolphins, Pacific white-sided dolphins, and Risso's dolphins makes it more likely (probabilistically) that a small number of individuals could be interrupted during foraging in a manner and amount such that impacts to the energy budgets of females (from either losing feeding opportunities or expending considerable energy to find alternative feeding options) could cause them to forego reproduction for a year. Energetic impacts to males are generally meaningless to population rates unless they cause death, and it takes extreme energy deficits beyond what would ever be likely to result from these activities to cause the death of an adult marine mammal. As noted previously, however, foregone reproduction (especially for only 1 year in 7, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low) has far less of an impact on population rates than mortality and a small number of instances of foregone reproduction would not be expected to adversely affect the stocks through effects on annual rates of recruitment or survival, especially given the residual PBRs of the CA/OR/WA stocks of bottlenose dolphins, Pacific white-sided dolphins, and Risso's dolphins (18.9, 272, and 42.3, respectively). For these reasons, in consideration of all of the effects of the Navy's activities combined, we have preliminarily determined that the authorized take proposed would have a negligible impact on these stocks of dolphins.

All HRC Dolphin Stocks

With the exception of the Main Hawaiian Island stock of false killer whales (listed as endangered under the ESA, with the MMPA stock identified as ''decreasing''), none of these stocks are listed under the ESA and their stock statuses are considered ''unknown.'' No M/SI or Level A harassment via tissue damage from exposure to explosives is expected or proposed for authorization for these stocks.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is from 46 to 1,166 percent and 14 to 2,130 percent, respectively (table 16). Given the ranges of these stocks (many of them are small, resident, island-associated stocks), this information suggests that a fairly large portion of the individuals of many of these stocks will be taken but that most individuals will only be impacted across a smaller to moderate number of days within the year (1–15), and with no more than several potentially sequential days, although two stocks (the Oahu stocks of bottlenose dolphin and pantropical spotted dolphin) have a slightly higher percentage, suggesting they could be taken up to 23 days within a year, with perhaps a few more of those days being sequential. We note that although the percentage is higher for the tropical stock of pygmy killer whale within the U.S. EEZ (2,130), given (1) the low overall number of takes (760) and (2) the fact that the small within-U.S. EEZ abundance is not a static set of individuals, but rather individuals moving in and out of the U.S. EEZ making it more appropriate to use the percentage comparison for the total takes versus total abundance—it is highly unlikely that any individuals would be taken across the number of days the within-U.S. EEZ percentage suggests (42). While interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options in the relative vicinity. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, or sometimes moderate level, less likely to evoke a severe response). However, as noted, some of these takes could occur on a fair number of sequential days for the Oahu stocks of bottlenose dolphin and pantropical spotted dolphins.

Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected

to interfere significantly with conspecific communication, echolocation, or other important low-frequency cues. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, they would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals, even if accrued to individuals that are also taken by behavioral harassment at the same time.

Altogether, most of these stocks (all but the Oahu stocks of bottlenose dolphin and pantropical spotted dolphins) will likely be taken (at a low to occasionally moderate level) over several days a year, with some smaller portion of the stock potentially taken on a more moderate number of days across the year (perhaps up to 15 days for Fraser's dolphin, though others notably less), some of which could be across a few sequential days, which is not expected to affect the reproductive success or survival of individuals. For the Oahu stocks of bottlenose dolphin and pantropical spotted dolphins, some subset of individuals could be taken up to 23 days in a year, with some small number being taken across several sequential days, such that a small number of individuals could be interrupted during foraging in a manner and amount such that impacts to the energy budgets of females (from either losing feeding opportunities or expending considerable energy to find alternative feeding options) could cause them to forego reproduction for a year. Energetic impacts to males are generally meaningless to population rates unless they cause death, and it takes extreme energy deficits beyond what would ever be likely to result from these activities to cause the death of an adult marine mammal. As noted previously, however, foregone reproduction (especially for 1 year, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low) has far less of an impact on population rates than mortality and a small number of instances of foregone reproduction would not be expected to adversely affect these two stocks through effects on annual rates of recruitment or survival. For these reasons, in consideration of all of the effects of the Navy's activities combined, we have preliminarily determined that the authorized take proposed would have a negligible impact on all of the stocks of dolphins found in the vicinity of the HRC.

Dall's Porpoise

In table 20 below for porpoises, we indicate the total annual mortality, Level A harassment and Level B harassment, and a number indicating the instances of total take as a percentage of abundance. Table 20 is updated from table 26 in the 2020 HSTT final rule with the 2022 final SARs. For additional information and analysis supporting the negligible-impact analysis, see the *Odontocetes* discussion as well as the *Dall's Porpoise* discussion in the *Group and Species-Specific Analyses* section of the 2018 HTT final rule, all of which remains applicable to this proposed rule unless specifically noted.

TABLE 20—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR PORPOISES IN THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes	Abundance		Instances of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality	Total takes (entire study area)	Navy abundance in action area	NMFS SARS abundance	Total take as percentage of total Navy abundance in action area	Total take as percentage of total SAR abundance
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage						
Dall's porpoise	CA/OR/WA	14,482	29,891	209	0	0	44,582	2,054	16,498	2,170	270

Note: For the SOCAL take estimates, because of the manner in which the Navy study area overlaps the ranges of many MMPA stocks (*i.e.,* a stock may range far north to Washington state and beyond and abundance may only be predicted within the U.S. EEZ, while the Navy study area is limited to Southern California and northern Mexico, but extends beyond the U.S. EEZ), we compare predicted takes to both the abundance estimates for the study area, as well as the SARs (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule).

Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

Below we compile and summarize the information that supports our determination that the Navy's activities would not adversely affect Dall's porpoises through effects on annual rates of recruitment or survival.

Dall's porpoise is not listed under the ESA and the stock status is considered ''unknown.'' No M/SI or Level A harassment via tissue damage from exposure to explosives is expected or proposed for authorization for this stock.

Most Level B harassments to Dall's porpoise from hull-mounted sonar (MF1) in the HSTT Study Area would result from received levels between 154 and 166 dB SPL (85 percent). While harbor porpoises have been observed to be especially sensitive to human activity, the same types of responses have not been observed in Dall's porpoises. Dall's porpoises are typically notably longer than and weigh more than twice as much as harbor porpoises making them generally less likely to be preyed upon and likely differentiating their behavioral repertoire somewhat from harbor porpoises. Further, they are typically seen in large groups and feeding aggregations or exhibiting bow-riding behaviors, which is very different from the group dynamics observed in the more typically solitary, cryptic harbor porpoises, which are not often seen bow-riding. For these reasons, Dall's porpoises are not treated as especially sensitive species (as compared to harbor porpoises, which have a lower threshold for Level B harassment by behavioral disturbance and more distant cutoff) but, rather, are analyzed similarly to other odontocetes. Therefore, the majority of Level B harassment takes are expected to be in the form of milder responses compared to higher level exposures. As discussed more fully in the 2018 HSTT final rule, we anticipate more severe effects from takes when animals are exposed to higher received levels.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) is 2,170 and 270 percent, respectively (table 20). Given the range of this stock (up the U.S. West Coast through Washington and sometimes beyond the U.S. EEZ), this information suggests that some smaller portion of the individuals of this stock will be taken, and that some subset of individuals within the stock will be taken repeatedly within the year (perhaps up to 42 days)—potentially over a fair number of sequential days, especially where individuals spend extensive time in the SOCAL range complex. While interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options in the relative vicinity. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, or sometimes moderate level, less likely to evoke a severe response). However, as noted, some of these takes could occur on a fair number of sequential days for this stock.

The severity of TTS takes is expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere significantly with conspecific communication, echolocation, or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities would not be expected to impact reproduction or survival. For these same reasons (low level and the likely frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, the estimated 209 takes by Level A harassment by PTS for Dall's porpoise would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival for most individuals. Because of the high number of PTS takes, however, we acknowledge that a few animals could potentially incur permanent hearing loss of a higher degree that could potentially interfere with their successful reproduction and growth. Given the status of the stock, even if this occurred, it would not adversely impact rates of recruitment or survival.

Altogether, a portion of this stock will likely be taken (at a low to occasionally moderate level) over several days a year, and some smaller portion of the stock is expected to be taken on a relatively moderate to high number of days across the year, some of which could be sequential days. Though the majority of impacts are expected to be of a lower to sometimes moderate severity, the larger number of takes (in total and for certain individuals) for the Dall's porpoise makes it more likely (probabilistically) that a small number of individuals could be interrupted during foraging in a manner and amount such that impacts to the energy budgets of females (from either losing feeding opportunities or expending considerable energy to find alternative feeding options) could cause them to forego reproduction for a year. Energetic impacts to males are generally meaningless to population rates unless they cause death, and it takes extreme energy deficits beyond what would ever be likely to result from these activities to cause the death of an adult marine mammal. Similarly, we acknowledge the potential for this to occur to a few individuals out of the 209 total that might incur a higher degree of PTS. As noted previously, however, foregone reproduction (especially for only 1 year in 7, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low) has far less of an impact on population rates than mortality. Further, the small number of instances of foregone reproduction that could potentially result from PTS and/or the few repeated, more severe Level B harassment takes by behavioral disturbance would not be expected to adversely affect the stock through effects on annual rates of recruitment or survival, especially given the status of the species (not endangered or threatened; minimum population of 10,286 just within the U.S. EEZ) and residual PBR of Dall's porpoise (98.3). For these reasons, in consideration of all of the effects of the Navy's activities combined, we have preliminarily determined that the authorized take proposed would have a negligible impact on Dall's porpoise.

Pinnipeds

In table 21 and table 22 below for pinnipeds, we indicate the total annual mortality, Level A harassment and Level B harassment, and a number indicating the instances of total take as a percentage of abundance. Table 21 and table 22 have been updated from tables 27 and 28 in the 2020 HSTT final rule with the 2022 final SARs, as appropriate. For additional information and analysis supporting the negligible-impact analysis, see the *Pinnipeds* discussion in the *Group and Species-Specific Analyses* section of the 2018 HSTT final rule, all of which remains applicable to this proposed rule unless specifically noted.

TABLE 21—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR PINNIPEDS IN THE HRC PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes		Abundance		Instance of total take as percent of abundance	
	Level B harassment		Level A harassment		Mortality	Total takes (entire study area)	Takes (within Navy EEZ)	Total Navy abundance inside and outside of EEZ (HRC)	Within EEZ Navy abundance (HRC)	Total take as percentage of total Navy abundance (HRC)	EEZ take as percentage of Navy EEZ abundance (HRC)
	Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage							
Hawaiian monk seal	143	62	1	0	0	206	195	169	169	122	115

Note: For the Hawaii take estimates, we compare predicted takes to abundance estimates generated from the same underlying density estimates (as described in the *Estimated Take of Marine Mammals* section of the 2018 HSTT final rule), both in and outside of the U.S. EEZ. Because the portion of the Navy's study area inside the U.S. EEZ is generally concomitant with the area used to generate the abundance estimates in the SARs, and the abundance predicted by the same underlying density estimates is the preferred abundance to use, there is no need to separately compare the take to the SARs abundance estimate.

Total takes inside and outside U.S. EEZ represent the sum of annual Level A and Level B harassment from training and testing activities.

TABLE 22—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT, LEVEL A HARASSMENT, AND MORTALITY FOR PINNIPEDS IN THE SOCAL PORTION OF THE HSTT STUDY AREA AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Total takes	Abundance		Instance of total take as percent of abundance	
		Level B harassment		Level A harassment		Mortality	Total takes (entire study area)	Navy abundance in action area (SOCAL)	NMFS SARS abundance	Total take as percentage of total Navy abundance in action area	Total take as percentage of total SAR abundance
		Behavioral disturbance	TTS (may also include disturbance)	PTS	Tissue damage						
California sea lion.	U.S	113,419	4,789	87	9	0.71	118,305	4,085	257,606	2,896	46
Guadalupe fur seal.	Mexico	1,442	15	0	0	0	1,457	1,171	34,187	124	4
Northern fur seal.	California	15,167	124	1	0	0	15,292	886	14,050	1,726	109
Harbor seal	California	2,450	2,994	8	0	0	5,452	321	30,968	1,698	18
Northern elephant seal.	California	42,916	17,955	97	2	0	60,970	4,108	187,386	1,484	33

Note: For the SOCAL take estimates, because of the manner in which the Navy action area overlaps the ranges of many MMPA stocks (*i.e.,* a stock may range far north to Washington state and beyond and abundance may only be predicted within the U.S. EEZ, while the Navy action area is limited to Southern California and northern Mexico, but extends beyond the U.S. EEZ), we compare predicted takes to both the abundance estimates for the action area, as well as the SARs.

For mortality takes there is an annual average of 0.71 California sea lions (*i.e.,* where five takes could potentially occur divided by 7 years to get the annual number of mortalities/serious injuries).

Below we compile and summarize the information that supports our determination that the Navy's activities would not adversely affect any pinnipeds through effects on annual rates of recruitment or survival for any of the affected species or stocks addressed in this section.

Five M/SI takes of California sea lions are proposed for authorization and when this mortality is combined with the other human-caused mortality from other sources, it still falls well below the insignificance threshold for residual PBR (13,684). A small number of Level A harassment takes by tissue damage are also proposed for authorization (nine and two for California sea lions and northern elephant seals, respectively), which, as discussed in the 2020 HSTT final rule, could range in impact from minor to something just less than M/SI that could seriously impact fitness. However, given the Navy's mitigation, exposure at the closer to the source and more severe end of the spectrum is less likely. Nevertheless, we cautiously assume some moderate impact on the individuals that experience these small numbers of take that could lower the individual's fitness within the year such that a female (assuming a 50 percent chance of it being a female) might forego reproduction for 1 year. As noted previously, foregone reproduction has less of an impact on population rates than death (especially for only one within 7 years, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low) and these low numbers of instances (especially assuming the likelihood that only 50 percent of the takes would affect females) would not be expected to impact annual rates of recruitment or survival, especially given the population sizes of these species.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disturbance), for Hawaiian monk seals and Guadalupe fur seals, the two species listed under the ESA, the estimated instances of takes as compared to the stock abundance does not exceed 124 percent, which suggests that some portion of these two stocks would be taken on 1 to a few days per year. For the remaining stocks, the number of estimated total instances of take compared to the abundance (measured against both the Navy-estimated abundance and the SAR) for these stocks is 1,484 to 2,896 percent and 18 to 46 percent, respectively (table 21). Given the ranges of these stocks (*i.e.,* very large ranges, but with individuals often staying in the vicinity of haulouts), this information suggests that some very small portion of the individuals of these stocks will be taken, but that some subset of individuals within the stock will be taken repeatedly within the year (perhaps up to 58 days)—potentially over a fair number of sequential days. Regarding the severity of those individual Level B harassment takes by behavioral disturbance, the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB, which is considered a relatively low to occasionally moderate level for pinnipeds. However, as noted, some of these takes could occur on a fair number of sequential days for this stock.

As described in the 2018 HSTT final rule and 2020 HSTT final rule, the Hawaii and 4-Islands mitigation areas protect (by not using explosives and limiting MFAS within) a significant portion of the designated critical habitat for Hawaiian monk seals in the Main Hawaiian Islands, including all of it around the islands of Hawaii and Lanai, most around Maui, and good portions around Molokai and Kaho'olawe. As discussed, this protection reduces the overall number of takes and further reduces the severity of effects by minimizing impacts near pupping beaches and in important foraging habitat.

The severity of TTS takes are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere significantly with conspecific communication, echolocation, or other important low-frequency cues that would affect the individual's reproduction or survival. For these same reasons (low level and frequency band), while a small permanent loss of hearing sensitivity may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, the one to eight estimated Level A harassment takes by PTS for monk seals, northern fur seals, and harbor seals would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with

reproductive success or survival of any individuals. Because of the high number of PTS takes for California sea lions and northern elephant seals (87 and 97, respectively), we acknowledge that a few animals could potentially incur permanent hearing loss of a higher degree that could potentially interfere with their successful reproduction and growth. Given the status of the stocks, even if this occurred, it would not adversely impact rates of recruitment or survival (residual PBR of 13,684 and 5,108, respectively).

Altogether, an individual Hawaiian monk seal and Guadalupe fur seal would be taken no more than a few days in any year with none of the expected take anticipated to affect individual reproduction or survival, let alone annual rates of recruitment and survival. With all other stocks, only a very small portion of the stock will be taken in any manner. Of those taken, some individuals will be taken by Level B harassment (at a moderate or sometimes low level) over several days a year, and some smaller portion of those taken will be on a relatively moderate to high number of days across the year (up to 58), a fair number of which would likely be sequential days. Though the majority of impacts are expected to be of a lower to sometimes moderate severity, the repeated takes over a potentially fair number of sequential days for some individuals makes it more likely that some number of individuals could be interrupted during foraging in a manner and amount such that impacts to the energy budgets of females (from either losing feeding opportunities or expending considerable energy to find alternative feeding options) could cause them to forego reproduction for a year (energetic impacts to males are generally meaningless to population rates unless they cause death, and it takes extreme energy deficits beyond what would ever be likely to result from these activities to cause the death of an adult marine mammal). As noted previously, however, foregone reproduction (especially for only 1 year within 7, which is the maximum predicted because the small number anticipated in any 1 year makes the probability that any individual would be impacted in this way twice in 7 years very low) has far less of an impact on population rates than mortality and a relatively small number of instances of foregone reproduction (as compared to the stock abundance and residual PBR) would not be expected to adversely affect the stock through effects on annual rates of recruitment or survival, especially given the status of these stocks. Accordingly, we do not anticipate the relatively small number of individual northern fur seals or harbor seals that might be taken over repeated days within the year in a manner that results in 1 year of foregone reproduction to adversely affect the stocks through effects on rates of recruitment or survival, given the status of the stocks, which are respectively increasing and stable with abundances and residual PBRs of 14,050/30,968 and 449/1,598.

For California sea lions, given the very high abundance and residual PBR (257,606 and 13,684, respectively), as well as the increasing status of the stock in the presence of similar levels of Navy activities over past years—the impacts of 0.71 annual mortalities, potential foregone reproduction for up to nine individuals in a year taken by tissue damage, and some relatively small number of individuals taken as a result of repeated behavioral harassment over a fair number of sequential days are not expected to adversely affect the stock through effects on annual rates of recruitment or survival. Similarly, for northern elephant seals, given the very high abundance and residual PBR (187,386 and 5,108, respectively), as well as the increasing status of the stock in the presence of similar levels of Navy activities over past years, the impacts of potential foregone reproduction for up to two individuals in a year taken by tissue damage and some relatively small number of individuals taken as a result of repeated behavioral harassment over a fair number of sequential days are not expected to adversely affect the stock through effects on annual rates of recruitment or survival. For these reasons, in consideration of all of the effects of the Navy's activities combined (M/SI, Level A harassment, and Level B harassment), we have preliminarily determined that the authorized take proposed would have a negligible impact on all pinniped species and stocks.

Preliminary Determination

The 2018 HSTT final rule included a detailed discussion of all of the anticipated impacts on the affected species and stocks from serious injury or mortality, Level A harassment, and Level B harassment; impacts on habitat; and how the Navy's mitigation and monitoring measures reduce the number and/or severity of adverse effects. We have evaluated how these impacts as well as an additional proposed take of two large whales by serious injury or mortality by vessel strike, and the proposed mitigation measures are expected to combine, annually, to affect individuals of each species and stock. Those effects were then evaluated in the context of whether they are reasonably likely to impact reproductive success or survivorship of individuals and then, if so, further analyzed to determine whether there would be effects on annual rates of recruitment or survival that would adversely affect the species or stock.

As described above, the basis for the negligible impact determination is the assessment of effects on annual rates of recruitment and survival. Accordingly, the analysis included in the 2018 HSTT final rule and 2020 HSTT final rule used annual activity levels, the best available science, and approved methods to predict the annual impacts to marine mammals, which were then analyzed in the context of whether each species or stock would incur more than a negligible impact based on anticipated adverse impacts to annual rates of recruitment or survival. As we have described above, none of the factors upon which the conclusions in the 2020 HSTT final rule were based have changed, with the exception of estimated take by vessel strike. Therefore, even though this proposed rule includes two additional takes by vessel strike, little has changed that would change our 2018 HSTT final rule and subsequent 2020 HSTT final rule analyses, and it is appropriate to rely on those analyses, as well as the new information and analysis discussed above, for this proposed rule.

Based on the applicable information and analysis from the 2018 HSTT final rule and 2020 HSTT final rule, as updated with the information and analysis contained herein on the potential and likely effects of the specified activities on the affected marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS preliminarily finds that the incidental take from the specified activities will have a negligible impact on all affected marine mammal species and stocks.

Subsistence Harvest of Marine Mammals

There are no subsistence uses or harvest of marine mammals in the geographic area affected by the specified activities. Therefore, NMFS has preliminarily determined that the total taking affecting species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Classification

Endangered Species Act

There are nine marine mammal species under NMFS jurisdiction that are listed as endangered or threatened under the ESA with confirmed or possible occurrence in the HSTT Study Area: blue whale (Eastern and Central North Pacific stocks), fin whale (CA/OR/WA and Hawaii stocks), gray whale (Western North Pacific stock), humpback whale (Mexico and Central America DPSs), sei whale (Eastern North Pacific and Hawaii stocks), sperm whale (CA/OR/WA and Hawaii stocks), false killer whale (Main Hawaiian Islands Insular), Hawaiian monk seal (Hawaii stock), and Guadalupe fur seal (Mexico to California). There is also ESA-designated critical habitat for Hawaiian monk seals and Main Hawaiian Islands Insular false killer whales. The Navy consulted with NMFS pursuant to section 7 of the ESA for HSTT activities. NMFS also consulted internally on the issuance of the 2018 HSTT regulations and LOAs under section 101(a)(5)(A) of the MMPA.

NMFS issued a Biological Opinion on December 10, 2018 concluding that the issuance of the 2018 HSTT final rule and subsequent LOAs are not likely to jeopardize the continued existence of the threatened and endangered species under NMFS' jurisdiction and are not likely to result in the destruction or adverse modification of critical habitat in the HSTT Study Area. The 2018 Biological Opinion included specified conditions under which NMFS would be required to reinitiate section 7 consultation. NMFS reviewed these specified conditions for the 2020 HSTT rulemaking and determined that reinitiation of consultation was not warranted. The incidental take statement that accompanied the 2018 Biological Opinion was amended to cover the 7-year period of the 2020 HSTT rule. The 2018 Biological Opinion for this action is available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities*.

The 2018 Biological Opinion reinitiation clause (2), states that formal consultation should be reinitiated if ''new information reveals effects of the agency action that may affect ESA-listed species or critical habitat in a manner or to an extent not previously considered.'' Given the new information regarding the recent occurrence of large whale strikes by naval vessels in the southern California portion of the HSTT Study Area, as described herein, the Navy has reinitiated consultation with NMFS pursuant to section 7 of the ESA for HSTT Study Area activities, and NMFS has also reinitiated consultation internally on the issuance of these proposed, revised regulations and LOAs under section 101(a)(5)(A) of the MMPA.

National Marine Sanctuaries Act

Federal agency actions that are likely to injure national marine sanctuary resources are subject to consultation with the Office of National Marine Sanctuaries (ONMS) under section 304(d) of the National Marine Sanctuaries Act (NMSA). There are two national marine sanctuaries in the HSTT Study Area, the Hawaiian Islands Humpback Whale National Marine Sanctuary and the Channel Islands National Marine Sanctuary. NMFS will work with NOAA's ONMS to fulfill our responsibilities under the NMSA as warranted and will complete any NMSA requirements prior to a determination on the issuance of the final rule and LOAs.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed actions and alternatives with respect to potential impacts on the human environment. NMFS participated as a cooperating agency on the 2018 HSTT FEIS/OEIS (published on October 26, 2018, *http://www.hstteis.com*) which evaluated impacts from Navy training and testing activities in the HSTT Study Area for the reasonably foreseeable future (including through 2025). In accordance with 40 CFR 1506.3, NMFS independently reviewed and evaluated the 2018 HSTT FEIS/OEIS and determined that it was adequate and sufficient to meet our responsibilities under NEPA for the issuance of the 2018 HSTT final rule and associated LOAs. NMFS therefore adopted the 2018 HSTT FEIS/OEIS.

In accordance with 40 CFR 1502.9 and the information and analysis contained in this proposed rule, the Navy and NMFS as a cooperating agency have made a preliminary determination that this proposed rule and any subsequent LOAs would not result in significant impacts that were not fully considered in the 2018 HSTT FEIS/OEIS. As indicated in this proposed rule, the Navy has made no substantial changes to the activities nor are there significant new circumstances or information relevant to environmental concerns or their impacts. NMFS will make a final NEPA determination prior to a decision whether to issue a final rule.

Regulatory Flexibility Act

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

Pursuant to the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The RFA requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. 605(b), that the action will not have a significant economic impact on a substantial number of small entities. The Navy is the sole entity that would be affected by this rulemaking, and the Navy is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Any requirements imposed by an LOA issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, would be applicable only to the Navy. NMFS does not expect the issuance of these regulations or the associated LOAs to result in any impacts to small entities pursuant to the RFA. Because this action, if adopted, would directly affect the Navy and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: September 26, 2023.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, NMFS proposes to amend 50 CFR part 218 as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Revise subpart H to read as follows:

Subpart H—Taking and Importing Marine Mammals; U.S. Navy's Hawaii-Southern California Training and Testing (HSTT)

Sec.

Subpart H—Taking and Importing Marine Mammals; U.S. Navy's Hawaii-Southern California Training and Testing (HSTT)

§ 218.70 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) for the taking of marine mammals that occurs in the area described in paragraph (b) of this section and that occurs incidental to the activities listed in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy under this subpart may be authorized in Letters of Authorization (LOAs) only if it occurs within the Hawaii-Southern California Training and Testing (HSTT) Study Area, which includes established operating and warning areas across the north-central Pacific Ocean, from the mean high tide line in Southern California west to Hawaii and the International Date Line. The HSTT Study Area includes the at-sea areas of three existing range complexes, the Hawaii Range Complex (HRC), the Southern California Range Complex (SOCAL), and the Silver Strand Training Complex, and overlaps a portion of the Point Mugu Sea Range (PMSR). Also included in the HSTT Study Area are Navy pierside locations in Hawaii and Southern California, Pearl Harbor, San Diego Bay, and the transit corridor on the high seas where sonar training and testing may occur.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the Navy conducting training and testing activities, including:

(1) *Training.* (i) Amphibious warfare;

(ii) Anti-submarine warfare;

(iii) Electronic warfare;

(iv) Expeditionary warfare;

(v) Mine warfare;

(vi) Surface warfare; and

(vii) Pile driving.

(2) *Testing.* (i) Naval Air Systems Command Testing Activities;

(ii) Naval Sea System Command Testing Activities;

(iii) Office of Naval Research Testing Activities; and

(iv) Naval Information Warfare Systems Command.

§ 218.71 Effective dates.

Regulations in this subpart are effective from [date of publication of a final rule in the **Federal Register**] through December 20, 2025.

§ 218.72 Permissible methods of taking.

(a) Under LOAs issued pursuant to §§ 216.106 of this chapter and 218.76, the Holder of the LOAs (hereinafter ''Navy'') may incidentally, but not intentionally, take marine mammals within the area described in § 218.70(b) by Level A harassment and Level B harassment associated with the use of active sonar and other acoustic sources and explosives as well as serious injury or mortality associated with vessel strikes and explosives, provided the activity is in compliance with all terms, conditions, and requirements of these regulations in this subpart and the applicable LOAs.

(b) The incidental take of marine mammals by the activities listed in § 218.70(c) is limited to the following species:

TABLE 1 TO PARAGRAPH (b)

Species	Stock
Blue whale	Central North Pacific.
Blue whale	Eastern North Pacific.
Bryde's whale	Eastern Tropical Pacific.
Bryde's whale	Hawaii.
Fin whale	CA/OR/WA.
Fin whale	Hawaii.
Humpback whale	Central America/Southern Mexico—CA/OR/WA.
Humpback whale	Mainland Mexico—CA/OR/WA.
Humpback whale	Hawaii.
Minke whale	CA/OR/WA.
Minke whale	Hawaii.
Sei whale	Eastern North Pacific.
Sei whale	Hawaii.
Gray whale	Eastern North Pacific.
Gray whale	Western North Pacific.
Sperm whale	CA/OR/WA.
Sperm whale	Hawaii.
Dwarf sperm whale	Hawaii.
Pygmy sperm whale	Hawaii.
Kogia whales	CA/OR/WA.
Baird's beaked whale	CA/OR/WA.
Blainville's beaked whale	Hawaii.
Cuvier's beaked whale	CA/OR/WA.
Cuvier's beaked whale	Hawaii.
Longman's beaked whale	Hawaii.
Mesoplodon spp	CA/OR/WA.
Bottlenose dolphin	California Coastal.
Bottlenose dolphin	CA/OR/WA Offshore.
Bottlenose dolphin	Hawaii Pelagic.
Bottlenose dolphin	Kauai & Niihau.
Bottlenose dolphin	Oahu.
Bottlenose dolphin	4-Island.

TABLE 1 TO PARAGRAPH (b)—Continued

Species	Stock
Bottlenose dolphin	Hawaii.
False killer whale	Hawaii Pelagic.
False killer whale	Main Hawaiian Islands Insular.
False killer whale	Northwestern Hawaiian Islands.
Fraser's dolphin	Hawaii.
Killer whale	Eastern North Pacific (ENP) Offshore.
Killer whale	ENP Transient/West Coast Transient.
Killer whale	Hawaii.
Long-beaked common dolphin	California.
Melon-headed whale	Hawaiian Islands.
Melon-headed whale	Kohala Resident.
Northern right whale dolphin	CA/OR/WA.
Pacific white-sided dolphin	CA/OR/WA.
Pantropical spotted dolphin	Hawaii Island.
Pantropical spotted dolphin	Hawaii Pelagic.
Pantropical spotted dolphin	Oahu.
Pantropical spotted dolphin	4-Island.
Pygmy killer whale	Hawaii.
Pygmy killer whale	Tropical.
Risso's dolphin	CA/OR/WA.
Risso's dolphin	Hawaii.
Rough-toothed dolphin	Hawaii.
Short-beaked common dolphin	CA/OR/WA.
Short-finned pilot whale	CA/OR/WA.
Short-finned pilot whale	Hawaii.
Spinner dolphin	Hawaii Island.
Spinner dolphin	Hawaii Pelagic.
Spinner dolphin	Kauai & Niihau.
Spinner dolphin	Oahu & 4-Island.
Striped dolphin	CA/OR/WA.
Striped dolphin	Hawaii.
Dall's porpoise	CA/OR/WA.
California sea lion	U.S.
Guadalupe fur seal	Mexico.
Northern fur seal	California.
Harbor seal	California.
Hawaiian monk seal	Hawaii.
Northern elephant seal	California.

Note to Table 1: CA/OR/WA = California/Oregon/Washington.

§ 218.73 Prohibitions.

Notwithstanding incidental takings contemplated in § 218.72(a) and authorized by LOAs issued under §§ 216.106 of this chapter and 218.76, no person in connection with the activities listed in § 218.70(c) may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 of this chapter and 218.76;

(b) Take any marine mammal not specified in § 218.72(b);

(c) Take any marine mammal specified in § 218.72(b) in any manner other than as specified in the LOAs; or

(d) Take a marine mammal specified in § 218.72(b) if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal.

§ 218.74 Mitigation requirements.

When conducting the activities identified in § 218.70(c), the mitigation measures contained in any LOAs issued under §§ 216.106 of this chapter and 218.76 must be implemented. These mitigation measures include, but are not limited to:

(a) *Procedural mitigation.* Procedural mitigation is mitigation that the Navy must implement whenever and wherever an applicable training or testing activity takes place within the HSTT Study Area for each applicable activity category or stressor category and includes acoustic stressors (*i.e.,* active sonar, air guns, pile driving, weapons firing noise), explosive stressors (*i.e.,* sonobuoys, torpedoes, medium-caliber and large-caliber projectiles, missiles and rockets, bombs, sinking exercises, mines, anti-swimmer grenades, and mat weave and obstacle loading), and physical disturbance and strike stressors (*i.e.,* vessel movement; towed in-water devices; small-, medium-, and large-caliber non-explosive practice munitions; non-explosive missiles and rockets; and non-explosive bombs and mine shapes).

(1) *Environmental awareness and education.* Appropriate Navy personnel (including civilian personnel) involved in mitigation and training or testing activity reporting under the specified activities will complete one or more modules identified in their career path training plan, as specified in the LOAs.

(2) *Active sonar.* Active sonar includes low-frequency active sonar, mid-frequency active sonar, and high-frequency active sonar. For vessel-based activities, mitigation applies only to sources that are positively controlled and deployed from manned surface vessels (*e.g.,* sonar sources towed from manned surface platforms). For aircraft-based activities, mitigation applies only to sources that are positively controlled and deployed from manned aircraft that do not operate at high altitudes (*e.g.,* rotary-wing aircraft). Mitigation does not apply to active sonar sources deployed from unmanned aircraft or aircraft operating at high altitudes (*e.g.,* maritime patrol aircraft).

(i) *Number of Lookouts and observation platform*—(A) *Hull-mounted sources.* One Lookout for

platforms with space or manning restrictions while underway (at the forward part of a small boat or ship) and platforms using active sonar while moored or at anchor (including pierside); and two Lookouts for platforms without space or manning restrictions while underway (at the forward part of the ship).

(B) *Sources that are not hull-mounted sources.* One Lookout on the ship or aircraft conducting the activity.

(ii) *Mitigation zone and requirements.* During the activity, at 1,000 yards (yd) Navy personnel must power down 6 decibels (dB), at 500 yd (457.2 m) Navy personnel must power down an additional 4 dB (for a total of 10 dB), and at 200 yd (182.9 m) Navy personnel must shut down for low-frequency active sonar ≥200 dB and hull-mounted mid-frequency active sonar; or at 200 yd (182.9 m) Navy personnel must shut down for low-frequency active sonar <200 dB, mid-frequency active sonar sources that are not hull-mounted, and high-frequency active sonar.

(A) *Prior to activity.* Prior to the start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of active sonar transmission until the mitigation zone is clear. Navy personnel must also observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of active sonar transmission.

(B) *During the activity for low-frequency active sonar at or above 200 dB and hull-mounted mid-frequency active sonar.* During the activity for low-frequency active sonar at or above 200 dB and hull-mounted mid-frequency active sonar, Navy personnel must observe the mitigation zone for marine mammals and power down active sonar transmission by 6 dB if marine mammals are observed within 1,000 yd (914.4 m) of the sonar source; power down by an additional 4 dB (for a total of 10 dB total) if marine mammals are observed within 500 yd (457.2 m) of the sonar source; and cease transmission if marine mammals are observed within 200 yd (182.9 m) of the sonar source.

(C) *During the activity for low-frequency active sonar below 200 dB, mid-frequency active sonar sources that are not hull mounted, and high-frequency active sonar.* During the activity for low-frequency active sonar below 200 dB, mid-frequency active sonar sources that are not hull mounted, and high-frequency active sonar, Navy personnel must observe the mitigation zone for marine mammals and cease active sonar transmission if marine mammals are observed within 200 yd (182.9 m) of the sonar source.

(D) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing or powering up active sonar transmission) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the sonar source;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 minutes (min) for aircraft-deployed sonar sources or 30 min for vessel-deployed sonar sources;

(*4*) *Sonar source transit.* For mobile activities, the active sonar source has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting; or

(*5*) *Bow-riding dolphins.* For activities using hull-mounted sonar where a dolphin(s) is observed in the mitigation zone, the Lookout concludes that the dolphin(s) are deliberately closing in on the ship to ride the ship's bow wave, and are therefore out of the main transmission axis of the sonar (and there are no other marine mammal sightings within the mitigation zone).

(3) *Air guns*—(i) *Number of Lookouts and observation platform.* One Lookout positioned on a ship or pierside.

(ii) *Mitigation zone and requirements.* 150 yd (137.2 m) around the air gun.

(A) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start until the mitigation zone is clear. Navy personnel must also observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of air gun use.

(B) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease air gun use.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing air gun use) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the air gun;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 30 min; or

(*4*) *Air gun transit.* For mobile activities, the air gun has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(4) *Pile driving.* Pile driving and pile extraction sound during Elevated Causeway System training.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned on the shore, the elevated causeway, or a small boat.

(ii) *Mitigation zone and requirements.* 100 yd (91.4 m) around the pile driver.

(A) *Prior to activity.* Prior to the initial start of the activity (for 30 min), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must delay the start until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must delay the start of pile driving or vibratory pile extraction.

(B) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease impact pile driving or vibratory pile extraction.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing pile driving or pile extraction) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the pile driving location; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 30 minutes.

(5) *Weapons firing noise.* Weapons firing noise associated with large-caliber gunnery activities.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned on the ship conducting the firing. Depending on the activity, the Lookout could be the same as the one provided for under ''Explosive medium-caliber and large-caliber projectiles'' or under ''Small-, medium-, and large-caliber non-explosive practice munitions'' in paragraphs (a)(8)(i) and (a)(18)(i) of this section.

(ii) *Mitigation zone and requirements.* Thirty degrees on either side of the firing line out to 70 yd from the muzzle of the weapon being fired.

(A) *Prior to activity.* Prior to the start of the activity, Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of weapons firing until the mitigation zone is clear. Navy personnel must also observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of weapons firing.

(B) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease weapons firing.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing weapons firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the firing ship;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 30 min; or

(*4*) *Firing ship transit.* For mobile activities, the firing ship has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(6) *Explosive sonobuoys*—(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft or on small boat. If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* 600 yd (548.6 m) around an explosive sonobuoy.

(A) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* during deployment of a sonobuoy field, which typically lasts 20–30 min), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of sonobuoy or source/receiver pair detonations until the mitigation zone is clear. Navy personnel must conduct passive acoustic monitoring for marine mammals and use information from detections to assist visual observations. Navy personnel also must visually observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of sonobuoy or source/receiver pair detonations.

(B) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease sonobuoy or source/receiver pair detonations.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the sonobuoy; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints (*e.g.,* helicopter), or 30 min when the activity involves aircraft that are not typically fuel constrained.

(D) *After activity.* After completion of the activity (*e.g.,* prior to maneuvering off station), when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), Navy personnel must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets must assist in the visual observation of the area where detonations occurred.

(7) *Explosive torpedoes*—(i) *Number of Lookouts and observation platform.* One Lookout positioned in an aircraft. If additional platforms are participating in the activity, Navy personnel positioned in those assets *(e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* 2,100 yd around the intended impact location.

(A) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* during deployment of the target), Navy personnel must observe the mitigation zone for floating vegetation and jellyfish aggregations; if floating vegetation or jellyfish aggregations are observed, Navy personnel must relocate or delay the start of firing until the mitigation zone is clear. Navy personnel must conduct passive acoustic monitoring for marine mammals and use the information from detections to assist visual observations. Navy personnel also must visually observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(B) *During activity.* During the activity, Navy personnel must observe for marine mammals and jellyfish aggregations; if marine mammals or jellyfish aggregations are observed, Navy personnel must cease firing.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when

the activity involves aircraft that are not typically fuel constrained.

(D) *After activity.* After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets must assist in the visual observation of the area where detonations occurred.

(8) *Explosive medium-caliber and large-caliber projectiles.* Gunnery activities using explosive medium-caliber and large-caliber projectiles. Mitigation applies to activities using a surface target.

(i) *Number of Lookouts and observation platform.* One Lookout must be on the vessel or aircraft conducting the activity. For activities using explosive large-caliber projectiles, depending on the activity, the Lookout could be the same as the one described in ''Weapons firing noise'' in paragraph (a)(5)(i) of this section. If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements*—(A) *Air-to-surface activities.* 200 yd (182.9 m) around the intended impact location for air-to-surface activities using explosive medium-caliber projectiles.

(B) *Surface-to-surface activities, medium-caliber.* 600 yd (548.6 m) around the intended impact location for surface-to-surface activities using explosive medium-caliber projectiles.

(C) *Surface-to-surface activities, large-caliber.* 1,000 yd (914.4 m) around the intended impact location for surface-to-surface activities using explosive large-caliber projectiles.

(D) *Prior to activity.* Prior to the start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of firing until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(E) *During activity.* During the activity, Navy personnel must observe for marine mammals; if marine mammals are observed, Navy personnel must cease firing.

(F) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min for aircraft-based firing or 30 min for vessel-based firing; or for activities using mobile targets, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(G) *After activity.* After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets must assist in the visual observation of the area where detonations occurred.

(9) *Explosive missiles and rockets.* Aircraft-deployed explosive missiles and rockets. Mitigation applies to activities using a surface target.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft. If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements*—(A) *Missiles or rockets with 0.6–20 lb net explosive weight.* 900 yd (823 m) around the intended impact location for missiles or rockets with 0.6–20 lb net explosive weight.

(B) *Missiles with 21–500 lb net explosive weight.* 2,000 yd (1,828.8 m) around the intended impact location for missiles with 21–500 lb net explosive weight.

(C) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* during a fly-over of the mitigation zone), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of firing until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(D) *During activity.* During the activity, Navy personnel must observe for marine mammals; if marine mammals are observed, Navy personnel must cease firing.

(E) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained.

(F) *After activity.* After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets will assist in the visual observation of the area where detonations occurred.

(10) *Explosive bombs*—(i) *Number of Lookouts and observation platform.* One

Lookout must be positioned in an aircraft conducting the activity. If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* 2,500 yd (2,286 m) around the intended target.

(A) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when arriving on station), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of bomb deployment until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of bomb deployment.

(B) *During activity.* During the activity (*e.g.,* during target approach), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease bomb deployment.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min; or for activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(D) *After activity.* After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets must assist in the visual observation of the area where detonations occurred.

(11) *Sinking exercises*—(i) *Number of Lookouts and observation platform.* Two Lookouts (one must be positioned in an aircraft and one must be positioned on a vessel). If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* 2.5 nautical miles (nmi) around the target ship hulk.

(A) *Prior to activity.* Prior to the initial start of the activity (90 min prior to the first firing), Navy personnel must conduct aerial observations of the mitigation zone for floating vegetation and jellyfish aggregations; if floating vegetation or jellyfish aggregations are observed, Navy personnel must delay the start of firing until the mitigation zone is clear. Navy personnel also must conduct aerial observations of the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must delay the start of firing.

(B) *During activity.* During the activity, Navy personnel must conduct passive acoustic monitoring for marine mammals and use the information from detections to assist visual observations. Navy personnel must visually observe the mitigation zone for marine mammals from the vessel; if marine mammals are observed, Navy personnel must cease firing. Immediately after any planned or unplanned breaks in weapons firing of longer than 2 hours, Navy personnel must observe the mitigation zone for marine mammals from the aircraft and vessel; if marine mammals are observed, Navy personnel must delay recommencement of firing.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the target ship hulk; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 30 minutes.

(D) *After activity.* After completion of the activity (for 2 hours after sinking the vessel or until sunset, whichever comes first), Navy personnel must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets will assist in the visual observation of the area where detonations occurred.

(12) *Explosive mine countermeasure and neutralization activities*—(i) *Number of Lookouts and observation platform*—(A) *Smaller mitigation zone.* One Lookout must be positioned on a vessel or in an aircraft when implementing the smaller mitigation zone.

(B) *Larger mitigation zone.* Two Lookouts (one must be positioned in an aircraft and one must be on a small boat) when implementing the larger mitigation zone.

(C) *Additional platforms.* If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) *Activities using 0.1–5 lb net explosive weight.* 600 yd (548.6 m) around the detonation site for activities using 0.1–5 lb net explosive weight.

(B) *Activities using 6–650 lb net explosive weight.* 2,100 yd (1,920.2 m) around the detonation site for activities using 6–650 lb net explosive weight (including high explosive target mines).

(C) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when maneuvering on station; typically, 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of detonations until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of detonations.

(D) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals, concentrations of seabirds,

and individual foraging seabirds; if marine mammals, concentrations of seabirds, or individual foraging seabirds are observed, Navy personnel must cease detonations.

(E) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity or a sighting of seabird concentrations or individual foraging seabirds during the activity.* Navy personnel must allow a sighted animal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to detonation site; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained.

(F) *After activity.* After completion of the activity (typically 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained), Navy personnel must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets must assist in the visual observation of the area where detonations occurred.

(13) *Explosive mine neutralization activities involving Navy divers*—(i) *Number of Lookouts and observation platform*—(A) *Smaller mitigation zone.* Two Lookouts (two small boats with one Lookout each, or one Lookout must be on a small boat and one must be in a rotary-wing aircraft) when implementing the smaller mitigation zone.

(B) *Larger mitigation zone.* Four Lookouts (two small boats with two Lookouts each), and a pilot or member of an aircrew must serve as an additional Lookout if aircraft are used during the activity, when implementing the larger mitigation zone.

(C) *Divers.* All divers placing the charges on mines will support the Lookouts while performing their regular duties and will report applicable sightings to their supporting small boat or Range Safety Officer.

(D) *Additional platforms.* If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements*—(A) *Activities under positive control using 0.1–20 lb net explosive weight.* 500 yd (457.2 m) around the detonation site during activities under positive control using 0.1–20 lb net explosive weight.

(B) *Activities under positive control using 21–60 lb net explosive weight charges.* 1,000 yd (914.4 m) around the detonation site during all activities using time-delay fuses (0.1–29 lb net explosive weight) and during activities under positive control using 21–60 lb net explosive weight charges.

(C) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when maneuvering on station for activities under positive control; 30 min for activities using time-delay firing devices), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of detonations or fuse initiation until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of detonations or fuse initiation.

(D) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals, concentrations of seabirds, and individual foraging seabirds (in the water and not on shore); if marine mammals, concentrations of seabirds, or individual foraging seabirds are observed, Navy personnel must cease detonations or fuse initiation. To the maximum extent practicable depending on mission requirements, safety, and environmental conditions, Navy personnel must position boats near the mid-point of the mitigation zone radius (but outside of the detonation plume and human safety zone), must position themselves on opposite sides of the detonation location (when two boats are used), and must travel in a circular pattern around the detonation location with one Lookout observing inward toward the detonation site and the other observing outward toward the perimeter of the mitigation zone. If used, Navy aircraft must travel in a circular pattern around the detonation location to the maximum extent practicable. Navy personnel must not set time-delay firing devices (0.1–29 lb net explosive weight) to exceed 10 minutes.

(E) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity or a sighting of seabird concentrations or individual foraging seabirds during the activity.* Navy personnel must allow a sighted animal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the detonation site; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min during activities under positive control with aircraft that have fuel constraints, or 30 min during activities under positive control with aircraft that are not typically fuel constrained and during activities using time-delay firing devices.

(F) *After activity.* After completion of an activity (for 30 min), the Navy must observe for marine mammals for 30 minutes. Navy personnel must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets must assist in the visual observation of the area where detonations occurred.

(14) *Maritime security operations—anti-swimmer grenades*—(i) *Number of Lookouts and observation platform.* One Lookout must be positioned on the small boat conducting the activity. If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* 200 yd (182.9 m) around the intended detonation location.

(A) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel

must relocate or delay the start of detonations until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of detonations.

(B) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease detonations.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended detonation location;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 30 min; or

(*4*) *Detonation location transit.* The intended detonation location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(D) *After activity.* After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets will assist in the visual observation of the area where detonations occurred.

(15) *Underwater demolition multiple charge—mat weave and obstacle loading exercises*—(i) *Number of Lookouts and observation platform.* Two Lookouts (one must be positioned on a small boat and one must be positioned on shore from an elevated platform). If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* 700 yd (640.1 m) around the intended detonation location.

(A) *Prior to activity.* Prior to the initial start of the activity, or 30 min prior to the first detonation, the Lookout positioned on a small boat must observe the mitigation zone for floating vegetation and marine mammals; if floating vegetation or marine mammals are observed, Navy personnel must delay the start of detonations until the mitigation zone is clear. For 10 min prior to the first detonation, the Lookout positioned on shore must use binoculars to observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must delay the start of detonations.

(B) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease detonations.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the detonation location; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min (as determined by the Navy shore observer).

(D) *After activity.* After completion of the activity (for 30 min), the Lookout positioned on a small boat must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), these Navy assets must assist in the visual observation of the area where detonations occurred.

(16) *Vessel movement.* The mitigation will not be applied if: the vessel's safety is threatened; the vessel is restricted in its ability to maneuver (*e.g.,* during launching and recovery of aircraft or landing craft, during towing activities, when mooring); the vessel is operated autonomously; or when impracticable based on mission requirements (*e.g.,* during Amphibious Assault—Battalion Landing exercise).

(i) *Number of Lookouts and observation platform.* One Lookout must be on the vessel that is underway.

(ii) *Mitigation zone and requirements*—(A) *Whales.* 500 yd (457.2 m) around whales.

(B) *Marine mammals other than whales.* 200 yd (182.9 m) around all other marine mammals (except bow-riding dolphins and pinnipeds hauled out on man-made navigational structures, port structures, and vessels).

(iii) *During the activity.* When underway, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must maneuver (which may include reducing speed as the mission or circumstances allow) to maintain distance.

(iv) *Incident reporting procedures.* If a marine mammal vessel strike occurs, Navy personnel must follow the established incident reporting procedures.

(v) *Post-strike alerts.* Navy personnel must send alerts to Navy vessels of increased risk of strike following any reported Navy vessel strike in the HSTT Study Area.

(vi) *Large whale aggregation alerts.* Navy personnel must issue real-time notifications to Navy vessels of large whale aggregations (four or more whales) within 1 nmi (1.9 km) of a Navy vessel in the area between 32–33 degrees North and 117.2–119.5 degrees West.

(17) *Towed in-water devices.* Mitigation applies to devices that are towed from a manned surface platform or manned aircraft. The mitigation will not be applied if the safety of the towing platform or in-water device is threatened.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned on a manned towing platform.

(ii) *Mitigation zone and requirements.* 250 yd (228.6 m) around marine mammals.

(iii) *During the activity.* During the activity (*i.e.,* when towing an in-water device), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must maneuver to maintain distance.

(18) *Small-, medium-, and large-caliber non-explosive practice munitions.* Mitigation applies to activities using a surface target.

(i) *Number of Lookouts and observation platform.* One Lookout must

be positioned on the platform conducting the activity. Depending on the activity, the Lookout could be the same as the one described for ''Weapons firing noise'' in paragraph (a)(5)(i) of this section.

(ii) *Mitigation zone and requirements.* 200 yd (182.9 m) around the intended impact location.

(A) *Prior to activity.* Prior to the start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of firing until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(B) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease firing.

(C) *Commencement/recommencement conditions after a marine mammal sighting before or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min for aircraft-based firing or 30 min for vessel-based firing; or

(*4*) *Impact location transit.* For activities using a mobile target, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(19) *Non-explosive missiles and rockets.* Aircraft-deployed non-explosive missiles and rockets. Mitigation applies to activities using a surface target.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft.

(ii) *Mitigation zone and requirements.* 900 yd around the intended impact location.

(A) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* during a fly-over of the mitigation zone), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of firing until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(B) *During activity.* During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease firing.

(C) *Commencement/recommencement conditions after a marine mammal sighting prior to or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained.

(20) *Non-explosive bombs and mine shapes.* Non-explosive bombs and non-explosive mine shapes during mine laying activities.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft.

(ii) *Mitigation zone and requirements.* 1,000 yd (914.4 m) around the intended target.

(A) *Prior to activity.* Prior to the initial start of the activity (*e.g.,* when arriving on station), Navy personnel must observe the mitigation zone for floating vegetation; if floating vegetation is observed, Navy personnel must relocate or delay the start of bomb deployment or mine laying until the mitigation zone is clear. Navy personnel also must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of bomb deployment or mine laying.

(B) *During activity.* During the activity (*e.g.,* during approach of the target or intended minefield location), Navy personnel must observe the mitigation zone for marine mammals and, if marine mammals are observed, Navy personnel must cease bomb deployment or mine laying.

(C) *Commencement/recommencement conditions after a marine mammal sighting prior to or during the activity.* Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment or mine laying) until one of the following conditions has been met:

(*1*) *Observed exiting.* The animal is observed exiting the mitigation zone;

(*2*) *Thought to have exited.* The animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target or minefield location;

(*3*) *Clear from additional sightings.* The mitigation zone has been clear from any additional sightings for 10 min; or

(*4*) *Target transit.* For activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(b) *Mitigation areas.* In addition to procedural mitigation, Navy personnel must implement mitigation measures within mitigation areas to avoid or reduce potential impacts on marine mammals.

(1) *Mitigation areas for marine mammals in the Hawaii Range Complex for sonar, explosives, and vessel strikes*—(i) *Mitigation area requirements*—(A) *Hawaii Island Mitigation Area (year-round)*—(*1*) *MF1 surface ship hull-mounted mid-frequency active sonar, MF4 dipping sonar, or explosives.* Except as provided in paragraph (b)(1)(i)(A)(*2*) of this section, Navy personnel must not conduct more than 300 hours of MF1 surface ship hull-mounted mid-frequency active sonar or 20 hours of MF4 dipping sonar annually, or use explosives that could potentially result in takes of marine mammals during training and testing.

(*2*) *National security exception.* Should national security require conduct of more than 300 hours of MF1 surface ship hull-mounted mid-frequency active sonar or 20 hours of MF4 dipping sonar, or use of explosives that could potentially result in the take of marine mammals during training or testing, Naval units must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include the

information (*e.g.,* sonar hours or explosives usage) in its annual activity reports submitted to NMFS.

(B) *4-Islands Region Mitigation Area (November 15–April 15 for active sonar; year-round for explosives)*—(*1*) *MF1 surface ship hull-mounted mid-frequency active sonar or explosives.* Except as provided in paragraph (b)(1)(i)(B)(*2*) of this section, Navy personnel must not use MF1 surface ship hull-mounted mid-frequency active sonar or explosives that could potentially result in takes of marine mammals during training and testing.

(*2*) *National security exception.* Should national security require use of MF1 surface ship hull-mounted mid-frequency active sonar or explosives that could potentially result in the take of marine mammals during training or testing, Naval units must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include the information (*e.g.,* sonar hours or explosives usage) in its annual activity reports submitted to NMFS.

(C) *Humpback Whale Special Reporting Areas (December 15–April 15).* Navy personnel must report the total hours of surface ship hull-mounted mid-frequency active sonar used in the special reporting areas in its annual training and testing activity reports submitted to NMFS.

(D) *Humpback Whale Awareness Notification Message Area (November–April)*—(*1*) *Seasonal awareness notification message.* Navy personnel must issue a seasonal awareness notification message to alert ships and aircraft operating in the area to the possible presence of concentrations of large whales, including humpback whales.

(*2*) *Vessel instruction.* To maintain safety of navigation and to avoid interactions with large whales during transits, Navy personnel must instruct vessels to remain vigilant to the presence of large whale species (including humpback whales).

(*3*) *Awareness notification message use.* Platforms must use the information from the awareness notification message to assist their visual observation of applicable mitigation zones during training and testing activities and to aid in the implementation of procedural mitigation.

(ii) [Reserved]

(2) *Mitigation areas for marine mammals in the southern California portion of the study area for sonar, explosives, and vessel strikes*—(i) *Mitigation area requirements*—(A) *San Diego Arc, San Nicolas Island, and Santa Monica/Long Beach Mitigation Areas (June 1–October 31)*—(*1*) *MF1 surface ship hull-mounted mid-frequency active sonar.* Except as provided in paragraph (b)(2)(i)(A)(*2*) of this section, Navy personnel must not conduct more than a total of 200 hours of MF1 surface ship hull-mounted mid-frequency active sonar in the combined areas, excluding normal maintenance and systems checks, during training and testing.

(*2*) *National security exception.* Should national security require conduct of more than 200 hours of MF1 surface ship hull-mounted mid-frequency active sonar in the combined areas during training and testing (excluding normal maintenance and systems checks), Naval units must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include the information (*e.g.,* sonar hours) in its annual activity reports submitted to NMFS.

(*3*) *Explosives in San Diego Arc Mitigation Area.* Except as provided in paragraph (b)(2)(i)(A)(*4*) of this section, within the San Diego Arc Mitigation Area, Navy personnel must not use explosives that could potentially result in the take of marine mammals during large-caliber gunnery, torpedo, bombing, and missile (including 2.75-inch rockets) activities during training and testing.

(*4*) *National security exception.* Should national security require use of explosives that could potentially result in the take of marine mammals during large-caliber gunnery, torpedo, bombing, and missile (including 2.75-inch rockets) activities during training or testing within the San Diego Arc Mitigation Area, Naval units must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include the information (*e.g.,* explosives usage) in its annual activity reports submitted to NMFS.

(*5*) *Explosives in San Nicolas Island Mitigation Area.* Except as provided in paragraph (b)(2)(i)(A)(*6*) of this section, within the San Nicolas Island Mitigation Area, Navy personnel must not use explosives that could potentially result in the take of marine mammals during mine warfare, large-caliber gunnery, torpedo, bombing, and missile (including 2.75-inch rockets) activities during training.

(*6*) *National security exception.* Should national security require use of explosives that could potentially result in the take of marine mammals during mine warfare, large-caliber gunnery, torpedo, bombing, and missile (including 2.75-inch rockets) activities during training in the San Nicolas Island Mitigation Area, Naval units must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include the information (*e.g.,* explosives usage) in its annual activity reports submitted to NMFS.

(*7*) *Explosives in the Santa Monica/Long Beach Mitigation Area.* Except as provided in paragraph (b)(2)(i)(A)(*8*) of this section, within the Santa Monica/Long Beach Mitigation Area, Navy personnel must not use explosives that could potentially result in the take of marine mammals during mine warfare, large-caliber gunnery, torpedo, bombing, and missile (including 2.75-inch rockets) activities during training and testing.

(*8*) *National security exception.* Should national security require use of explosives that could potentially result in the take of marine mammals during mine warfare, large-caliber gunnery, torpedo, bombing, and missile (including 2.75-inch rockets) activities during training or testing in the Santa Monica/Long Beach Mitigation Area, Naval units must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include the information (*e.g.,* explosives usage) in its annual activity reports submitted to NMFS.

(B) *Santa Barbara Island Mitigation Area (year-round)*—(*1*) *MF1 surface ship hull-mounted mid-frequency active sonar or explosives.* Except as provided in paragraph (b)(2)(i)(B)(*2*) of this section, Navy personnel must not use MF1 surface ship hull-mounted mid-frequency active sonar during training or testing, or explosives that could potentially result in the take of marine mammals during medium-caliber or large-caliber gunnery, torpedo, bombing, and missile (including 2.75-inch rockets) activities during training.

(*2*) *National security exception.* Should national security require use of MF1 surface ship hull-mounted mid-frequency active sonar during training or testing, or explosives that could potentially result in the take of marine mammals during medium-caliber or large-caliber gunnery, torpedo, bombing,

and missile (including 2.75-inch rockets) activities during training, Naval units must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include the information (*e.g.,* sonar hours or explosives usage) in its annual activity reports submitted to NMFS.

(C) *Spring Large Whale Awareness Notification Message*—(*1*) *Awareness notification message.* Navy personnel must issue an awareness notification message to alert ships and aircraft operating in the area to the possible presence of concentrations of large whales, including blue whales, fin whales, and humpback whales.

(*2*) *Applicable period.* This message must apply to a period that is based on predicted oceanographic conditions for a given year.

(*3*) *Marine mammals and vessel transit.* To maintain safety of navigation and to avoid interactions with large whales during transits, Navy personnel must emphasize to vessels that when a marine mammal is spotted, this may be an indicator that additional marine mammals are present nearby, and increased vigilance and awareness of Navy personnel is warranted.

(*4*) *Platform use of message.* Platforms must use the information from the awareness notification messages to assist their visual observation of applicable mitigation zones during training and testing activities and to aid in the implementation of procedural mitigation.

(D) *Gray Whale (November–March) and Fin Whale (November–May) Awareness Notification Message Areas*—(*1*) *Seasonal awareness message.* Navy personnel must issue a seasonal awareness notification message to alert ships and aircraft operating in the area to the possible presence of concentrations of large whales, including gray whales, and fin whales.

(*2*) *Marine mammals and vessel transit.* To maintain safety of navigation and to avoid interactions with large whales during transits, Navy personnel must instruct vessels to remain vigilant to the presence of large whale species.

(*3*) *Platform use of message.* Platforms must use the information from the awareness notification messages to assist their visual observation of applicable mitigation zones during training and testing activities and to aid in the implementation of procedural mitigation.

(ii) [Reserved]

§ 218.75 Requirements for monitoring and reporting.

(a) *Unauthorized take.* Navy personnel must notify NMFS immediately (or as soon as operational security considerations allow) if the specified activity identified in § 218.70 is thought to have resulted in the mortality or serious injury of any marine mammals, or in any Level A harassment or Level B harassment take of marine mammals not identified in this subpart.

(b) *Monitoring and reporting under the LOAs.* The Navy must conduct all monitoring and reporting required under the LOAs, including abiding by the HSTT Study Area monitoring program. Details on program goals, objectives, project selection process, and current projects are available at *www.navymarinespeciesmonitoring.us.*

(c) *Notification of injured, live stranded, or dead marine mammals.* The Navy must consult the Notification and Reporting Plan, which sets out notification, reporting, and other requirements when dead, injured, or live stranded marine mammals are detected. The Notification and Reporting Plan is available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

(d) *Changes in Lookout Policies.* The Navy must report changes in its Lookout policies to NMFS as soon as practicable after a change is made.

(e) *Annual HSTT Study Area marine species monitoring report.* The Navy must submit an annual report of the HSTT Study Area monitoring describing the implementation and results from the previous calendar year. Data collection methods must be standardized across range complexes and study areas to allow for comparison in different geographic locations. The report must be submitted to the Director, Office of Protected Resources, NMFS, either within 3 months after the end of the calendar year, or within 3 months after the conclusion of the monitoring year, to be determined by the Adaptive Management process. This report will describe progress of knowledge made with respect to intermediate scientific objectives within the HSTT Study Area associated with the Integrated Comprehensive Monitoring Program (ICMP). Similar study questions must be treated together so that progress on each topic can be summarized across all Navy ranges. The report need not include analyses and content that does not provide direct assessment of cumulative progress on the monitoring plan study questions. As an alternative, the Navy may submit a multi-Range Complex annual Monitoring Plan report to fulfill this requirement. Such a report will describe progress of knowledge made with respect to monitoring study questions across multiple Navy ranges associated with the ICMP. Similar study questions must be treated together so that progress on each topic can be summarized across multiple Navy ranges. The report need not include analyses and content that does not provide direct assessment of cumulative progress on the monitoring study question. This will continue to allow the Navy to provide a cohesive monitoring report covering multiple ranges (as per ICMP goals), rather than entirely separate reports for the HSTT, Gulf of Alaska, Mariana Islands, and Northwest Study Areas.

(f) *Annual HSTT Study Area training exercise report and testing activity report.* Each year, the Navy must submit two preliminary reports (Quick Look Report) detailing the status of authorized sound sources within 21 days after the anniversary of the date of issuance of each LOA to the Director, Office of Protected Resources, NMFS. Each year, the Navy must submit detailed reports to the Director, Office of Protected Resources, NMFS, within 3 months after the 1-year anniversary of the date of issuance of the LOA. The HSTT annual Training Exercise Report and Testing Activity Report can be consolidated with other exercise reports from other range complexes in the Pacific Ocean for a single Pacific Exercise Report, if desired. The annual reports must contain information on major training exercises (MTEs), Sinking Exercise (SINKEX) events, and a summary of all sound sources used, including within specific mitigation reporting areas, as described in paragraph (e)(3) through (5) of this section. The analysis in the detailed reports must be based on the accumulation of data from the current year's report and data collected from previous reports. The detailed reports must contain information identified in paragraphs (e)(1) through (7) of this section.

(1) *MTEs.* This section of the report must contain the following information for MTEs conducted in the HSTT Study Area.

(i) Exercise information (for each MTE).

(A) Exercise designator.

(B) Date that exercise began and ended.

(C) Location.

(D) Number and types of active sonar sources used in the exercise.

(E) Number and types of passive acoustic sources used in exercise.

(F) Number and types of vessels, aircraft, and other platforms participating in exercise.

(G) Total hours of all active sonar source operation.

(H) Total hours of each active sonar source bin.

(I) Wave height (high, low, and average) during exercise.

(ii) Individual marine mammal sighting information for each sighting in each exercise where mitigation was implemented:

(A) Date, time, and location of sighting.

(B) Species (if not possible, indication of whale/dolphin/pinniped).

(C) Number of individuals.

(D) Initial Detection Sensor (*e.g.,* sonar, Lookout).

(E) Indication of specific type of platform observation was made from (including, for example, what type of surface vessel or testing platform).

(F) Length of time observers maintained visual contact with marine mammal.

(G) Sea state.

(H) Visibility.

(I) Sound source in use at the time of sighting.

(J) Indication of whether animal was less than 200 yd (182.9 m), 200 to 500 yd (182.9 to 457.2 m), 500 to 1,000 yd (457.2 m to 914.4 m), 1,000 to 2,000 yd (914.4 m to 1,828.8 m), or greater than 2,000 yd (1,828.8 m) from sonar source.

(K) Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay.

(L) If source in use was hull-mounted, true bearing of animal from the vessel, true direction of vessel's travel, and estimation of animal's motion relative to vessel (opening, closing, parallel).

(M) Lookouts must report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, *etc.*) and if any calves were present.

(iii) An evaluation (based on data gathered during all of the MTEs) of the effectiveness of mitigation measures designed to minimize the received level to which marine mammals may be exposed. This evaluation must identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

(2) *SINKEXs.* This section of the report must include the following information for each SINKEX completed that year.

(i) Exercise information (gathered for each SINKEX).

(A) Location.

(B) Date and time exercise began and ended.

(C) Total hours of observation by Lookouts before, during, and after exercise.

(D) Total number and types of explosive source bins detonated.

(E) Number and types of passive acoustic sources used in exercise.

(F) Total hours of passive acoustic search time.

(G) Number and types of vessels, aircraft, and other platforms participating in exercise.

(H) Wave height in feet (high, low, and average) during exercise.

(I) Narrative description of sensors and platforms utilized for marine mammal detection and timeline illustrating how marine mammal detection was conducted.

(ii) Individual marine mammal observation (by Navy Lookouts) information for each sighting where mitigation was implemented.

(A) Date/Time/Location of sighting.

(B) Species (if not possible, indicate whale, dolphin, or pinniped).

(C) Number of individuals.

(D) Initial detection sensor (*e.g.,* sonar or Lookout).

(E) Length of time observers maintained visual contact with marine mammal.

(F) Sea state.

(G) Visibility.

(H) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after.

(I) Distance of marine mammal from actual detonations (or target spot if not yet detonated): Less than 200 yd (182.9 m), 200 to 500 yd (182.9 to 457.2 m), 500 to 1,000 yd (457.2 m to 914.4 m), 1,000 to 2,000 yd (914.4 m to 1,828.8 m), or greater than 2,000 yd (1,828.8 m).

(J) Lookouts must report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming *etc.*), including speed and direction and if any calves were present.

(K) The report must indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long.

(L) If observation occurred while explosives were detonating in the water, indicate munition type in use at time of marine mammal detection.

(3) *Summary of sources used.* This section of the report must include the following information summarized from the authorized sound sources used in all training and testing events:

(i) Total annual hours or quantity (per the LOA) of each bin of sonar or other acoustic sources *(e.g.,* pile driving and air gun activities); and

(ii) Total annual expended/detonated ordinance (missiles, bombs, sonobuoys, *etc.*) for each explosive bin.

(4) *Humpback Whale Special Reporting Area (December 15–April 15).* The Navy must report the total hours of operation of surface ship hull-mounted mid-frequency active sonar used in the special reporting area.

(5) *HSTT Study Area Mitigation Areas.* The Navy must report any use that occurred as specifically described in these areas. Information included in the classified annual reports may be used to inform future adaptive management of activities within the HSTT Study Area.

(6) *Geographic information presentation.* The reports must present an annual (and seasonal, where practical) depiction of training and testing bin usage (as well as pile driving activities) geographically across the HSTT Study Area.

(7) *Sonar exercise notification.* The Navy must submit to NMFS (contact as specified in the LOA) an electronic report within 15 calendar days after the completion of any MTE indicating:

(i) Location of the exercise;

(ii) Beginning and end dates of the exercise; and

(iii) Type of exercise.

(g) *Seven-year close-out comprehensive training and testing activity report.* This report must be included as part of the 2025 annual training and testing report. This report must provide the annual totals for each sound source bin with a comparison to the annual allowance and the 7-year total for each sound source bin with a comparison to the 7-year allowance. Additionally, if there were any changes to the sound source allowance, this report must include a discussion of why the change was made and include the analysis to support how the change did or did not result in a change in the 2018 HSTT FEIS/OEIS and final rule determinations. The draft report must be submitted within 3 months after the expiration of this subpart to the Director, Office of Protected Resources, NMFS. NMFS must submit comments on the draft close-out report, if any, within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or 3 months after the submittal of the draft if NMFS does not provide comments.

§ 218.76 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to the regulations in

this subpart, the Navy must apply for and obtain LOAs in accordance with § 216.106 of this chapter.

(b) LOAs, unless suspended or revoked, may be effective for a period of time not to exceed December 20, 2025.

(c) If an LOA expires prior to December 20, 2025, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision of § 218.77(c)(1)) required by an LOA issued under this subpart, the Navy must apply for and obtain a modification of the LOA as described in § 218.77.

(e) Each LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Geographic areas for incidental taking;

(3) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species or stocks of marine mammals and their habitat; and

(4) Requirements for monitoring and reporting.

(f) Issuance of the LOA(s) must be based on a determination that the level of taking is consistent with the findings made for the total taking allowable under the regulations in this subpart.

(g) Notice of issuance or denial of the LOA(s) must be published in the **Federal Register** within 30 days of a determination.

§ 218.77 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 218.76 for the activity identified in § 218.70(c) may be renewed or modified upon request by the applicant, provided that:

(1) The planned specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for the regulations in this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA(s) were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or to the mitigation, monitoring, or reporting measures (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or stock or years), NMFS may publish a notice of planned LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 218.76 may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* After consulting with the Navy regarding the practicability of the modifications, NMFS may modify (including adding or removing measures) the existing mitigation, monitoring, or reporting measures if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA include:

(A) Results from the Navy's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies; or

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by the regulations in this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of planned LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this chapter and 218.76, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§§ 218.78–218.79 [Reserved]

[FR Doc. 2023–21499 Filed 10–2–23; 8:45 am]

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for the Northwestern Pond Turtle and Southwestern Pond Turtle; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2023–0092; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BH08

Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for the Northwestern Pond Turtle and Southwestern Pond Turtle

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the northwestern pond turtle (*Actinemys marmorata*), a species from Washington, Oregon, Nevada, and northern and central California, and the southwestern pond turtle (*Actinemys pallida*), a species from central and southern California and Baja California, Mexico, as 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 western pond turtle, which is now recognized as two separate species (northwestern pond turtle and southwestern pond turtle). After a review of the best scientific and commercial information available, we find that listing the northwestern pond turtle and southwestern pond turtle is warranted. Accordingly, we propose to list the northwestern pond turtle and southwestern pond turtle as threatened species with rules issued under section 4(d) of the Act (''4(d) rule'') for each species. If we finalize this rule as proposed, it would add the northwestern pond turtle and southwestern pond turtle to the List of Endangered and Threatened Wildlife and extend the Act's protections to the two species. Due to the current lack of data sufficient to perform required analyses, we conclude that the designation of critical habitat for the northwestern pond turtle and southwestern pond turtle is not determinable at this time.

DATES: We will accept comments received or postmarked on or before December 4, 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 17, 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–R8–ES–2023–0092, 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–R8–ES–2023–0092, 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–R8–ES–2023–0092.

FOR FURTHER INFORMATION CONTACT: Steve Henry, Field Supervisor, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003; telephone 805–644–1766. 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. In compliance with the Providing Accountability Through Transparency Act of 2023, please see docket FWS–R8–ES–2023–0092 on *https://www.regulations.gov* for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act (16 U.S.C. 1531 *et seq.*), a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the northwestern pond turtle and the southwestern pond turtle meet the Act's definition of threatened species; therefore, we are proposing to list them 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 are proposing to list the northwestern pond turtle and southwestern pond turtle as threatened species with a rule issued under section 4(d) of the Act (a ''4(d) rule'') for both species.

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 northwestern pond turtle and southwestern pond turtle are threatened species due to the following threats: impacts to terrestrial and aquatic habitat (Factor A), anthropogenic impacts to the species and its habitat (*e.g.,* human modification of habitat, land conversion, loss of connectivity between populations, recreation) (Factors A and E), nonnative predators (Factor C), and the effects of climate change (*e.g.,* drought, impacts associated with wildfire) (Factors A and E).

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary), to the maximum extent prudent and determinable, to designate critical habitat concurrent with listing. We have not yet been able to obtain the necessary economic information needed to develop proposed critical habitat designations for the two species, although we are in the process of obtaining this information. At this time, we find that designation of critical habitat for the northwestern pond turtle and southwestern pond turtle is not determinable. Once we obtain the necessary economic information, we will propose critical habitat designations for the two species.

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 for the northwestern and southwestern pond turtle. We particularly seek comments concerning:

(1) The two species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the two 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 these two species;

(d) Historical and current population levels, and current and projected trends;

(e) Past and ongoing conservation measures for these two species, their habitat, or both; and

(f) Tribal use or cultural significance of the northwestern pond turtle and southwestern pond turtle, including possession and collection and use of the two species for ceremonial or traditional crafts.

(2) Threats and conservation actions affecting the two species, including:

(a) Factors that may be affecting the continued existence of the two 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 these two species.

(c) Existing regulations or conservation actions that may be addressing threats to these two species.

(3) Additional information concerning the historical and current status of these two species.

(4) Information on regulations that may be necessary and advisable to provide for the conservation of the northwestern and southwestern pond turtle and that we can consider in developing a 4(d) rule for these two species. In particular, we seek 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.

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, and section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the northwestern or southwestern pond turtle is endangered instead of threatened, or we may conclude that either of the two 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 either of the two 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 either of the two 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

On July 11, 2012, we received a petition from the Center for Biological Diversity (Center) (Center 2012, pp. 1–96), requesting that 53 species of amphibians and reptiles, including the western pond turtle, be listed as endangered or threatened species and that critical habitat be designated for those species under the Act. On June 10, 2014, the Center sent us a letter that cited a publication (Spinks et al. 2014, p. 2238) recommending that the western pond turtle be split into two separate species. The Center suggested that we consider the separation in our status review for the western pond turtle (Center 2014, entire). On April 10, 2015, we published in the **Federal Register** (80 FR 19259) a 90-day finding affirming that the petition for the western pond turtle as one species presented substantial scientific or commercial information indicating that the petitioned action may be warranted. The 12-month finding was added to our workload as part of our National Listing Workplan. In 2020, the Center included the western pond turtle in a lawsuit (*Center for Biological Diversity* v. *Debra Haaland et al.* No. 1:20–cv–00573–EGS) challenging the Service's failure to issue listing determinations in response to petitions for 241 species; the Service subsequently agreed in settlement to

submit to the **Federal Register** the 12-month finding in response to the petition to list the western pond turtle by September 30, 2023.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the northwestern pond turtle and the southwestern pond turtle (Service 2023, entire). 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 two species, including the impacts of past, present, and future factors (both negative and beneficial) affecting each species. In development of the SSA, we worked with academic researchers affiliated with the University of Florida and U.S. Geological Survey (USGS) to develop a population model for areas in Oregon and California (Gregory and McGowan 2023, entire). The model was included as part of the analysis of the western pond turtle's status, is included as an appendix to the SSA report, and was reviewed by the peer reviewers.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the SSA report for the two species. We sent the SSA report to three independent peer reviewers and received responses from two of the reviewers. Results of this structured review process can be found at *https://www.regulations.gov.* In preparing this proposed rule and 12-month finding, we incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this proposed rule and 12-month finding.

Summary of Peer Reviewer Comments

As discussed in Peer Review above, we received comments from two 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 material contained in the SSA report. The peer reviewers generally provided additional references, clarifications, and suggestions for the SSA report. We updated the SSA report based on the peer reviewers' comments and worked with researchers to update the current and future condition analyses in Oregon and California. The peer reviewer comments are addressed in the following summary and any necessary changes were incorporated into the current version of the SSA report as appropriate (Service 2023, entire).

Comment 1: One peer reviewer commented on the scale at which resiliency and redundancy were addressed, suggesting that we analyze resiliency at the subwatershed level and redundancy at the regional level (*i.e.,* analysis unit level) rather than species level.

Our response: To assess the current and future condition of the two species, we divided their ranges into analysis units that incorporate genetic, management, and ecological data (Service 2023, Analysis Units, pp. 33–37). Although we acknowledge in the SSA report that, based on conversations with species experts, population processes are likely happening at the subwatershed level, the data necessary to conduct the analysis at such a level were limited and not available in all circumstances to analyze the two species' condition at this scale. Because of data limitations, breaking the analysis into smaller pieces potentially would have amplified uncertainties, so we maintained the use of analysis units for assessing resiliency, but reiterated that they contain multiple populations. Redundancy describes the ability of the species to withstand catastrophic events and, following the SSA framework, we analyzed redundancy at the species level rather than the regional level (Service 2016, pp. 11–13).

Comment 2: One peer reviewer was critical on the methods and assumptions used for the model (*i.e.,* Gregory and McGowan 2023, entire) to analyze probability of extirpation of the analysis units that we used to inform resiliency of portions of the northwestern and southwestern pond turtle ranges in the SSA report in Oregon and California. The peer reviewer was concerned that the results of the model would overestimate population sizes and not provide accurate information on population persistence.

Our response: In response to peer review of the model, the researchers that developed the model lowered the initial starting population size in their analysis and revised their methods and provided additional clarifying information on how the model incorporated and generated results from the initial abundance estimates for the two species. As a result, the model currently reflects comments and suggestions provided by the peer reviewers. The peer reviewer comments did not notably change the overall results (which are probabilities of extirpation at the analysis unit level). Changes to the model are reflected in Gregory and McGowan (2023) (appendix to the SSA report) and incorporated into the analyses within the SSA report.

Comment 3: One peer reviewer questioned why the threat of disease (specifically shell disease) was not included in the model to assess the two species.

Our response: The top threats to each species were determined based on meetings with species experts and are consistent with a recent peer-reviewed publication (Manzo et al. 2021, entire) that is referenced in the SSA report. We acknowledge that disease is a threat with unknown demographic impacts to the species at this time. In the SSA report, we present the best scientific data available at this time in the section on disease. Our use of the model is one part of our analysis of the threats acting on the two species. We also considered disease as one of the factors in determining status of the two species.

Comment 4: One peer reviewer questioned the lack of objective criteria for assessing current condition in the model.

Our response: The model incorporates information about human use activities, drought conditions, and impacts from bullfrogs. The human use information includes numerous factors that may affect the species or its habitat. In our analysis, we used a 2050 timeframe to assess current condition because the western pond turtle is a long-lived species. More specific objective or species-specific criteria were not available rangewide and use of such localized information may have amplified uncertainties.

Comment 5: One peer reviewer stated that the generation time should be closer to 25 years rather than 50. They further stated that the projection period in the model (Gregory and McGowan 2023, entire) should span more generations/time.

Our response: Based on this comment, we revised our discussion of western pond turtle longevity in the SSA report to reflect generation time. In concert with this change, we added additional time steps in the model that are consistent with three western pond turtle generations (approximately 25, 50, and 75 years from now (year 2050, 2075, and 2100), respectively).

I. Proposed Listing Determination

Background

The western pond turtle (*Emys marmorata*) was first identified in 1852, from specimens collected from Puget Sound, Washington (Baird and Girard 1852, pp. 174–177). In 2017, the western

pond turtle was recognized and accepted by the scientific community as two separate species (northwestern pond turtle (*Actinemys marmorata*) and southwestern pond turtle (*Actinemys pallida*)) (Crother 2017, p. 82; Rhodin et al. 2017, pp. 76, 171–172). Because of the relatively recent split of the species into two separate entities, the majority of available research and information refers to a single species (western pond turtle). In the SSA report and this document, and unless otherwise noted, any reference to the western pond turtle is understood to apply to the northwestern and/or southwestern pond turtle.

Description

The northwestern pond turtle and southwestern pond turtle are medium in size (110 to 170 millimeter (4.33 to 7.05 inches) in length), with larger specimens occurring geographically in the northwestern pond turtle's range. Male and female western pond turtles are sexually dimorphic (Holland 1994, p. 2–4; Rosenberg et al. 2009, p. 10). Western pond turtle coloring varies with most appearing olive to dark brown, or blackish, occasionally without pattern but usually with a network of spots, lines, or dashes of brown or black (Hays et al. 1999, p. 2; Bury et al. 2012, p. 4; Stebbins and McGinnis 2018, pp. 204–205). The plastron (underside of shell) is yellowish and may have blackish or dark brown blotches or be unmarked (Stebbins and McGinnis 2018, p. 204). The first proposed study of geographic differentiation of western pond turtles into northern and southern subspecies was based on differences in coloration and the presence, shape, and size of the inguinal scute—the plate where the carapace joins the plastron at the groin (Seeliger 1945, entire; Service 2023, p. 15, Figure 2). Recent genetic results corroborated the presence/absence of inguinal scutes as a differentiating factor between the two species (Shaffer and Scott 2022, p. 9).

Diet and Habitat

The two species are omnivorous and considered dietary generalists, consuming a wide variety of food items including small aquatic invertebrates (insect larvae) and vertebrates (fish, tadpoles, and frogs), carrion, and plant material (Bury 1986, pp. 516–517; Holland 1994, pp. 2–5–2–6). Habitat needs for the two species include: (1) aquatic features such as ponds, lakes, and streams for breeding, feeding, overwintering, sheltering, and dispersal; (2) basking sites that allow for thermoregulation; and (3) terrestrial or upland features adjacent to the aquatic habitat for nesting, overwintering and aestivation, and dispersal and connectivity between populations (Service 2023, pp. 28–32). The elevational range of the two species is from sea-level to approximately 2,000 meters (m) (6,500 feet (ft)).

Lifespan and Reproduction

The maximum lifespan of the two species is unknown. However, they are long-lived after reaching adulthood with one individual living to at least 55 years of age (Bury et al. 2012, p. 17). These old individuals are rare in natural populations, but they appear to reproduce throughout their life (Kaufman and Garwood 2022, p. 354). In our analysis in the SSA report, we estimated the generation time for the northwestern pond turtle and southwestern pond turtle to be approximately 25 years (Service 2023, p. 12). The age at sexual maturity and breeding is variable between the two species and by specific locality and ranges from approximately 3.5 to 12 years of age depending on size, sex, environmental condition, and resource availability (Holland 1994, pp. 2–9, 5–2; (Hays et al. 1999, p. 12; Germano and Rathbun 2008, pp. 190–191; Rosenberg et al. 2009, p. 22; Germano 2010, p. 95; Bury et al. 2012, p. 15; Germano et al. 2022, p. 114–115). Courtship and mating behavior has been observed from April through November (Holland 1991, p. 23). Nesting behavior and oviposition usually occur from May through July, with northern populations nesting later in the season than those in the south (Bury et al. 2012, p. 15). Incubation periods range from 73–80 days in captivity under controlled conditions (Feldman 1982, p. 10) and 75 to 134 days in field studies in Oregon and northern California (Holland 1991, 26–33; Geist et al. 2015, p. 495, figure 2(B); Christie and Geist 2017, p. 49).

Species' Ranges

The historical range of the western pond turtle as a single species included areas in the States of Washington, Oregon, Nevada, and California, areas in British Columbia, Canada, and areas in Baja California, Mexico. The current collective range of the two species has experienced contractions within existing occupied areas including extirpation from British Columbia, Canada. In Washington, the northwestern pond turtle was nearly extirpated from Puget Sound and was restricted to 150 individuals within two remnant populations along the Columbia River Gorge. As a result of the reduced numbers, the Washington Department of Fish and Wildlife (WDFW) along with other partners initiated numerous conservation measures to conserve the species in Washington (see *Conservation Efforts and Regulatory Mechanisms*).

The current range of the northwestern pond turtle includes portions of Washington, Oregon, Nevada, and northern and central California. The range in Washington now includes six areas located in the Puget Sound area southward toward and including areas along the Columbia River. In Oregon, the species occupies areas along the Columbia River and west of the higher elevations of the Cascades Range, including portions of the Klamath Basin to the California border. The range in Nevada includes areas along the Carson and Truckee Rivers. The range in California includes areas of the Coast Range from the Oregon-California border down to northern Monterey County, the lower elevation and foothills of the southern Cascades and Sierra Nevada Mountains, and areas within the Sacramento and San Joaquin Valleys (see figure below).

The range of the southwestern pond turtle includes areas of central and southern California south into Baja California, Mexico. This includes areas of the central Coast Range from near northern Monterey County, California, portions of the Transverse Range into the Mojave River watershed, and areas south into Baja California, Mexico.

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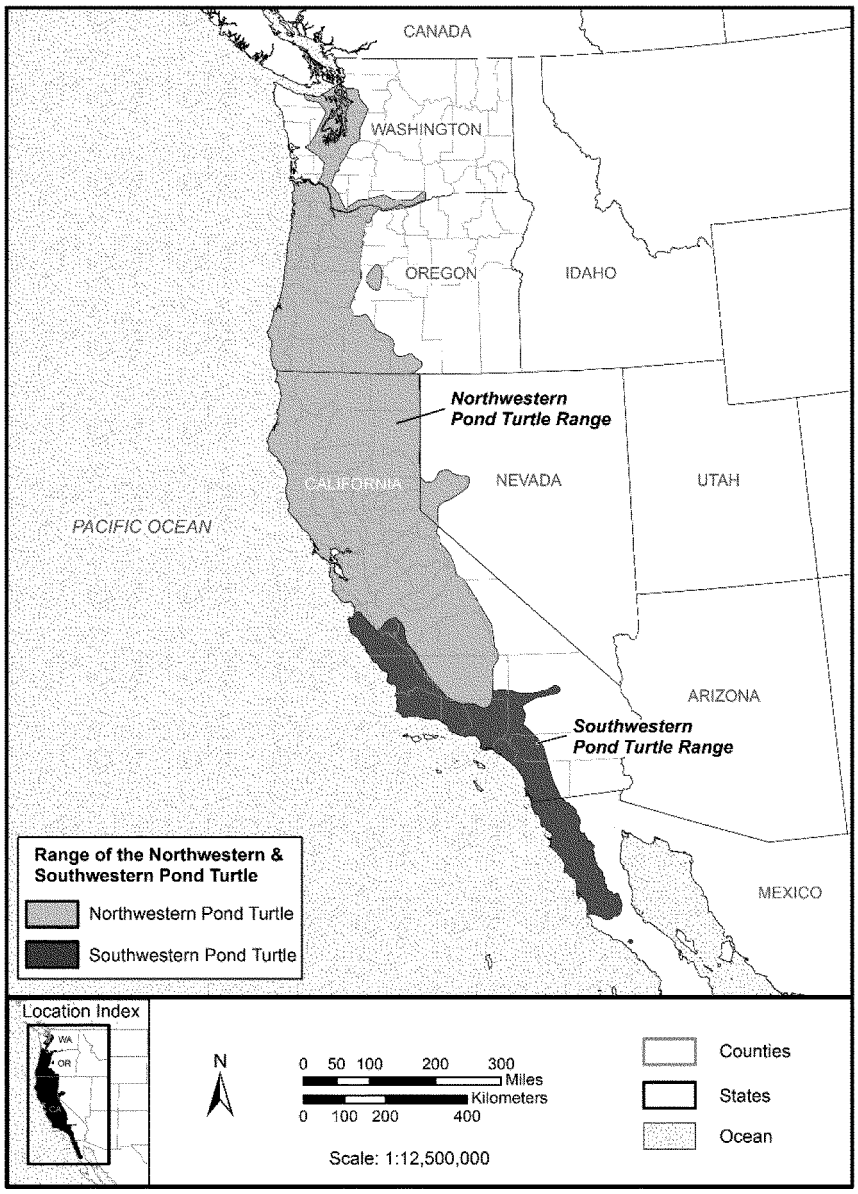
Figure: Range of the Northwestern and Southwestern Pond Turtle.



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Recent genetic information identifies the boundary between the two species along the Coast Range to be the middle of the Monterey Bay coastline south of the Monterey/Santa Cruz County line in California (Shaffer and Scott 2022, p. 5). The contact zone between the two species lies at the edge of the southern Coast Range and Transverse Range where they meet along the floor of the Central Valley; individuals of both species occur along this contact zone but do not overlap (Shaffer and Scott 2022, pp. 4–5).

Genetics

Molecular analyses for western pond turtles were first conducted in the mid-1990s, with results generally following long-held subspecies designations based on coloration and morphological variation (Seeliger 1945, p. 156). More recent genetic analyses have since confirmed the taxonomic separation between the two entities and split them into two separate species (Spinks and Shaffer 2005, entire; Spinks et al. 2010, entire; Spinks et al. 2014, entire). The genetic makeup of the northwestern and southwestern pond turtle each largely follows a north/south geographic characterization, with greater (more differentiated) clustering in southern portions of the two species' ranges (Shaffer and Scott 2022, entire).

When reviewing the patterns of relative genetic similarity for the northwestern pond turtle, the species was found to be subdivided into five groups or clusters and includes: (1) a large area including the north California coast, Oregon, and Washington; (2) the area occupying the Sacramento Valley; (3) the Delta and areas due east across the Central Valley and Nevada; (4) the Yosemite Valley area; and (5) the San Joaquin Valley and the area east and south of the San Francisco Bay Area and San Francisco Peninsula (Shaffer and Scott 2022, p. 6–8). Genetic clustering for the southwestern pond turtle includes six groups or clusters: (1) a Coast Range group in the central coast from roughly Monterey Bay south to northern Santa Barbara County; (2) a Ventura/Santa Barbara cluster from

Point Conception to the Santa Clara River; (3) a Los Angeles group including the west-flowing Los Angeles basin drainages; (4) a Mojave group from the east-flowing Mojave River Drainage; (5) an Orange County/San Diego cluster encompassing southern coastal California from the Santa Ana river south through most of San Diego and Orange Counties; and (6) a Baja California group covering populations south of the U.S.-Mexico border.

We used this genetic clustering information on the two species as one of the factors in determining the boundaries of the analysis units used in our SSA report (Service 2023, pp. 33–37). A thorough description and review of the taxonomy, genetics, and ranges of the northwestern pond turtle and southwestern pond turtle is presented in the SSA report for the two species and literature cited within (Service 2023, pp. 11–20).

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 the viability of the two species, 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, severe 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, changing 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 two species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the two species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs for the two species. The next stage involved an assessment of the historical and current condition of the two species' demographics and habitat characteristics, including an explanation of how the two species arrived at their current condition. The final stage of the SSA involved making predictions about the two species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best scientific information available to characterize viability as the ability of the two species to sustain populations in the wild over time which we then used to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report for the northwestern and southwestern pond turtle; the full SSA report can be found at Docket FWS–R8–ES–2023–0092 on *https://www.regulations.gov.*

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the two species and their resources, and the threats that influence the two species' current and future condition, in order to assess the two species' overall viability and the risks to that viability.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report for the northwestern and southwestern pond turtle, 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.

Species Needs

The habitat needs considered most important for western pond turtles to complete their life cycle include: aquatic habitat, upland habitat, and basking sites. Table 1, below, summarizes the individual habitat needs by life stage and resource function. The demographic needs considered most important for western pond turtles are abundance, reproduction/recruitment, survival, and connectivity.

TABLE 1—INDIVIDUAL HABITAT NEEDS OF THE WESTERN POND TURTLE

Individual need	Life stage	Resource function
Aquatic habitat	Hatchlings, juveniles, adults	Breeding, feeding, overwintering, sheltering, and dispersal.
Upland habitat	Eggs, hatchlings, juveniles, adults	Nesting, overwintering and aestivation, and dispersal.
Basking sites	Hatchlings, juveniles, adults	Thermoregulation, physiological functioning, and predator avoidance.

Aquatic Habitat

Western pond turtles are semi-aquatic, requiring both aquatic and terrestrial (upland) habitats that are connected to one another or within close proximity. Western pond turtles occur in a broad range of permanent and ephemeral water bodies including rivers and streams, lakes, natural and constructed ponds, wetlands, marshes, vernal pools, reservoirs, settling ponds, irrigation ditches, and estuaries with tidal influence (Spinks et al. 2003, entire; Bury and Germano 2008, p. 001.3; Ernst and Lovich 2009, p. 175; Bury et al. 2012, p. 12; Stebbins and McGinnis 2018, p. 205). Western pond turtles use aquatic habitat for breeding, feeding, overwintering, and sheltering. Preferred aquatic conditions are those with standing or slow-moving water that contain underwater shelter sites (undercut banks, submerged vegetation, mud, rocks, and logs) and abundant basking sites (see ''Basking Sites,'' below) (Holland 1991, pp. 13–14; Reese and Welsh Jr. 1998a, p. 852; Hays et al. 1999, p. 10; Bury and Germano 2008, p. 001.4; Ernst and Lovich 2009, p. 175). Western pond turtles inhabiting lentic aquatic habitat, such as ponds, lakes, and slack water habitats, often overwinter within the aquatic environment by burying themselves within the bottom substrate, such as mud. Various depths of both deeper and shallower water provide western pond turtles with habitat necessary for overwintering and hatchling growth. Primary habitat for hatchlings and young juveniles is shallow water with dense submerged vegetation and logs, which most likely provides shelter, prey, and thermoregulatory requirements or other functions for survival (Holland 1994, pp. 1–14, 2–12; Rosenberg and Swift 2013, p. 119).

Upland Habitat

Western pond turtles use upland habitat for nesting and overwintering. Females require upland nesting habitat in order to lay their eggs. Upland nesting habitat varies greatly across the two species' geographic ranges, but regardless of composition, it needs to be in close proximity to the aquatic habitat being used by the species. This habitat is typically characterized as having sparse vegetation with short grasses and forbs and little or no canopy cover to allow for exposure to direct sunlight (Holland 1994, p. 2–10; Rathbun et al. 2002, p. 232; Rosenberg et al. 2009, pp. 16–17; Riensche et al. 2019, p. 97). Females excavate nests in compact, dry soils that are 3 to 400 m (10 to 1,300 ft) from water (Holland 1994, p. 2–10; Holte 1998, p. 54). Additional features of nesting habitat/sites that may be important include aspect, slope, and vegetation (Service 2023, pp. 29–30).

Upland overwintering habitat also varies greatly across the two species' ranges. Overwintering habitat usually occurs above the high water elevation of the aquatic habitat and beyond any riparian zone (Reese and Welsh Jr. 1997, p. 355; Rathbun et al. 2002, p. 229; Oregon Department of Fish and Wildlife (ODFW) 2015, pp. 6–7). While vegetation communities differ from site to site, open areas were avoided for overwintering, and leaf litter was present at most sites (Reese and Welsh Jr. 1997, pp. 354–355; Davis 1998, p. 19; Rathbun et al. 2002, p. 230). In central California, overwintering western pond turtles were generally located where they could be exposed to direct sunlight during a portion of the day (Rathbun et al. 2002, p. 230).

Basking Sites

As reptiles, western pond turtles use basking as a means to thermoregulate their body temperature. Western pond turtles engage in basking both within water (aquatic basking) and outside water (emergent basking). Basking is essential for physiological functions such as metabolism, digestion, reproduction, and growth. Additional benefits of emergent basking include drying out the shell and skin for parasite or algal control. Western pond turtles use logs, rocks, vegetation, shorelines, and essentially any other substrate located within and adjacent to aquatic habitat for emergent basking (Holland 1994, p. 2–8; Hays et al. 1999, p. 10). The location of the basking site above or adjacent to aquatic features allows for quick retreat into the water if there is perceived danger (Storer 1930, p. 431). Aquatic basking occurs in shallow water in top layers of vegetative matter or in submerged vegetation such as algal mats. Aquatic basking may be used when emergent basking sites are limited or not present and provides a warmer environment than that of surrounding water (Jennings and Hayes 1994, p. 100; Reese and Welsh Jr. 1998a, p. 851).

Habitat Connectivity

Despite their ability to use a wide range of aquatic and upland features, suitable aquatic habitats are relatively rare across much of the range, exacerbated mostly by past land use changes (*e.g.,* urbanization and agriculture) (see ''Habitat Loss and Fragmentation,'' below). Consequently, the distribution of populations of the two species may be disjunct depending on habitat availability across the landscape, especially in areas with increased development; roadways; or extensive open, dry terrain between waterways (Holland 1991, pp. 13, 53–54; Bury et al. 2012, p. 12; Thomson et al. 2016, pp. 300–301). Western pond turtle populations need a network of appropriate aquatic breeding, feeding, and basking habitat that has sufficient upland nesting and overwintering/aestivation sites that are connected by suitable habitat. The back-and-forth movements between aquatic and upland habitats of individuals within a population (*i.e.,* migration) are typically less than 500 m (1,600 ft) (Reese and Welsh Jr 1997, p. 357).

Dispersal between populations is an important demographic need for both western pond turtle species. A population that is connected to other populations through dispersal is more resilient because individuals have the ability to bolster existing sites and thereby enhance the genetic diversity of the population or recolonize extirpated sites. The dispersal of western pond turtles between populations is not well understood. However, genetic research suggests that most dispersal activity occurs within drainages or watersheds (Spinks and Shaffer 2005, p. 2057). Observed dispersal distances for the western pond turtle varied from approximately 2.6 kilometers (km) (1.6 miles (mi)) to 7 km (4.3 mi) within aquatic habitat, with overland dispersal distances being slightly less (approximately 5 km (3 mi)) under optimal conditions (Holland 1994, pp. 2–9; 7–28; Rosenberg et al. 2009, p. 21; Purcell et al. 2017, pp. 21, 24).

Threats Influencing Current and Future Condition of the Western Pond Turtle

The following is a summary of information and evaluations of the threats analyzed in the SSA report for the northwestern and southwestern pond turtle. The discussion focuses on threats impacting both species with specific information regarding threats acting on each species individually. Additional information on the specific threats associated with each species is provided in the SSA report (Service 2023, Chapter 8, pp. 38–69).

Based on the best scientific and commercial information available including State wildlife agency status reviews, threat and conservation assessments, and management plans in Washington, Oregon, Nevada, and California (Rosenberg et al. 2009, pp. 1–80; Thomson et al. 2016, pp. 296–303; Hallock et al. 2017, pp. 8–11; Wildlife Action Plan Team 2022, p. 57), a peer-reviewed threat analysis (Manzo et al. 2021, pp. 485–501), and other published information gathered for the SSA report on the northwestern pond turtle and southwestern pond turtle (Service 2023, Chapter 8, pp. 38–69), we identified habitat loss and fragmentation (including latent impacts from past habitat impacts), altered hydrology, predation, competition, road impacts, collection (including historical overutilization in California (Bettelheim and Wong 2022, pp. 7–12)), contaminants, disease, and the effects of climate change (including increasing temperatures, severe drought, extreme flood events, and high severity wildfire) as threats acting on individuals, populations, or each species as a whole to varying degrees across their respective ranges. Based on our assessment as identified in the SSA report (Service 2023, pp. 85–91, section 9.2), we identified three key factors as most influential in driving the western pond turtle's current and future condition: anthropogenic impacts, predation by bullfrogs, and drought. Anthropogenic impacts are a group of threats that are driving or influencing the viability of both the northwestern or southwestern pond turtle and are outlined in the threat discussion of the SSA report (Service 2023, pp. 38–69, 81–85, and figure 18) and other supporting literature (Theobald et al. 2020, entire; Manzo et al. 2021, pp. 492–493; Theobald 2021, entire). Anthropogenic impacts include or exacerbate all the threats identified below outside of those associated with bullfrogs and drought. These threats have had substantial population-level effects on the northwestern and southwestern pond turtle and are anticipated to continue to be the primary drivers of northwestern and southwestern pond turtle viability.

Habitat Loss and Fragmentation

Habitat loss and fragmentation from land conversion associated with historical and current urbanization and agriculture has impacted aquatic and upland habitat for the western pond turtle (Service 2023, pp. 41–45). Areas of significant habitat loss, conversion, and alteration for the northwestern pond turtle include areas in Washington in the Puget Sound and lower Columbia River (Lower Columbia River Fish Recovery Board 2010, p. B–204; Hallock et al. 2017, p. 10), areas in Oregon in the Portland metropolitan area and Willamette Basin (Rosenberg et al. 2009, pp. 37, 40), and areas in California in the Sacramento and San Joaquin Valleys and urbanized areas for the San Francisco Bay Area (Jennings et al. 1992, p.12; Jennings and Hayes 1994, p. 99; Kelly et al. 2005, pp. 63, 70). Areas of significant habitat loss for the southwestern pond turtle include areas in the heavily urbanized portions of southern California including Los Angeles, Orange, Riverside, and San Diego Counties (Thomson et al. 2016, p. 301).

In areas associated with agriculture and urbanization, upland land conversion and draining of the extensive wetlands or channeling of streams have resulted in the decline and extirpation of many populations and left the remaining western pond turtle populations within these areas disjunct, scattered, and isolated from each other with little upland habitat available for nesting (Holland 1991, p. 13; Reese 1996, p. 105; Thomson et al. 2016, p. 300–301). Currently, western pond turtle populations rarely have densities similar to their historical counterparts, and age structures of extant populations tend to be skewed towards adults

(Holland 1991, p. 53; Reese 1996, p. 73; Manzo et al. 2021, p. 493).

Although the rate of habitat losses has diminished, the lingering effects of past habitat loss and ongoing habitat loss, alteration, and fragmentation continue to impact the northwestern and southwestern pond turtle by reducing the size of populations due to reductions in available aquatic and upland habitat, isolating populations, and limiting dispersal between populations. These impacts reduce the capability of populations of the two species to respond to stochastic or catastrophic events and thereby affect the species' ability to maintain populations in the wild; the level of impact varies among populations and is dependent on habitat availability and condition and level of past habitat loss (Holland 1991, pp. 13, 53; Reese 1996, p. 73; Manzo et al. 2021, p. 493; Service 2023, pp. 41–45). The effects associated with habitat loss by urbanization and agriculture include additional impacts associated with human activity such as recreation, road impacts, collection, and contaminants (Service 2023, pp. 45–46, 54–59) (see Human Impacts below).

Altered Hydrology

The threats associated with altered hydrology that have impacted both the northwestern and southwestern pond turtle include: wetland conversion and draining; stream channelization and ditching; modification of flow regimes; groundwater pumping; water diversions; damming; and water regulation for flood risk management (flood control) (Reese and Welsh Jr. 1998b, p. 505; Rosenberg et al. 2009, pp. 37, 40; Germano 2010, p. 89). These threats affect the hydrology, thermal conditions, and structure of the western pond turtle aquatic and upland habitat (Service 2023, pp. 45–46). Dams and the reservoirs they create can act as barriers to migration, create stretches of unsuitable habitat, and/or degrade or eliminate habitat (Holland 1994, p. 1–29; Reese and Welsh Jr. 1998a, p. 851). Managed stream flows below dams that alter natural flow regimes and hold water during winter and release water during the summer have been shown to reduce water temperatures, increase sedimentation, and have a higher canopy cover percentage compared to undammed systems (Ligon et al. 1995, entire; Reese and Welsh Jr. 1998a, p. 842, 847–848; Madden-Smith et al. 2005, p. 5; Rosenberg et al. 2009, p. 40; Williams and Wolman, entire). Reduced water temperatures, increased sedimentation, and high canopy cover all negatively impact the aquatic habitat as well as basking habitat conditions for the northwestern and southwestern pond turtle.

In northern California, colder water temperatures on regulated streams below dams likely contributed to northwestern pond turtles having a slower growth rate, less recruitment, and fewer juveniles (Reese 1996, pp. 43–44; Reese and Welsh Jr. 1998b, p. 513; Ashton et al. 2015, pp. 624–628). Changes to the timing of water releases from a dam on a regulated stream in northern California resulted in a pre-dam intermittent stream having year-round flows post-dam. This change provided for an increase in food availability, which allowed northwestern pond turtles to grow larger. However, similar to the other studies, there were fewer juveniles below the dam, which suggested an effect on the population's recruitment (Bondi and Marks 2013, p. 146–149).

The impacts of altered hydrology can also be exacerbated or compounded by other threats to the two species, such as drought and nonnative predators (see Predation and Drought below) (Meyer et al. 2003, p. 2; Moyle 1973, p. 21; Holland 1991, pp. 54–57; Holland 1994, pp. 2–11–2–12; Hays et al. 1999, pp. 13–14; Spinks et al. 2003, pp. 264–265; Cadi and Joly 2004, pp. 2515–2517; Service 2023, p. 47).

Disease

Disease has been and is an emerging concern for western pond turtle populations. Documented diseases in western pond turtles include respiratory disease and shell disease. Several respiratory diseases have been shown to impact both northwestern and southwestern pond turtles but only in limited areas and not in large numbers. Shell disease has been found to impact the northwestern pond turtle, but again in only parts of its range and may be associated with headstarted western pond turtles. Although disease may impact individuals or localized populations and may be a cumulative impact on either the northwestern or southwestern pond turtle, we do not consider disease a driving factor in the viability of either species. As a result, we do not expect that respiratory or shell disease are significant threats impacting the northwestern or southwestern pond turtle. See the SSA report for additional information regarding disease (Service 2023, pp. 53–54).

Predation

Western pond turtles are impacted by both native and nonnative predators including most carnivorous or omnivorous animals large enough to consume eggs, nestlings, or adult turtles (Rosenberg et al. 2009, p. 27). Native predators to western pond turtles include but are not limited to black bears (*Ursus americanus*), foxes (*Urocyon cinereoargenteus* and *Vulpes vulpes*), coyotes (*Canis latrans*), raccoons (*Procyon lotor*), skunks (*Mephitis* sp. and *Spilogale* sp.), mink (*Neogale vison*), river otters (*Lontra canadensis*), osprey (*Pandion haliaetus*), bald eagles (*Haliaeetus leucocephalus*), ravens (*Corvus corax*), American crows (*Corvus brachyrhynchos*), and herons (Order *Ciconiiformes*) (Holland 1994, p. 2–12; Bury and Germano 2008, p. 5; Ernst and Lovich 2009, p. 180; Thomson et al. 2016, p. 302). Nonnative predators include American bullfrogs (bullfrogs) (*Lithobates catesbeianus*), invasive fish, such as large and smallmouth bass (*Micropterus* sp.), and feral and domestic dogs (*Canis familiaris*) (Moyle 1973, p. 21; Bury and Whelan 1984, pp. 2–5; Holland 1994, p. 2–12; Ernst and Lovich 2009, p. 180).

Nonnative predators in western pond turtle habitat influence the species by increasing predation pressure on hatchlings and young juveniles. Increased predation beyond the natural levels under which western pond turtles evolved results in reduced survival and reproduction, affecting population recruitment and abundance, which in turn, lessens overall resiliency. Increased predation effects beyond those in natural settings are further amplified when considered with other factors contributing to reduced recruitment and survival, such as occurrence in urbanized areas with increased nest predators (such as dogs, raccoons, crows, ravens, or coyotes), or in areas with altered hydrology that are more susceptible to drought (Service 2023, p. 49).

Although the effects of bullfrogs on western pond turtles are difficult to distinguish from co-occurring factors influencing viability (such as habitat loss and degradation), research indicates that bullfrogs play an instrumental role in western pond turtle population declines due to reductions in recruitment through predation on hatchlings and competition for resources (see ''Competition (nonnative species),'' below) (Holland 1991, p. 43; Holland 1994, p. 2–12; Hays et al. 1999, p. 14; Ernst and Lovich 2009, p. 180; Hallock et al. 2017, pp. 9–10; Nicholson et al. 2020, pp. 4–5, 9). Teasing apart the impacts of nonnative predators from other factors may best be observed by testing the effects of removing them from the system and measuring the response by western pond turtles. For

example, at Sycuan Peak Ecological Reserve in San Diego County, California, removal of invasive predators including bullfrogs resulted in observations of hatchling and young juvenile southwestern pond turtles (less than 80 millimeter carapace length (over the curve measurement)) for the first time in over a decade (Brown et al. 2015, pp. 24, 110). Similar improvements of hatchling success have been observed in northwestern pond turtles in Washington once bullfrog control efforts were implemented (Hallock et al. 2017, pp. 13–14).

Bullfrogs are native to the eastern United States and were first introduced into the West as part of commercial farming operations and were first documented in California in 1896 (Heard 1904, p. 24; Jennings and Hayes 1985, p. 98, California Department of Fish and Wildlife (CDFW) 2023b, entire). Since that time, bullfrogs have become widespread throughout much of the western pond turtles' range due in part to altered hydrology, land-use and habitat changes, and unauthorized introductions (Holland 1991, p. 40; Fuller et al. 2011, pp. 210–211; CDFW 2023b, entire). Once bullfrogs are introduced or become established, they often require multi-year or permanent implementation of management efforts for their removal and eradication from a site (Doubledee et al. 2003, pp. 424–425; Adams and Pearl 2007, pp. 679–670; Kamoroff et al. 2020, pp. 618–622). For example, the National Park Service (NPS) implemented a program to remove bullfrogs from sites in Yosemite National Park. The program required implementation of numerous eradication and monitoring methods and a significant amount of funding and staffing resources over a multi-year timeframe (2005 to 2019 for a site in Yosemite Valley, and 2019–2024 (and potentially beyond) for an ongoing effort on a site in the Tuolumne River watershed) (Kamoroff et al. 2020, pp. 617–624; NPS 2020, entire). Bullfrogs are an especially detrimental aquatic predator due to their use of shallow aquatic habitat less suitable to other predators such as nonnative fish; the apparent lack of an anti-predator response in western pond turtles (particularly in hatchlings, which are most susceptible to predation), as western pond turtles did not co-evolve with bullfrogs; and the difficulty and continued intensive management necessary for removal once bullfrogs are established (Hays et al. 1999, p. 14; Hallock et al. 2017, pp. 9–10; Nicholson et al. 2020, pp. 4–5, 9).

Competition (Nonnative Species)

Nonnative species such as red-eared sliders, bullfrogs, bass, snapping turtles (*Chelydra serpentina*), and several crayfish species (*Pacifastacus leniusculus, Procambarus clarkii*) may compete with the western pond turtle for food or habitat resources (Thomson et al. 2010, p. 300; Lambert et al. 2013, p. 196; Fulton et al. 2022, pp. 102–104; ODFW 2022, entire). Although competition is a contributing factor and may act as a cumulative threat on individual northwestern and southwestern pond turtles, its impact on populations of the two species is not to such a degree that it causes significant impacts to the northwestern or southwestern pond turtle. As a result we do not consider competition from nonnative species to be a factor influencing the viability of the northwestern or southwestern pond turtle. See the SSA report for additional discussion on competition from nonnative species (Service 2023, pp. 51–53)

Human Impacts

Recreation. Recreational activities such as hiking, biking, fishing, boating, and off-highway vehicles, and the associated disturbance within or adjacent to aquatic and nest habitats, can affect western pond turtles in a variety of ways, depending on the region and type of recreation. Some forms of recreation may inadvertently cause mortality, degrade habitat, disturb pond turtle behavior, and/or contribute to other threats.

Western pond turtles are extremely wary and will rapidly flee from basking sites or dive when on the water surface when disturbed by the sight or sound of people at distances of greater than 100 m (328 ft) (Bury and Germano 2008, p. 001.5). This disturbance reduces the amount of time basking and has potential effects on the species' metabolism, proper digestion, feeding, reproduction, and growth (Lambert et al. 2013, p. 196; Nyhof and Trulio 2015, p. 183; Service 2023, p. 45). Direct impacts to western pond turtles, although less prevalent, may include ingestion of or injury by fishhooks (Lovich et al. 2017, p. 6) and shooting (Shore 2001, p. 37). Although impacts from recreation may affect individual turtles, recreation's impact on populations of the two species is not to such a degree that it causes significant impacts to the northwestern or southwestern pond turtle.

Road and Transportation Impacts. Although roads and other transportation infrastructure are tightly linked to urbanization and development, they also exist as a stand-alone threat since their presence is not always associated with urban or developed areas. In an assessment of the susceptibility of California herpetofauna to road mortality and habitat fragmentation, one study evaluated 160 species and classified western pond turtles in the top 10 affected (Brehme et al. 2018, p. 921). Populations of western pond turtles are increasingly male-biased the closer the species' aquatic habitat is to roads, a correlation consistent with higher road mortality of females dispersing to nesting habitat (Nicholson et al. 2020, pp. 11–13, 16). Roads can affect western pond turtle viability by killing or injuring individuals through vehicle impacts, disturbing basking behavior, increasing human and predator access to areas, reducing migration between upland and aquatic habitat of individual populations, and limiting connectivity between populations (Steen and Gibbs 2004, pp. 1145–1146; Rosenberg et al. 2009, p. 41; Nyhof 2013, p. 43; Nyhof and Trulio 2015, p. 183; Thomson et al. 2016, p. 301; Rautsaw et al. 2018, pp. 138–139; Madden-Smith et al. 2005, pp. 43, 45; Nicholson et al. 2020, entire; Manzo et al. 2021, p. 494, S1 text supplement). As a result, we expect that populations of northwestern or southwestern pond turtles near or within urbanized areas may be negatively affected by the impacts of roads.

Collection. Historical collection of the western pond turtle for commercial harvesting of food for the San Francisco market in the latter part of the 19th century and early 20th century was extensive and led in part to the declines in abundance of western pond turtles especially in the San Francisco Bay area and the Sacramento and San Joaquin Valleys (Holland 1991, p. 44; Holland 1994, p. 2–13; Hays et al. 1999, p. 16; Bettelheim 2005, entire; Rosenberg et al. 2009, p. 42; Thomson et al. 2016, p. 301; Bettelheim and Wong 2022, pp. 5–16). Harvesting of western pond turtles has declined significantly, but still occurs, typically for the pet trade, food, or opportunistic collection by the public as a personal pet in urbanized areas. In some instances (especially near urbanized areas), the collection may cause a reduction in numbers of individuals within populations of western pond turtles, but the impact is expected to be localized and not a driving factor of population or species' status (Sweet pers. comm. in Bettelheim 2005, p. 42; Germano 2021, p. 240; Barnes 2023, entire).

Contaminants. Western pond turtles are exposed to a variety of toxins

throughout their range; however, the exact sensitivity of individuals to pesticides, heavy metals, pollutants, and other contaminants is largely unknown. Sources of contaminants affecting western pond turtles include run-off, discharge, or drift from agricultural activities, mining sites, accidental hazardous waste spills, urbanized areas, and roadways (Bury 1972, p. 294; Holland 1994, p. 2–13; Majewski and Capel 1995, entire; Tudi et al. 2021, pp. 6–8; Meyer et al. 2014, p. 2994). Potential effects from contaminants to long-lived species such as the western pond turtle include premature mortality or chronic accumulation that could potentially be transferred to offspring (Rowe 2008, p. 626). Contaminants can be toxic to aquatic prey or food items of western pond turtles such as amphibians, small aquatic invertebrates, and plants (Davidson 2004, p. 1892; Relyea 2005, p. 1118; Brühl et al. 2013, p. 1). Thus, a potential reduction of prey due to contaminants may have negative impacts at the individual and population level of western pond turtle.

Effects of Climate Change

The effects of climate change are already having statewide impacts in California, Oregon, Nevada, and Washington (Washington Department of Ecology 2012, pp. 34–44; Bedsworth et al. 2018, p. 13; Mote et al. 2019, p. ii, summary; University of Nevada, Reno Extension 2021, pp. 1–9). The recent overall trends in climate conditions across the range of the western pond turtle include increasing temperatures, changes in precipitation patterns, and increased frequency and severity of extreme events such as droughts, heat waves, wildfires (and associated debris flows), and floods (Bedsworth et al. 2018, pp. 19–33; May et al. 2018, pp. 1036–1050; Oregon Climate Change Research Institute 2019, pp. 5–7). Because of the large ranges of the northwestern and southwestern pond turtle, impacts associated with climate change are expected to vary throughout the range of the two species with the southern portion of each species' range seeing greater impacts. Below we provide information regarding the major impacts associated with climate change: increasing temperatures, drought, extreme flood events, and wildfire impacts.

Increasing Temperatures. Both the northwestern and southwestern pond turtle exhibit temperature-dependent sex determination (TSD). This is where the sexual makeup of male and female hatchlings within a population is based on the temperature conditions of the nest site during egg incubation (Ewert et al. 1994, pp. 3–7; Ewert et al. 2004, pp. 21–32). Under higher mean nest temperatures during the incubation period, western pond turtle hatchlings are more likely to be female and under lower mean nest temperatures, hatchlings are more likely to be male. Increases in incubation temperature of the nest site due to the effects of climate change could lead to skewed sex ratios or reduced hatching success (Christie and Geist 2017, pp. 49, 51). The western pond turtle requires certain temperature thresholds for proper development of the embryo (Geist et al. 2015, pp. 494–496). The mean and maximum temperatures of the nest site and their interaction with each other significantly influence the incubation period for the western pond turtle (Christie and Geist 2017, p. 51). According to one study, nest sites exposed to mean higher temperatures had shorter incubation periods, and nest sites exposed to higher temperature extremes had a longer incubation period (Christie and Geist 2017, p. 49). This is most likely due to higher extreme temperatures, which are outside proper temperature development thresholds for the western pond turtle, slowing or halting embryo development (Christie and Geist 2017, p. 51). Longer incubation times delay hatchling emergence and cause them to either enter aquatic habitat later in the season when aquatic habitat conditions may be reduced or impacted by drought, or cause hatchlings to overwinter in the nest and have a lower fitness level when they do emerge in the spring. If extreme or elevated temperatures are prolonged during the incubation period, then development of the embryos would stop entirely and the embryos would die (Christie and Geist 2017, pp. 50–51).

The incubation temperatures observed at nest sites over a 3-year period in a northern California pond in Lake County, commonly fluctuated more than 20 degrees Celsius (°C) (36 degrees Fahrenheit (°F)) on a daily basis, with nearly half of the eggs reaching maximum temperatures of 39 °C (102 °F) or greater (Christie and Geist 2017, pp. 50–51). Site temperatures above 40 °C (104 °F) were lethal to 50 percent of eggs, and temperatures above 45 °C (113 °F) resulted in a 90 percent infertility rate (Christie and Geist 2017, pp. 49, 51).

In some instances, such as in cooler climactic regions, warmer mean temperatures may allow for reproductive success by expanding the nesting season (Washington Department of Fish and Wildlife 2015, p. C–56), but the impacts of winter warming temperatures were less clear based on research of other reptile species (Moss and MacLeod 2022, pp. 264–266).

This skew in populations favoring more females, limiting reproductive success, and reducing the number of hatchlings produced as a result of increased temperatures has been found in other turtle species with TSD (Refsnider and Janzen 2016, pp. 66–67). Individual western pond turtles within a population may be able to tolerate increased temperatures and show some level of tolerance to temperature variation, or egg-laying females may be able to compensate for increased temperatures by digging deeper nests or seeking cooler upland nest sites, if such locations are available. However, due to the current expected rate and magnitude of temperature changes, it is unknown whether any individual behavioral changes or internal traits can compensate for the expected temperature changes. Increasing temperatures will impact the western pond turtle on both the individual and population level by impacting population composition, nesting behavior, and nesting success, and further influence aquatic habitat conditions. Therefore, we would expect declines in both individuals and populations of northwestern pond turtle and southwestern pond turtle, especially in areas in the southern parts of each species' range where temperatures are typically warmer.

Drought: Since 1900, drought conditions (or below average precipitation seasons) in the range of the western pond turtle in California have been relatively common, with significant drought conditions occurring intermittently over an extended period in the 1920s through 1930s and in 1976–77 (CDWR 2015, pp. 6–12). In Nevada, the western pond turtle populations on the Truckee River and Carson River are mostly influenced by snowpack in the Sierra Nevada Mountains, and, as a result, those populations' drought and aquatic habitat conditions in Nevada mimic those in California. In Oregon and Washington, documented drought impacts to western pond turtles are limited; however, drought conditions in the Northwest have increased in incidence, extent, and severity between 2000 and 2021, and this trend is predicted to continue (Dalton and Fleishman 2021, pp. 37–42). However, the severity and impacts of drought are not uniform across the north-south gradient from Washington to Mexico, resulting in a variable impact intensity for both the northwestern pond turtle and southwestern pond turtle (Dong et

al. 2019, pp. 3818–3819; Manzo et al. 2021, p. 497).

During normal drought conditions, when aquatic habitat levels are low or become dry, western pond turtles can aestivate in upland habitat or move to another water body if one is within migration or dispersal distance. Aestivating western pond turtles have been observed to remain in upland habitat during drought periods for approximately 7 months, suggesting that the western pond turtle is adapted to some level of drought conditions (Belli 2015, pp. 57, 59). During multi-year or severe drought conditions, individuals could remain alive in upland habitat and return to their aquatic habitat when conditions become suitable again depending on whether the aquatic habitat is more ephemeral or permanent, other aquatic habitat is located nearby (within dispersal capabilities of the species), climate refugia between sites are available, and if the species can avoid the expected increased predation opportunities in upland areas (Purcell et al. 2017, pp. 19–24). However, although individuals may survive extended droughts, the ability of small or isolated populations of western pond turtles to survive such events is unlikely (Purcell et al. 2017, pp. 23–24). Survival of populations would require a sufficient number of adult individuals of appropriate male and female composition to survive. A study on common box turtles (*Terrapene carolina*), a similarly long-lived turtle subject to catastrophic events such as severe drought, found that populations that were increasing or stable would remain at a site subject to a single event after 50 years, and that if the site was subject to multiple catastrophic events, only those sites with increasing populations would remain (Dodd et al. 2015, pp. 373–376). Although the western pond turtle has evolved with and can tolerate periodic drought conditions, its populations have been reduced or extirpated in areas that have been impacted by severe drought, especially in central and southern California (Leidy et al. 2016, pp. 71–74; Purcell et al. 2017, pp. 6–10; Service 2023, pp. 60–63), and the frequency, severity, and duration of drought are expected to increase in response to climate change (Washington Department of Ecology 2012, pp. 34–44; Bedsworth et al. 2018, pp. 13, 19–33; May et al. 2018, pp. 1036–1050; Mote et al. 2019, p. ii, summary; Oregon Climate Change Research Institute 2019, pp. 5–7). The increased frequency, severity, and duration of droughts would greatly alter hydrology or reduce aquatic habitat, would limit movement of western pond turtles between habitats, would further isolate local populations, and would cause species' declines (Holland 1994, p. 2–14; Leidy et al. 2016, pp. 73–74; Hallock et al. 2017, pp. 10–11). In addition, drought affects the quality and quantity of aquatic habitat, increases competition for resources (leading to starvation), limits reproductive output, and causes warmer water temperatures that may benefit nonnative predators and competitors such as bullfrogs and nonnative fish in the remaining aquatic habitat (Goodman Jr. 1997, p. 23; Lovich et al. 2017, p. 7; Purcell et al. 2017, p. 21). In addition, because females often forego nesting when conditions are unfavorable, extended drought can result in reduced reproduction and recruitment opportunities.

As a result, extended drought conditions or the increased frequency or severity of droughts could have significant effects on both northwestern or southwestern pond turtle populations, and other cumulative effects could create conditions such that repopulation of sites is unlikely, especially in more ephemeral aquatic habitats.

Extreme flood events: Flooding is a natural event that occurs throughout the range of the western pond turtle. Effects of flooding on western pond turtles include flushing of individuals from aquatic and terrestrial habitat and inundation of nesting sites (Rathbun et al. 1992, p. 323; Nerhus 2016, p. 45). Strong winter flows from heavy precipitation are typical in western pond turtle habitats, and floods can maintain and improve nesting habitat quality (Risley et al. 2010, p. 64). However, extreme flood events have the potential to cause severe habitat destruction and can act in concert with other stressors, leading to potential extirpation of populations, as may have occurred at two sites in the Mojave Desert, San Bernardino County, California (Lovich pers. comm. in Nerhus 2016, p. 44; Puffer et al. 2020, unpaginated). Western pond turtles are known to leave the water during times of highwater events and mostly aestivate or overwinter in the uplands above the highwater marks (Reese and Welsh Jr. 1997, p. 356). In Oregon, most hatchlings overwinter in the nest; however, fall emergence was observed in response to a heavy precipitation event (Rosenberg and Swift 2013, p. 117). Without protection from the nest, these hatchlings were exposed to both environmental and predation risk that may have reduced their survival. Extreme flood events can also cause nest failure as a result of prolonged inundation or too much moisture during the incubation period, and they may cause drowning of hatchlings (Bury et al. 2012, p. 17).

A potential benefit of flood events may be aided dispersal. Hatchlings that overwinter in nests along the Mojave River may be dispersed by floods (Lovich and Meyer 2002, p. 542). Anecdotal accounts have been reported of young and adult turtles being flushed to the mouth of rivers after the floods of 1995 in Ventura County, California (Rosenberg et al. 2009, pp. 20–21). While some pond turtles were most likely injured or killed, long distance dispersal from these infrequent but large flood events likely occurred (Rosenberg et al. 2009, pp. 20–21) and may have provided opportunities for genetic exchange.

High Severity Wildfire. Wildfires are a natural part of the environment within the range of the western pond turtle, increased wildfire activity on the landscape is expected and is likely exacerbated by years of wildfire suppression (both by increasing fuel levels and increased shading) and increased temperatures and drought conditions; and increased wildfire activity on the landscape is also positively correlated with urbanization, roads, and recreation (Lang 1961, pp. 84–86; Crawford and Hall 1998, pp. 13–14; Hays et al. 1999, p. 11; Abatzoglou and Williams 2016, entire; Halofsky et al. 2020, pp. 2–16; Parks and Abatzoglou 2020, pp. 1, 5–6; Service 2023, pp. 64–65). Observed and projected trends in warmer and drier wildfire seasons in the western United States are likely to continue the trend toward higher-severity wildfires and larger burn areas (Parks and Abatzoglou 2020, pp. 1, 5–6). There is broad agreement among wildfire scientists that dry forests are becoming less resilient to fire under current and projected climate conditions (Moritz et al. 2018, p. 3). Large-scale wildfires would result in additional loss, degradation, fragmentation, and alteration of habitat, and secondary impacts from wildfire suppression activities, increased sedimentation (from debris flows), and increased predation (due to lack of cover) for the western pond turtle across its range (McDonald et al. 1996, pp. 62, 69, 71; Finger et al. 1997, pp. 136–137; Moritz et al. 2018, p. 3).

Conservation Efforts and Regulatory Mechanisms

The western pond turtle was listed as endangered by the State of Washington in 1993 (Hays et al. 1999, p. 23; WDFW 2022, p. 1). The WDFW developed a State recovery plan for the northwestern

pond turtle in 1999 (Hays et al. 1999, entire). Recovery efforts being implemented by the State include monitoring, bullfrog removal, habitat restoration, land acquisition and protection, and population enhancement (see Headstarting, Captive Breeding and Rearing, and Reintroductions, below). In Oregon, the species is State sensitive-critical and a species of greatest conservation need (ODFW 2021, p. 9). ODFW has developed a western pond turtle conservation strategy for Oregon, identified and implemented best management practices, developed an educational program, established a monitoring program, and conducted habitat enhancement projects for the northwestern pond turtle. In Nevada, the northwestern pond turtle is a species of conservation priority (Nevada State Wildlife Action Plan 2012, p. 77; Nevada Natural Heritage Program 2012, p. 11) and measures being implemented include population monitoring and education. In California, the species (both northwestern and southwestern pond turtle) is a species of special concern (CDFW 2023a, p. 53). Measures being implemented by the CDFW include research funding, population monitoring, conservation coordination, and education. These State efforts have identified conservation strategies and priorities, and the States have implemented efforts to conserve western pond turtles; however, outside Washington where it is state listed, these efforts do not provide regulatory protections for the species. The southwestern pond turtle is not listed in Mexico (NOM–059–SEMARNAT–2010, entire), although monitoring and survey work has identified the southwestern pond turtle in small populations throughout its range in Baja California, Mexico (Amphibian and Reptile Atlas 2023, entire).

As part of an effort to foster awareness and promote conservation of sensitive species, the Association of Zoos and Aquariums (AZA) implemented programs for numerous species including the western pond turtle (AZA 2017, entire). This effort has resulted in a multi-stakeholder supported agreement to coordinate western pond turtle conservation and develop a conservation strategy for the species across its range (Western Pond Turtle Range-wide Conservation Coalition 2020, entire; Western Pond Turtle Memorandum of Understanding (MOU) 2021, entire). This effort includes Federal agencies (the Service, U.S. Forest Service, Bureau of Land Management (BLM), NPS, Department of Defense (DOD), USGS), State agencies (WDFW, ODFW, Nevada Department of Wildlife (NDOW), CDFW), and nongovernmental conservation partners (AZA, Fauna Del Noroeste A.C.) throughout the range of both species. This coordinated strategy will assist in identifying priorities for conservation, will assist in obtaining funding for identified initiatives, will kick-start recovery planning, and will raise awareness of and provide educational information on both the northwestern and southwestern pond turtle.

Several Federal and State regulatory mechanisms, other than listing the northwestern pond turtle by the State of Washington, provide some protection for the western pond turtle or reduce or eliminate impacts to habitat from threats. These regulatory mechanisms include the California Environmental Quality Act, which requires minimizing significant effects to the environment; U.S. Forest Service/BLM's sensitive species conservation through the Northwest Forest Plan (USDA and USDI 1994, entire); CDFW's lake and streambed alteration agreements (California Fish and Game Code, section 1602), which provide measures to protect lake and stream habitat; CDFW's natural community conservation plans (NCCPs); and the Service's habitat conservation plans (HCPs) permitted under section 10(a)(1)(B) of the Act. Currently, 20 HCPs are being implemented that include western pond turtles as a covered species (10 for the northwestern pond turtle, and 10 for the southwestern pond turtle). Several of these in California are also joint NCCPs. In general, these plans assure that habitat will be set aside and managed for the western pond turtle as compensation for covered activities that occur in the plan area, such as planned urban development, and that measures will be implemented to avoid or minimize take of the covered species. Many of these plans have been in place for over 20 years and have implemented measures for habitat protection, habitat restoration, species monitoring, and provided educational benefits for the western pond turtle or its habitat. Of these 20 HCPs, several in the range of the southwestern pond turtle have been implemented since 1998 and have resulted in significant protection and management for the southwestern pond turtle. Two examples of large-scale HCPs in the range of the southwestern pond turtle include the 2004 Western Riverside County Multi-Species HCP (MSHCP) (Dudek and Associates 2003, entire) and the 1998 South County HCP in San Diego County (San Diego County 1998, entire). These two HCPs cover areas in the western portion of the southwestern pond turtle's range and help minimize the effects of urbanization, development, and other human activities as well as assist in maintaining populations of the southwestern pond turtle by establishing connected ecosystem preserves, controlling unauthorized access, monitoring habitat conditions, and maintaining and improving aquatic and upland habitat. Together, the two HCPs have established over 425,000 ac (171,992 ha) of preserve lands in the western portion of the southwestern pond turtle's range. Although not all of the preserve land is used by the southwestern pond turtle, the preserve land they do occupy within the two HCP areas is well connected and provides both aquatic and upland habitat. This level of habitat conservation and connectivity will reduce the current threats impacting the southwestern pond turtle and assist in maintaining populations by avoiding impacts from development and other habitat loss and allow the species to respond to the environmental variability of drought by providing connected habitat should conditions at a given site become unsuitable in a given year.

The DOD has implemented numerous integrated natural resources management plans (INRMPs) for their military installations through the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a) including INRMPs for U.S. Marine Corps base at Camp Pendleton (DOD MCB Camp Pendleton 2018, entire) in San Diego County, U.S. Army bases at Camp Roberts (DOD Camp Roberts INRMP 2022, entire) and Fort Hunter Liggett (DOD Fort Hunter Liggett INRMP 2022, entire) in Monterey and San Luis Obispo County, and Vandenberg Space Force Base (DOD VSFB INRMP 2021, entire) in Santa Barbara County, California, which all include large areas within the range of the southwestern pond turtle. Some of the DOD military installations in the range of the northwestern pond turtle include: Joint Base Lewis-McChord in Washington; Air National Guard installations in Portland (142 Wing) and Klamath Falls (Kingsley Field) in Oregon; and Travis Air Force Base and Beale Air Force Base in California. The DOD military facilities in the range of the northwestern pond turtle are generally associated with airbases and do not contain large amounts of habitat for the northwestern pond turtle, except for Joint Base Lewis-McChord (U.S. Army/Air Force) which has developed an INRMP for their facilities (Joint Base

Lewis-McChord INRMP 2017, entire). However, populations in Washington are limited and the occupancy by northwestern pond turtle on Joint Base Lewis-McChord is unknown. Conservation measures and management for species in the INRMPs include establishing restrictions for vehicle use, habitat protections, monitoring, habitat enhancement, and establishment of best management practices for species and habitat protection.

Headstarting, Captive Breeding and Rearing, and Reintroductions

Headstarting is the process of collecting eggs or young from the wild and rearing them in captivity through the most vulnerable stages of their life cycle, and then releasing those individuals back into wild populations. Headstarting was initiated in Washington in 1990 (Hays et al. 1999, pp. 25–26) to bolster the last two known populations of western pond turtle left in the State (Hays et al. 1999, entire; Pramuk et al. 2013, p. 3; Hallock et al. 2017, p. iv). From 1991 through 2015, 2,200 captive-bred and wild-bred western pond turtles raised at the Woodland Park Zoo and Oregon Zoo have been released, increasing the number of sites for these turtles in Washington from two sites in 1993 to six sites today (Hallock et al. 2017, p. iv). The Washington State Recovery Plan indicates that headstarting and captive breeding should continue until northwestern pond turtle populations are sustainable without such intervention (Hays et al. 1999, p. 39). Due to the success of the headstarting program in bolstering the populations of northwestern pond turtle, the captive breeding has been discontinued. In reviewing the success of the headstarting program and commitment of the WDFW and other partners to continue the program, we consider headstarting and other conservation efforts (not including captive breeding) such as conducting habitat management efforts, investigating and managing shell disease, and predator control for the species to increase adult and hatchling survival to currently be sufficient for the conservation of the northwestern pond turtle in Washington (Anderson 2022, entire; Bergh and Wickhem 2022, p. 13; Hallock 2022, entire).

Headstarting of both northwestern pond turtles and southwestern pond turtles has been implemented to a limited degree by additional zoos and other partners in other parts of the two species' ranges (Spinks et al. 2003, pp. 260–261; Brown et al. 2015, pp. 4–16). Other reintroduction efforts in San Diego County have occurred that involved translocating western pond turtles from private ponds into restored habitat, often in conjunction with nonnative species removals (Molden et al. 2022, p. 2).

Current and Future Conditions

The current condition of a species may be described in terms of past and ongoing changes in a species' habitat, demographics, and distribution (Smith et al. 2018, p. 306). To assess the current condition of the northwestern pond turtle and southwestern pond turtle, we used the best scientific and commercial data available to describe past and ongoing changes in occupancy and impacts from the primary threats impacting the two species. We assessed the current and future conditions for both the northwestern and southwestern pond turtle by evaluating the health and distribution of western pond turtles in identified analysis units throughout the range of each species. The analysis units are delineated based on occupancy, genetic makeup, management regions, and ecological data depending on each State, and they stem from information gathered in collaboration with researchers and other stakeholders across the range of both species (Service 2023, pp. 33–37). Each of the analysis units contains multiple populations based on observation information. We identified 14 analysis units for the northwestern pond turtle: 2 analysis units in Washington, 7 in Oregon, and 5 in California (Service 2023, p. 34, figure 8, and p. 36, table 2). For the southwestern pond turtle, we identified six analysis units: five analysis units over the species' range in California and one analysis unit in Baja California, Mexico (Service 2023, p. 35, figure 9, and p. 37, table 3).

Modeling Population Growth and Probability of Extirpation

To assist in our analysis and quantitatively assess the current and future condition of the northwestern and southwestern pond turtle, we used results from two modeling efforts. For northwestern pond turtle analysis units in the State of Washington, we used information from a population viability analysis model (PVA) (Pramuk et al. 2013, entire) that looked at potential changes in the number of individuals over time based on various parameters including with and without bullfrog removal efforts and with or without headstarting efforts (Pramuk et al. 2013, pp. 19–28). Although the model is from 2013, the projections for the model start with slightly reduced population levels and therefore may slightly overestimate the rates of decline. To account for this potential overestimation we compared the model results to current population numbers and took any differences into account in our analysis. Drought is not explicitly incorporated into the Washington PVA but has been considered as part of our assessment of threats facing the northwestern pond turtle. We used a separate model for Washington due to its availability and because the populations in Washington have been extensively supplemented by headstarted turtles, so using this separate model avoided potentially conflicting results when compared to natural populations in other parts of the species' range.

For the remainder of the northwestern pond turtle analysis units in Oregon, Nevada, and California, as well as for 5 of the 6 analysis units in the range of the southwestern pond turtle, we used a single sex (female) stochastic stage-based (hatchling, juvenile, adult) matrix population model developed by researchers as part of our SSA analysis (Gregory and McGowan 2023, entire; Service 2023, appendix A). The model did not include information regarding the analysis unit in Baja California, Mexico (AU–6), due to the paucity of occurrence information for the unit (Service 2023, Appendix A). In the model, the researchers refer to declines of the northwestern and southwestern pond turtle as the ''probabilities of extinction'' in each analysis unit in Oregon, Nevada, and California. In this document, we present information from the model as probability of extirpation (locally or regionally extinct) to avoid confusion with the loss of either of the two species rangewide.

This model incorporated information on western pond turtle presence, specifically occurrence observations, as well as data on the primary threats identified for the northwestern and southwestern pond turtle (anthropogenic impacts, drought, and bullfrogs) as described above. The model projected land use change and drought conditions into the future by calculating annual rates of increase of moderate and extreme drought for representative concentration pathway (RCP) 4.5 (shared socioeconomic pathway (SSP 2)) and RCP 8.5 (SSP 5). RCPs are changes in carbon dioxide gas emissions based on land use pattern changes and other climate drivers. An RCP level of 4.5 represents mid-level emission scenario with some level of carbon dioxide emission reduction and an RCP of 8.5 represents continued carbon dioxide emission with little or no reduction. RCPs were developed explicitly for climate modeling into the

future based on the emission level, and, as a result, the socioeconomic characteristics used in RCPs were not standardized. SSPs further refine RCP emission levels to include other factors, such as standardized societal and economic patterns. The model also incorporated the spread of bullfrogs based on a continuation of the bullfrog's existing rates of distribution change at the analysis unit scale.

The modeling identified threats to the species or its habitat from human alteration of habitat and anthropogenic effects on the species (anthropogenic impacts), effects from nonnative bullfrogs, and the effects of drought conditions, which are influenced by the effects of climate change, to the year 2100 (approximately 75 years or three western pond turtle generations) (Gregory and McGowan 2023, entire; Service 2023, pp. 91–98). To model impacts from human alteration and land conversion, the modelers used data and projection information developed by the USGS and Environmental Protection Agency from the Integrated Climate and Land-Use Scenarios model (ICLUS) (Gregory and McGowan 2023, p. 22). The ICLUS project produces spatially explicit projections of human population and land-use that are based on Intergovernmental Panel on Climate Change's (IPCC) scenarios and pathways (Morefield et al. 2018, unpaginated). The model provided a continuous rate of change over time to the year 2100 and assigns probabilities of extirpation in each analysis unit for the two species in Oregon, Nevada, and California under two emission scenarios (RCP 8.5/SSP5 (scenario 1: higher emissions/higher human population growth impacts) and RCP 4.5/SSP2 (scenario 2: medium emissions/medium human population growth impacts)) (Gregory and McGowan 2023, pp. 18–22; Service 2023, pp. 102–105).

In the SSA report, we identified the results of the model from three time periods (2050, 2075, and 2100) to provide information for the two species' current and projected future condition in Oregon, Nevada, and California. Because the western pond turtle is a long-lived species, we consider results from the model at 2050 (approximately 25 years) (approximately one western pond turtle generation) to represent current condition of western pond turtles. The SSA report also provides results for discussion purposes to the year 2075 (approximately two generations) and to the year 2100 (approximately three generations) (Service 2023, pp. 69, 101–114). Because the results of the modeling in Oregon, Nevada, and California (Gregory and McGowan 2023, entire) provide information on a continuum to the year 2100 rather than specifically identified intermediate dates, in our analysis of future conditions, we considered a range of 50 to 75 years from now (between the year 2075 and 2100) to be our foreseeable future timeframe for both the northwestern pond turtle and southwestern pond turtle. This time range allows for the incorporation of the climate change information, projected human development changes, and additional impacts from bullfrogs on the northwestern pond turtle in Oregon, Nevada, and California, and the southwestern pond turtle in California, and this time range allows us to address how the impacts from these driving threats may impact the two species' resiliency over time. Our analysis of the northwestern and southwestern pond turtles' current and future redundancy and resiliency are assessed qualitatively based on past population trends and the life-history characteristics of the two species. Therefore, in addition to the modeling effort used to assist our determinations on resiliency, we also considered other factors not specifically part of the modeling efforts to determine the future condition of the northwestern pond turtle such as information on population persistence and species' longevity, the species' reproduction capabilities, known species distribution, the species' ability to use variable aquatic habitat, the variable ecological and environmental characteristics of habitat used across the species' range, regulatory mechanisms in place to protect the species, and any current management and rangewide conservation efforts and coordination being implemented for the species. Below, we provide information on the current and future conditions of the northwestern pond turtle and southwestern pond turtle separately.

Northwestern Pond Turtle—Current Condition

In Washington, historically the northwestern pond turtle was considered locally common. The species was listed as a WDFW sensitive species in 1981 and State threatened in 1983, and then was uplisted to State endangered in 1993 (Hays et al. 1999, p. 23). In 1990, the northwestern pond turtle in Washington was nearly extirpated in Puget Sound and other areas of the State and was found in two isolated populations, totaling only 150 individuals, near the Columbia Gorge. As a result of the northwestern pond turtle's reduced numbers, the WDFW and other partners initiated the headstarting program (see *Conservation Efforts and Regulatory Mechanisms,* above) and captive breeding program in 1990 and 1991, respectively (Hays et al. 1999, pp. 25–27).

The captive breeding efforts collected the last 12 western pond turtles from the Puget Sound area and placed them in a breeding program at the Woodland Park Zoo. The captive breeding program was successful and, along with the headstarting program, assisted in releasing captive-bred and wild-bred western pond turtles into the wild. The captive breeding program was discontinued after 1991, but the headstarting program is still being implemented. By 2015, these programs expanded the total number of populations to six (two reestablished populations in Puget Sound, two remnant populations in Columbia River Gorge, and two additional reestablished populations also in the Columbia River Gorge) and increased the total number of northwestern pond turtle individuals in the State to approximately 800–1,000 (Hallock et al. 2017, pp. 5–6).

More than 2,300 headstarted turtles have been released to these 6 sites since the program's inception and the total current population estimate in Washington remains near 1,000 individuals, although survey efforts at some of the sites have imperfect detection and may underestimate actual numbers, especially for detecting juvenile turtles (Hallock et al. 2017, p. 6; WDFW 2021, entire; Oregon Zoo 2022, entire; Woodland Park Zoo 2023, entire). The six sites are part of recovery efforts by the State and all are protected through landowner agreements or ownership by the WDFW (Hays et al. 1999, pp 36–45; Hallock et al. 2017, p. 7). Two of the sites in Skamania County (Pierce National Wildlife Refuge (Service-owned) and Beacon Rock sites (Washington State Parks-owned)) are within the dispersal distance for the species from each other (Hallock et al. 2017, p. 7). Two additional sites (one in Puget Sound area and one along the Columbia River Gorge) have populations of more than 250 individuals and are above the State-identified recovery goals for population size (Hays et al. 1999, p. 37; Hallock et al. 2017, p. 7). Despite these successes, the northwestern pond turtle is still heavily dependent on the headstarting program and the WDFW has committed to continue to implement the program as part of their recovery efforts for the northwestern pond turtle (Hays et al. 1999, entire; Hallock 2022, entire; Hallock and Anderson 2022, entire).

Resiliency

Resiliency is having sufficiently robust populations for the species to withstand stochastic events (*i.e.,* events arising from random factors). Analysis unit resiliency relies on sufficient suitable habitat in a condition to support multiple populations with enough individuals to withstand stochastic events. To evaluate resiliency for the northwestern pond turtle, we considered the modeling results, as well as the long-lived nature of the species and its ability to reproduce throughout its lifespan, habitat availability and quality, environmental conditions across this range of the species, the proximity of populations to each other and opportunities of dispersal between populations, the level of habitat fragmentation and habitat loss and conservation efforts being implemented across these areas by numerous Federal, State, and other entities.

For the northwestern pond turtle, we determined that resiliency (at the analysis unit level) is a function of the probability of extirpation as derived from the modeling results (Service 2023, pp. 96–97, 102–105, Appendix A). Specifically, the model uses quasi-extinction as the threshold under which the western pond turtle numbers within an analysis unit would be so small that it would no longer be viable (functionally extirpated) and unlikely to sustain populations in the wild. According to the Washington PVA, populations of northwestern pond turtle would decline significantly in the absence of headstarting (Pramuk et al. 2013, pp. 28–29). When looking at adult females only, the PVA identified an initial increase in abundance that reflected the transition of sub-adults to adults, where the number of adult females increased even as the overall population declined (Pramuk et al. 2013, pp. 26–27). Despite these overall declines, the PVA suggests that northwestern pond turtles are expected to persist in Washington, although at substantially reduced numbers through the year 2050 without headstarting (Pramuk et al. 2013, pp. 28–29; Service 2023, p. 114). However, based on our discussions with WDFW and those assisting in the headstarting program, our information gathering for the SSA, our work with researchers and zoos associated with the headstarting program, and the State's emphasis and commitment to northwestern pond turtle conservation and to the continuance of the implementation of the recovery goals for the species (including the headstarting and bullfrog removal programs), we do not anticipate that the headstarting efforts would cease now or in the near future due to WDFW's designation of the species as State endangered. As a result, we consider the northwestern pond turtle in Washington to currently have sufficient resiliency due to current conservation measures to provide for the current viability of the species.

In Oregon, Nevada, and California within all of the analysis units, population growth rate and abundance for the northwestern pond turtle are currently declining. However, based on species survey information and abundance modeling, numerous relatively large populations exist throughout the species range in these three States (Rosenberg et al. 2009, pp. 32–38; Manzo et al. 2021, pp. 493–495; Service 2023, 72–74). According to the modeling efforts, at the year 2050, the probability of extirpation in analysis units in Oregon, Nevada, and California ranges from approximately 6 percent in AU–11 in the North Central Valley unit in California to 15 percent in analysis unit 14 (AU–14) in the southern part of the species' range in the San Joaquin Valley unit in California using the RCP 8.5 climatic conditions and ranges from approximately 6 percent in AU–6 in the North Coast unit in Oregon to 15 percent in AU–14 using the RCP 4.5 climatic conditions. This equates to an overall probability of persistence of 85 to 94 percent in 2050 across analysis units in Oregon, Nevada, and California under either emission scenario (Gregory and McGowan 2023, entire; Service 2023, pp. 97–99 and Appendix A). Based on habitat availability and connectivity, relatively favorable environmental conditions lessening the effects of climate change, the number and distribution of occupied areas, the number of relatively large populations and their distribution throughout the three States, and the relatively low probabilities of extirpation identified above, we consider the northwestern pond turtle in Oregon, Nevada, and California to currently have sufficient resiliency.

Redundancy

Redundancy describes the ability of a species to withstand catastrophic events. To determine redundancy for the northwestern pond turtle, we assessed the number and distribution of sufficiently resilient analysis units relative to the scale of anticipated species-relevant catastrophic events, which entailed assessing the cumulative risk of catastrophes occurring within the species' range over time. These factors were assessed in terms of their potential influence on the ability of northwestern pond turtle populations to survive and recover after a plausible catastrophic event.

The northwestern pond turtle has been subject to historical habitat loss, alteration, and fragmentation and is still impacted by the legacy effects from such habitat impacts (Rosenberg et al. 2009, p. 40). Nonnative predators, such as bullfrogs and largemouth bass, are also a threat to northwestern pond turtles (Rosenberg et al. 2009, pp. 40–47; Manzo et al. 2021, p. 492). Based on standardized occupancy surveys that were conducted in 2018–2020 at 138 historical sites and 176 new sites in Oregon, the current occupancy information appears to indicate that there are fewer occupied areas when compared to historical information (Samara Group, LLC 2021, entire). However, the existing habitat availability and connectivity, population distribution, and size of some populations would help maintain the species in Oregon. In California, the most significant declines have occurred in the southern portion of its range and is associated with habitat loss, urbanization, and historical overutilization (Jennings et al. 1992, pp. 10–11; Jennings and Hayes 1994, pp. 101–102; Kelly et al. 2005, pp. 63, 70; Bury and Germano 2008, p. 001.6; Bettelheim and Wong 2022, pp. 7–12). According to modeling efforts and other status assessments, the parts of the species' range in Oregon and northern California currently are less likely to be subject to the extensive habitat losses that have occurred further south and still have numerous well distributed and well connected populations in this area (Thomson et al. 2016, p. 301; Gregory and McGowan 2023, entire; Service 2023, Appendix A). For the species' southern parts of its range in central California, the species has a higher probability of extirpation than the populations in Oregon and northern California; however, numerous populations with evidence of breeding do still occur in areas such as Merced, Fresno and Kern Counties and would also provide some level of redundancy as these areas are associated with permanent natural and artificially ponded habitats that are currently protected or maintained (Germano 2010, pp. 91–96; Gregory and McGowan 2023, entire; Service 2023, Appendix A).

In terms of current redundancy, the northwestern pond turtle is currently distributed across the analysis units in Washington, Oregon, Nevada, and California similarly to its historical distribution, with the majority of populations in northern California and Oregon. This spatial spread would most

likely protect the species from catastrophic events including wildfire, flooding events, and severe drought. As a result, the species would most likely continue to maintain its ability to withstand catastrophic events, particularly in the center of the range (Oregon and Northern California) due to this extensive distribution. Based on this information, we consider the northwestern pond turtle in Oregon, Nevada, and California to currently have sufficient redundancy.

Representation

Representation describes the ability of a species to adapt to changing environmental conditions. This includes both near-term and long-term changes in its physical (*e.g.,* climate conditions, habitat conditions, habitat structure, etc.) and biological (*e.g.,* pathogens, competitors, predators, etc.) environments. This ability of a species to adapt to these changes is often referred to as ''adaptive capacity.'' To assess the current condition of representation for the northwestern pond turtle, we considered the current diversity of ecological conditions and genetic make-up of the species throughout its range.

For current representation, the species exhibits ecological flexibility in habitat use, particularly different types of waterbodies and ecological conditions from the Pacific Northwest in Oregon to northern and central California and eastern Sierra Nevada in Nevada. Based on genetic analyses, the northwestern pond turtle in Oregon and northern California has lower genetic variation than those further south, despite covering a larger geographic area. Although genetic variation is lower in the northern portions of its range, researchers suggest this is due to a more relatively recent (on a geologic timescale, after the retreat of Pleistocene glaciation in the last ~15,000 years) range expansion rather than a reduction in available genetic make-up (Shaffer and Scott 2022, p. 6). In addition, based on the number and distribution of populations and modeling efforts on persistence to the year 2050 (Gregory and McGowan 2023, entire; Service 2023, Appendix A), we do not expect severe population declines or extirpations in the near-term across Washington, Oregon, Nevada, and California analysis units; therefore the species is likely to maintain its ability to adapt to changing environmental conditions in the near-term and currently has sufficient representation.

Northwestern Pond Turtle—Future Condition

In the future, impacts from land conversion, bullfrog predation, and increasing drought will continue throughout the 50- to 75-year timeframe (to the year 2100) we considered in our analysis. The level of impact on the northwestern pond turtle associated with these threats generally follows a latitudinal trend, with the southern analysis units having a more negative response and therefore poorer condition than the more northern analysis units.

Resiliency

In Washington, as discussed above, the northwestern pond turtle is heavily reliant on implementation of conservation measures and is expected to depend on headstarting, bullfrog control, and habitat management into the future (Hallock et al. 2017, p. 14). Population modeling efforts looking out approximately 100 years (year 2112) found that populations declined towards extirpation in the absence of headstarting and management (Pramuk et al. 2013, pp. 28–29). Declines in populations were tied to both adult and hatchling mortality rates, with bullfrog removal positively influencing population persistence (Service 2023, pp. 101–102). Small populations were shown in the model to persist in the future without headstarting as long as adult mortality is relatively low and hatchling mortality is reduced through habitat management and predator control (Pramuk et al. 2013, pp. 29 and 32). The current adult mortality rate is unknown and hatchling mortality is estimated to be high (above 85 percent). Because the northwestern pond turtle is a State endangered species and recovery goals for down and delisting have not been met, the WDFW is committed to continuing the conservation measures of headstarting, conducting habitat management efforts, investigating and managing shell disease, and implementing predator control for the species to increase adult and hatchling survival (Anderson 2022, entire; Bergh and Wickhem 2022, p. 13; Hallock 2022, entire). However, without the continuance of current management (*i.e.,* headstarting, predator control, and ongoing habitat management), we consider the northwestern pond turtle's resiliency in Washington to be in decline and question the ability of the species to withstand stochastic events in the future.

In the Oregon, Nevada, and California analysis units, we used the modeling efforts to inform resiliency into the future. Looking at conditions of the northwestern pond turtle in the 50–75 year timeframe, by the year 2075 (approximately the next 50 years), the modeling efforts identified some declines in population size for the species with the probabilities of extirpation of the analysis units ranging from 30 percent in AU–6 along the Oregon coast to 43 percent in AU–14 in the San Joaquin Valley and San Francisco Bay area in California under scenario 1 (RCP 8.5/SSP 5) and 29 percent in AU–5 in the Willamette Valley unit in Oregon to 42 percent in AU–14 under scenario 2 (RCP 4.5/SSP 2). By the year 2100 (approximately next 75 years), the probabilities of extirpation of populations in analysis units ranged from 46 percent in AU–10 in the Northern California unit to 59 percent in AU–14 under scenario 1 (RCP 8.5/SSP 5) and 47 percent in AU–11 to 59 percent in AU–14 under scenario 2 (Service 2023, pp. 101–105). These predicted results of extirpation at the end of the 75-year timeframe (year 2100) will most likely cause declines in all analysis units with some populations within the analysis units to become functionally extirpated and limit the ability of smaller populations or populations in fragmented habitats to respond to stochastic events and limit the population resiliency in those units. Table 2 below identifies the range of the probability of extirpation (highest and lowest percentage) of analysis units for the northwestern pond turtle in 2050, 2075, and 2100.

TABLE 2—NORTHWESTERN POND TURTLE RESILIENCY RANGES

[Probability of extirpation percentages]

Scenario	Year	High (relevant analysis unit)	Low (relevant analysis unit)
RCP 8.5	2050	15 (AU–14)	6 (AU–11).
	2075	43 (AU–14)	30 (AU–6).
	2100	59 (AU–14)	46 (AU–10).
RCP 4.5	2050	15 (AU–14)	6 (AU–6).

TABLE 2—NORTHWESTERN POND TURTLE RESILIENCY RANGES—Continued

[Probability of extirpation percentages]

Scenario	Year	High (relevant analysis unit)	Low (relevant analysis unit)
	2075	42 (AU–14)	29 (AU–5).
	2100	59 (AU–14)	47 (AU–11).

We consider the northwestern pond turtle's resiliency in Oregon, Nevada, and California will decline from current levels such that the species will be less able to withstand stochastic events in the future because of the fragmented nature of habitat and increased threat from anthropogenic impacts, predation from nonnative bullfrogs, and the effects of climate change from drought.

Therefore, looking at the overall resiliency of the northwestern pond turtle across its range, we have determined that the species' resiliency will decline across the majority of its range in the next 50–75 year timeframe.

Redundancy

Future redundancy of northwestern pond turtles is expected to decline due to the reduced number of populations across the range of the species. In Washington, as discussed, the species relies heavily on headstarting and other conservation actions to sustain populations in the wild. Although we expect those conservation measures to continue to be implemented for the northwestern pond turtle in the State in the future (Hallock and Anderson 2022, entire) the certainty of future funding mechanisms are not secure. In addition, the existing populations are small and dispersed with little connectivity or opportunity to bounce back from catastrophic events such as drought or high severity wildfire. In Oregon, Nevada, and California, the latent negative effects to habitat from land use conversion (urbanization and agriculture), impacts from the increased magnitude and frequency of wildfire, impacts from more frequent and intense drought conditions, and the continued effects from existing threats will cause further declines in populations. These declines are reflected in probability of extirpation for all analysis units (AU–3 through AU–14) for the northwestern pond turtle in Oregon, Nevada, and California. Under scenario 1 (RCP 4.5/SSP 2) the probabilities of extirpation are near 30 percent in 2075 and above 47 percent by the year 2100. Similar probabilities of extirpation are expected under scenario 2 (RCP 8.5/SSP 5) for 2075 and 2100. Therefore, in the future, we expect that northwestern pond turtle populations in Washington, Oregon, Nevada, and California to become reduced in size, distribution, and connectivity with numerous populations becoming functionally extirpated resulting in a decline in the ability to bounce back from catastrophic events.

Representation

Future representation of northwestern pond turtles is expected to be reduced. As discussed, the number and distribution of populations and the differing habitat conditions in which they occur is projected to decrease across all analysis units. This loss will likely reduce the species' genetic diversity and ability to adapt to changing environmental conditions under both scenarios. By 2100, continued declines would result in additional losses of representation. Besides analysis units in Washington, the southern-most northwestern pond turtle analysis unit (San Joaquin Valley, AU–14) has the highest probability of extirpation. Given that these turtles are at the lowest latitude and experience some of the highest temperatures across the range, loss of these individuals may result in a potential loss of adaptive capacity for increasing temperatures with climate change. Overall, in the 50–75 year timeframe, genetic diversity and adaptive capacity will be lost and we anticipate that the future representation of the northwestern pond turtle will be reduced.

Southwestern Pond Turtle—Current Condition

The current distribution of the southwestern pond turtle in California is similar to its historically occupied range except for the areas associated with the heavily urbanized areas of the Los Angeles basin, San Diego County, and other heavily developed areas along the California coast (Service 2023, pp. 76–77). Recent occurrence information in Baja California, Mexico, also identifies occurrence records throughout the historically occupied range of the species in Mexico (Amphibian and Reptile Atlas of Peninsular California 2023, entire).

Specific population abundance and trend information is lacking rangewide for the southwestern pond turtle, but estimates of selected localities have identified most populations in California and one location in Mexico to be made up of less than 50 individuals with a mean of 10 individuals (Manzo et al. 2021, pp. 493, 495; Service 2023, p. 78). Information on the southwestern pond turtle in Baja California, Mexico is limited mostly to occurrence information (Amphibian and Reptile Atlas of Peninsular California 2023, entire). The limited information available identifies the distribution of the southwestern pond turtle in Baja California, Mexico as being ''marginal'' (Macip-Ríos et al. 2015, p. 1053). This is reflected in the limited streams and isolated desert ponds or other similar habitats where they are currently known to occur. An assessment looking at the environmental vulnerability (an assessment of a species' distribution, habitat, and threats) of amphibians and reptiles in Mexico (Wilson et al. 2013, pp. 1–47), found the southwestern pond turtle to have an environmental vulnerability score of 17 out of 20 (Wilson et al. 2013, p. 29) and similar to the International Union of Conservation of Nature (IUCN) as being vulnerable (VU)(high risk of extinction) (IUCN 2012, p. 15).

Resiliency

In California, we used the modeling efforts (Gregory and McGowan 2023, entire) to assist in determining the current and future resiliency for the southwestern pond turtle. According to the modeling efforts, which takes into account threats to the species and its habitat, the probability of extirpation to the year 2050 for the analysis units is relatively low and ranges from approximately 21 percent (AU–1 Coast Range unit) to 24 percent (AU–3 Mojave unit) using the RCP 8.5 (SSP 5) climatic conditions and approximately 20 percent (AU–1) to 23 percent (AU–2 Ventura/Santa Barbara unit) using the RCP 4.5 (SSP 2) climatic conditions (Gregory and McGowan 2023, entire; Service 2023, Appendix A).

The current condition of the southwestern pond turtle in Mexico is expected to have sufficient resiliency. This is based on recent occupancy records (2014–2022) distributed in both new and previously known to be

occupied areas; in addition, the areas in which they occur are in relatively remote areas and not subject to development or other threats. Therefore, we would expect that the habitat and environmental conditions would be sufficient for southwestern pond turtle populations within Baja California, Mexico to be currently able continue to carry out their normal life history functions and be able to withstand stochastic events.

Based on this information, we consider southwestern pond turtle populations to currently withstand stochastic events such that the species currently has sufficient resiliency.

Redundancy

Because the threats facing the species are relatively uniform, the majority of populations are expected to maintain their distribution, and are not expected to be lost in the next 25 years, we expect the species will be able to maintain its ability to withstand catastrophic events. The southwestern pond turtle is currently distributed across all analysis units in California and Mexico similarly to their historical distribution, with the majority of occupancy in California. This broad distribution would most likely protect the species from catastrophic events including wildfire, flooding events, and severe drought. Based on this information, we consider southwestern pond turtle to currently have sufficient redundancy.

Representation

The southwestern pond turtle exhibits ecological flexibility in habitat use, particularly different types of waterbodies and ecological conditions from the arid portions of Mexico and the Mojave region in California to the moister areas along the California Coast Range to Monterey County. In addition, based on the number and distribution of populations and the probabilities of extirpation for each analysis unit identified in the modeling efforts to the year 2050 (Gregory and McGowan 2023, entire) (Service 2023, Appendix A), we expect the species can likely maintain its ability to adapt to changing environmental conditions in the near-term and it currently has sufficient representation.

Southwestern Pond Turtle—Future Condition

Resiliency

Across all southwestern pond turtle analysis units in California, populations declined for the duration of the model simulation, with the probability of extirpation rising over time. Model results were most sensitive to increases in drought, especially in the Ventura/Santa Barbara (AU–2), LA (AU–4), and Orange County/San Diego (AU–5) analysis units. The probability of extirpation for all the analysis units in 2075 was above 50 percent and ranged from 54 percent (AU–1) to 57 percent (AU–3) under scenario 1 (RCP 8.5 (SSP 5)) and 51 percent (AU–5) to 55 percent (AU–3) under scenario 2 (RCP 4.5 (SSP 2)). These results suggest that the populations in some of the analysis units are likely to become extirpated and that all populations across the species' range in California would be less able to withstand stochastic events within the next 50 years.

The probability of extirpation of all the analysis units in 2100 increases substantially to over 70 percent, ranging from 73 percent (AU–1) to 78 percent (AU–2) under scenario 1 and 70 percent (AU–5) to 73 percent (AU–2) under scenario 2 (Service 2023, pp. 107, 108 (figures 32 and 33)). This indicates a 70 to 78 percent likelihood of extirpation of the populations for each analysis unit in the next 75 years under either plausible future scenario. Under both scenarios, multiple analysis units are projected to be at risk of extirpation and resiliency would be reduced such that the species is less able to withstand environmental stochasticity. Table 3 below, identifies the range of the probability of extirpation (highest and lowest percentage) of analysis units for the southwestern pond turtle in 2050, 2075, and 2100.

TABLE 3—SOUTHWESTERN POND TURTLE RESILIENCY RANGES

[Probability of extirpation percentages]

Scenario	Year	High (relevant analysis unit)	Low (relevant analysis unit)
RCP 8.5	2050	24 (AU–3)	21 (AU–1).
	2075	57 (AU–3)	54 (AU–1).
	2100	78 (AU–2)	73 (AU–1).
RCP 4.5	2050	23 (AU–2)	20 (AU–1).
	2075	55 (AU–3)	51 (AU–5).
	2100	73 (AU–2)	70 (AU–5).

Redundancy

Based on projections of probability of extirpation, loss of all 5 analysis units in the U.S. is greater than 50 percent under both scenarios by 2075. Therefore, all U.S. analysis units are more likely than not to become functionally extinct in approximately 50 years. There is a possibility that the species could maintain some of its current distribution in those waterbodies most resistant to anthropogenic impacts, bullfrog predation, and drought, which would continue to offer some low level of redundancy for the species. However, increasing probability of extirpation across analysis units and contraction of the range mean that the species would be less likely to withstand catastrophic events under either future scenario in approximately 50 years.

By 2100, all California analysis units are substantially likely (greater than 70 percent) to be functionally extinct under both scenarios. Given the increasing probability of extirpation predicted across analysis units and contraction of the range, the species would be much less likely to withstand catastrophic events under either future scenario in approximately 75 years.

Representation

Representation of southwestern pond turtles would be reduced with extirpation of any analysis units. As stated above, based on probability of extirpation, all analysis units in the U.S. portion of the range have greater than a 50 percent probability of extirpation or are more likely than not to become functionally extinct by 2075 and have over a 70 percent probability of becoming functionally extinct by 2100. With projected losses in both future scenarios, the species may lose occupancy throughout most of its current distribution. Inbreeding depression and loss of genetic diversity

would be exacerbated as abundance declines across analysis units with increasing probability of population-level extirpations. Even without the overall extirpation of analysis units, additive loss of individuals over time leads to an overall decline in species genetic diversity due to increased probability of inbreeding, genetic drift, and increasing the potential for incorporating detrimental genetic traits into a population, which decreases adaptive potential (Palstra and Ruzzante 2008, entire). Therefore, under both future scenarios, representation in southwestern pond turtles is likely to be severely reduced in the next approximately 50 to 75 years, such that the species will be less able to adapt to changing conditions.

Determination of Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species 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.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the northwestern pond turtle and southwestern pond turtle. Below we summarize our assessment of status of the northwestern pond turtle and southwestern pond turtle under the Act.

Northwestern Pond Turtle: Status Throughout All of Its Range

The threats that are affecting the northwestern pond turtle throughout its range in Washington, Oregon, Nevada, and California include habitat loss, fragmentation, and alteration (Factor A), predation from nonnative species (Factor C), urbanization (including development and roads) (Factor A), and the effects of climate change and recreation (Factor E). In addition, in portions of its range, the northwestern pond turtle is impacted by disease (Factor C) and competition from nonnative turtles (Factor E).

In Washington, the condition of the northwestern pond turtle is considered to be conservation reliant due to the small number of occupied sites, low abundance, impacts from nonnative predators, and reliance of these populations on headstarting. A population viability assessment for Washington that looked at populations to the year 2112 suggested that the sites in that State are reliant on continuation of population augmentation via the headstarting program until bullfrog predation and adult and hatchling mortality are reduced (Pramuk et al. 2013, entire). The State of Washington has listed the northwestern pond turtle as endangered and WDFW has developed a recovery plan for the northwestern pond turtle that identifies that headstarting and captive breeding should continue until populations are sustainable without such intervention (Hays et al. 1999, p. 39). The captive breeding program was discontinued by the WDFW after initial efforts to maintain the northwestern pond turtle. Based on our discussions with WDFW, they intend to continue their emphasis and commitment to northwestern pond turtle conservation and continuance of the implementation of the recovery goals (except for captive breeding) for the species, and we do not anticipate that the headstarting efforts would cease now or in the foreseeable future. As discussed above, headstarting and other conservation efforts are required to maintain populations of the northwestern pond turtle in the wild in Washington. As a result, we consider the northwestern pond turtle in Washington to be conservation reliant in order to maintain sufficient resiliency, redundancy, and representation and provide for the continued viability of the species now and into the future.

In Oregon, Nevada, and California, based on occurrence information and some survey efforts, the northwestern pond turtle is still well distributed throughout its historical range. Some of the analysis units have at least one population with relatively large abundances and habitat connectivity between populations. The occupancy and distribution of the species covers Oregon and northern California Coast Ranges, Willamette Valley, Klamath Mountains, Trinity Mountains, eastern and southern Cascades in Oregon and California, Sacramento Valley, Carson River and other areas of Nevada, west slope of the Sierra Nevada foothills in California, as well as the majority of the species' range outside the southern San Joaquin Valley region (Rosenberg et al. 2009, pp. 31–38, 72–80; Thomson et al. 2016, pp. 297, 300–301; Manzo et al. 2021, p. 495; Service 2023, pp. 70–75). Populations within the Willamette Valley, Oregon (AU–5) and southwest Oregon (AU–9) and populations in northwestern California (AU–10) and into the northern and southern Sacramento Valley and northern San Joaquin Valley (AU–11, AU–12, AU–13) in California all contain a number of abundantly sized and connected populations. The number of individuals in several of these populations is over 50 with some over 100 (Service 2023, pp. 70–75). Based on modeling efforts to the year 2050 (our current condition timeframe) the probability of extirpation under both scenarios ranges from 5 to 9 percent in Oregon. As a result, despite some expected declines in abundance and distribution of individuals from negative habitat impacts (Factor A), nonnative predators (Factor C), and negative effects of climate change (Factor E), the populations of northwestern pond turtle in Oregon are likely to currently withstand stochastic and catastrophic events, maintain its ecological flexibility and likely be able to adapt to changing environmental conditions and thereby still has a sufficient degree of resiliency, redundancy, and representation to sustain populations in the near term.

In California and Nevada, as discussed above, parts of the historical distribution and abundance of the northwestern pond turtle have declined, especially in the southern parts of its range in the Central Valley of California associated with historical habitat loss, although some stable populations with relatively large abundance and reproduction do still occur within these areas in Merced, Fresno, and Kern Counties (Jennings et al. 1992; pp. 10–11; Kelly et al. 2005, pp. 63, 70; Bury and Germano 2008, p. 001.6; Germano 2010, 91–96; Bettelheim and Wong 2022, pp. 10–12). In Nevada, available historical distribution and status information is limited and additional research is needed (Nevada State Wildlife Action Plan 2012, pp. 44–45). However, information from the State's natural heritage program on vulnerability and conservation priority for the northwestern pond turtle does not suggest that the species' current abundance or distribution within its currently known occupied areas will change substantially by the year 2050; the northwestern pond turtle has been

assigned as a not vulnerable or presumed stable species for the State (Nevada Natural Heritage Program 2012, pp. 7 and 11). In California, the main threats facing the species include the latent impacts associated with historical habitat loss and fragmentation (Factor A), current urbanization (Factor A), nonnative species predation (Factor C), and the effects of climate change (Factor E) on habitat and the species. These threats continue to reduce and fragment habitat, reduce recruitment, and impact the ability of the species to maintain populations. However, due to the number and distribution of populations of the species, the amount of available habitat for the populations of the species to sustain themselves, and relatively low near-term (2050) probability of extirpation (6 to 15 percent) of the populations in all five analysis units in California (Service 2023, pp. 71 and 97, figures 13 and 26 respectively), we have concluded that although the impacts resulting from present-day threats are currently negatively affecting individuals of the northwestern pond turtle in California, the species still has a sufficient degree of resiliency, redundancy, and representation to sustain populations in the near term.

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors as well as assessing the conservation measures in place for the species, we have determined that the northwestern pond turtle throughout all of its range in Washington, Oregon, Nevada, and California, is able to maintain viability with numerous populations that are well distributed across the species' range and those populations currently have sufficient resiliency, redundancy, and representation to sustain themselves in the wild. Thus, after assessing the best information available, we conclude that the northwestern pond turtle is not currently in danger of extinction throughout all of its range.

Therefore, we proceed with determining whether the northwestern pond turtle is likely to become endangered within the foreseeable future throughout all of its range. In considering the foreseeable future as it relates to the status of the northwestern pond turtle, we considered the timeframes applicable to the relevant risk factors (threats) to the species and whether we could draw reliable predictions about future exposure, timing, and scale of negative effects and the species' response to these effects. We considered whether we could reliably assess the risk posed by the threats to the species, recognizing that our ability to assess risk is limited by the variable quantity and quality of available data about the effects to the northwestern pond turtle and its response to those effects.

In the SSA report, we developed two future scenarios that range over an approximately 50- to 75-year timeframe to the years 2075 and 2100 that encompass the best information available for projected future conditions across the range of the northwestern pond turtle. This 50- to 75-year timeframe encompasses approximately two to three generations of western pond turtles and enabled us to consider the threats acting on the species and to draw conclusions on the species' response to those threats, and accordingly, we consider this 50- to 75-year range to be the period of foreseeable future for this species.

As discussed above, to assist in determining the future condition of the northwestern pond turtle, we used two modeling efforts, one for Washington (Pramuk et al. 2013, entire; Service 2023, pp. 101–102) and one for Oregon, Nevada, and California (Gregory and McGowan 2023, entire; Service 2023, pp. 101–105) (see *Modeling Population Growth and Probability of Extirpation,* above). These models looked at those threats most influential on determining the species' future condition. We also considered other factors not specifically part of the modeling efforts to determine the future condition of the northwestern pond turtle such as information on population persistence and species' longevity, the species' reproduction capabilities, known species distribution, the species' ability to use variable aquatic habitat, the variable ecological and environmental characteristics of habitat used across the species' range, regulatory mechanisms in place to protect the species, and any current management and rangewide conservation efforts and coordination being implemented for the species.

In Washington, modeling efforts looking out approximately 100 years using four management scenarios found that populations declined towards extirpation in the absence of headstarting and management within this timeframe (Pramuk et al. 2013, pp. 28–29). The four scenarios included: (1) maintaining current headstarting efforts; (2) complete cessation of headstarting without additional management; (3) continuing headstarting to year 20; and (4) continuing headstarting to year 20 with bullfrog removal efforts. Scenario 1 identified a short term increase then leveling of population numbers for the species into the future. Scenarios 2 and 3 each showed declines in populations which eventually lead to expected functional extirpation of the species, although at differing rates of decline, at or near the 100 year timeframe. Declines in populations were tied to both adult and hatchling mortality rates, with bullfrog removal positively influencing continued population persistence even under a scenario (scenario 4) where headstarting was discontinued after 20 years but bullfrog removal efforts were maintained (Pramuk et al. 2013, pp. 28–29, figure 6–4; Service 2023, pp. 101–102). WDFW has committed to manage for and conserve the northwestern pond turtle through implementation of its existing headstarting program, habitat management actions, disease control, and bullfrog removal activities as identified in its recovery plan for the species. These conservation measures will assist in maintaining and increasing adult and hatchling survival in the State. However, because the northwestern pond turtles in Washington are conservation reliant and require on-going management and commitment by the WDFW, the species in Washington would decline and become functionally extirpated in the foreseeable future should management efforts for the species cease.

In Oregon, Nevada, and California, modeling efforts of future resiliency of populations within our analysis units identified that individuals and populations of the northwestern pond turtle will most likely decline due to the threats from human activities and habitat loss, increased predation from nonnative bullfrogs, and increased impacts from the effects of climate change mostly attributed to drought. These threats would reduce resiliency, redundancy, and representation into the future. However, the threats, the magnitude of threats, and the species' response to the threats in both extent and timing are not uniform throughout the area, with populations in northern California and Oregon faring better over time than populations in more southerly parts of the species' range within the 50- to 75-year timeframe (Service 2023, pp. 102–103). This is partly due to past extensive habitat loss and fragmentation due to agriculture and urbanized land conversion leaving mostly small, isolated populations. However, rangewide, Federal, State, and local conservation efforts such as the HCPs/NCCPs, DOD facilities with INRMPs, BLM and Forest Service sensitive species management activities under the Northwest Forest Plan will continue to assist in conservation of the

northwestern pond turtle throughout its range.

According to the modeling efforts for Oregon, Nevada, and California, the range of the probabilities of extirpation across analysis units was estimated to be between 28 to 33 percent over the next approximately 50 years (year 2075), and between 45 to 60 percent over the next approximately 75 years (year 2100) (Gregory and McGowan 2023, entire; Service 2023, pp. 96–97 and 102–105). The analysis units most impacted and more likely (greater than 50 percent chance) of becoming extirpated by 2100 included areas in the San Joaquin Valley (AU–13 and AU–14), southern Sacramento Valley (AU–12) of California and areas in the Klamath Basin (AU–8), and an area along the Columbia River Gorge (AU–3) in Oregon (Service 2023, figure 30, p. 105). According to our modeling efforts, the species is likely to maintain populations throughout its range in the next 50 to 75 years in Oregon, Nevada, and California; however, the species is likely to lose its adaptability to variable environmental conditions and ability to use various habitat types and conditions, have reduced levels of reproduction, and have a low likelihood of responding to catastrophic events such as severe drought, extreme flooding events, or high severity wildfire occurring uniformly across the entire species' range (see Effects of Climate Change).

Therefore, due to the northwestern pond turtle's projected lower occupancy levels, abundance, connectivity, and distribution of populations within its range in Washington, Oregon, Nevada, and California, we have determined that the northwestern pond turtle will have a reduced level of resiliency, redundancy, and representation such that we anticipate the future threats will limit the species' ability to maintain populations in the wild in the next 50 to 75 years.

After our review of the threats identified above and cumulative effects facing the northwestern pond turtle, as well as existing regulatory mechanisms and conservation measures, we conclude that threats have and will likely continue to impact individuals or localized populations of the northwestern pond turtle especially in the southern portion of its range in California to the point where populations may become extirpated. As a result, we have determined that the northwestern pond turtle will have reduced resiliency, representation, and redundancy in the future such that it is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Northwestern Pond Turtle: 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 northwestern pond turtle 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 northwestern pond turtle's range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for northwestern pond turtle, 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.

In undertaking this analysis for northwestern pond turtle, we choose to address the status question first. We began by identifying portions of the range where the biological status of the species may be different from its biological status elsewhere in its range. For this purpose, we considered information pertaining to the geographic distribution of (a) individuals of the species, (b) the threats that the species faces, and (c) the resiliency condition of populations.

We evaluated the range of the northwestern pond turtle to determine if the species is in danger of extinction now or likely to become so within the foreseeable future in any portion of its range. The range of a species can theoretically be divided into portions in an infinite number of ways. We focused our analysis on portions of the species' range that may meet the Act's definition of an endangered species. For the northwestern pond turtle, we considered whether the threats or their effects on the species are greater in any biologically meaningful portion of the species' range than in other portions such that the species is in danger of extinction now in that portion.

For the northwestern pond turtle, we examined the following threats: habitat impacts, disease, predation, competition, recreation, collection, and the effects of climate change, including cumulative effects.

The threats associated with negative habitat conditions or availability, nonnative predators, and the effects of climate changes (drought and increased temperatures) are occurring throughout the range of the northwestern pond turtle to varying degrees. In the 14 analysis units we evaluated in Oregon, Nevada, and California a portion of the species' range within AU–14 associated with the lower elevations of the southern San Joaquin Valley in Tulare and Kern County, California has been subject to extensive past habitat loss and land use changes which have resulted in declines of the northwestern pond turtle (Frayer et al. 1989, p. 4; Jennings et al. 1992; pp. 10–11; Kelly et al. 2005, pp. 63, 70; Bury and Germano 2008, p. 001.6; Germano 2010, 91–96; Bettelheim and Wong 2022, pp. 10–12). Based on modeling efforts, this unit also had the highest probability of likely current and future extirpation based on the current lower levels of occurrence, human disturbance, nonnative predators, and impacts from climate change (drought) (Service 2023, figure 30, p. 105). The probability of extirpation for AU–14 as a whole, which also includes portions of Merced County and several other San Francisco Bay counties (see figure 8 and 13 in the SSA report (Service 2023, pp. 34 and 71 respectively)), is 15 percent in the year 2050 (current condition). Although these areas in the species' southern portion of its range in California were identified as being impacted to a greater degree than other portions of the species' range, numerous well established and breeding northwestern pond turtle populations still occur (observation information from 2013–2022) within AU–14 in these lower elevation areas, including but not

limited to areas in Merced, Fresno, and Kern Counties (Germano 2010, pp. 91–96; Thomson et al. 2016, pp. 301) and we find that the populations in these areas will maintain sufficient resiliency, redundancy, and representation currently. Therefore, we found no concentration of threats in any portion of the northwestern pond turtle's range at a biologically meaningful scale.

Although within the southern San Joaquin Valley portion of AU–14, some threats to the northwestern pond turtle are impacting individuals differently from how they are affecting the species elsewhere in its range, or the biological condition of the species differs from its condition elsewhere in its range, the best scientific and commercial data available do not indicate that the threats, or the species' responses to the threats, are such that the northwestern pond turtle is currently in danger of extinction in the identified portion. Based on the discussion outlined above, we find that the species is not in danger of extinction now in the southern San Joaquin Valley portion of AU–14.

Therefore, no portion of the northwestern pond turtle's 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 determination 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 on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014), including the definition of ''significant'' that those court decisions held to be invalid.

Northwestern Pond Turtle: Determination of Status

Our review of the best scientific and commercial information available indicates that the northwestern pond turtle meets the definition of a threatened species. Therefore, we propose to list the northwestern pond turtle as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Southwestern Pond Turtle: Status Throughout All of Its Range

As discussed above, the threats that are affecting the southwestern pond turtle throughout its range in California and Baja California, Mexico, include impacts to habitat from land conversion and urbanization (including development and roads) (Factor A), predation from nonnative species (Factor C), and the effects of climate change and other anthropogenic impacts (Factor E). The impact of these threats has caused the distribution and abundance of the southwestern pond turtle to decline, especially in the southern parts of California that are associated with the developed and highly urbanized areas of southern Los Angeles, Orange, and San Diego Counties (AU–5), although some stable populations with relatively high abundance and evidence of reproduction do still occur in these areas, especially in areas further north along the California Coast Range outside urbanized areas (Jennings and Hayes 1994, pp. 99, 101; Thomson et al. 2016, p. 301). Status trends and abundance for areas in Baja California are not available, but information suggests that similar conditions exist for the species in Mexico, based on recent occupancy and distribution of populations of the species. Despite populations of the species being impacted by the existing threats, the species currently continues to maintain populations (Manzo et al. 2021, p. 495; Service 2023, pp. 75–80). This is supported by the modeling efforts (see Modeling Population Growth and Probability of Extirpation, above) developed for our analysis that found that probability of extirpation across southwestern pond turtle analysis unit was approximately 20 to 24 percent (76 to 80 percent probability of persistence) in the year 2050 (*i.e.,* current condition, representing one generation into the future) (Gregory and McGowan 2023, entire; Service 2023, pp. 97–99).

After evaluating threats to the southwestern pond turtle and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we have determined that the southwestern pond turtle is maintaining its viability due to the number and distribution of populations of the species, the current ability of the species to maintain its populations despite the existing threats, and relatively low current probability of extirpation of the species across its range (Service 2023, pp. 76 and 97, figures 15 and 26 respectively). We conclude that, although the impacts resulting from present-day threats are currently negatively affecting the southwestern pond turtle, the species still has a sufficient degree of resiliency, redundancy, and representation. As such, after assessing the best available information, we conclude that the southwestern pond turtle is not currently in danger of extinction.

Therefore, we proceed with determining whether the southwestern pond turtle is likely to become endangered within the foreseeable future throughout all of its range. In considering the foreseeable future as it relates to the status of the southwestern pond turtle, we considered the timeframes applicable to the relevant risk factors (threats) to the species and whether we could draw reliable predictions about future exposure, timing, and scale of negative effects and the species' response to these effects. We considered whether we could reliably assess the risk posed by the threats to the species, recognizing that our ability to assess risk is limited by the variable quantity and quality of available data about the effects to the southwestern pond turtle and its response to those effects.

In the SSA report, we developed two future scenarios that range over an approximately 50- to 75-year timeframe to the years 2075 and 2100 that encompass the best information available for projected future conditions across the range of the southwestern pond turtle. This 50- to 75-year timeframe encompasses approximately two to three generations of western pond turtles and enabled us to consider the threats acting on the species and to draw conclusions on the species' response to those threats, and accordingly, we consider this 50- to 75-year range to be the period of foreseeable future for this species. As discussed above (see Modeling Population Growth and Probability of Extirpation), we used modeling efforts (Gregory and McGowan 2023, entire; Service 2023, pp. 101–105) to assist in determining the future condition of the southwestern pond turtle. According to the modeling efforts developed for the southwestern pond turtle, the probability of extirpation for the species by the year 2075 (two generations) was estimated at greater than 50 percent across all analysis units, ranging from 54 percent to 57 percent under scenario 1 (RCP 8.5/SSP 5) and 51 percent to 55 percent under scenario 2 (RCP 4.5/SSP 2). The future impacts on the species would most likely include reduced distribution, abundance, and range contraction resulting in a reduced ability to withstand catastrophic events or adapt to changing environmental

conditions. The modeling results in the year 2100 (approximately three generations) identified continued declines for the species with the probability of extirpation estimated at greater than 70 percent in all analysis units, ranging from 73 percent to 78 percent under scenario 1 (RCP 8.5/SSP 5) and 70 percent to 73 percent under scenario 2 (RCP 4.5/SSP 2) (Gregory and McGowan 2023, entire; Service 2023, pp. 107–110).

Based on our projections of the future condition for the species in the next 50 to 75 years and the ongoing and increased threats to the species into the future from anthropogenic impacts, bullfrog predation, and increases in drought intensity due to climate change conditions, the species will have 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. Thus, after assessing the best available information, we conclude that the southwestern pond turtle is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Southwestern Pond Turtle: 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 within 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 southwestern pond turtle, 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 southwestern pond turtle 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 southwestern pond turtle, 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: habitat impacts, anthropogenic impacts, competition, and the effects of climate change, including cumulative effects. The current and expected future threat conditions and impacts from those threats on the southwestern pond turtle across its range are relatively uniform as informed by the modeling efforts used to determine the species' current and future conditions (Service 2023, p. 108, figure 32). The difference in the species' probability of extirpation across all analysis units varied only by a maximum of 4 percent between the highest and lowest analysis unit probabilities for both current and future conditions (Service 2023, p. 109, figure 33).

Based on this information, we found no biologically meaningful portion of the southwestern pond turtle'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 any other portion of the species' range.

Therefore, no portion of the southwestern pond turtle's 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.

Southwestern Pond Turtle: Determination of Status

Our review of the best available scientific and commercial information indicates that the southwestern pond turtle meets the definition of a threatened species. Therefore, we propose to list the southwestern pond turtle as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures for the Northwestern and Southwestern Pond Turtle

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 for each species will be available on our website as they are completed (*https://www.fws.gov/program/endangered-species*), or from our Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If these species are 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 States of Washington, Oregon, Nevada, and California would be eligible for Federal funds to implement management actions that promote the protection or recovery of the northwestern pond turtle and southwestern pond turtle, as applicable to each species' range. 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 northwestern pond turtle and southwestern pond turtle are only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for these species. Additionally, we invite you to submit any new information on the northwestern pond turtle and southwestern pond turtle 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 northwestern pond turtle and southwestern pond turtle 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. Forest Service, Bureau of Land Management, National Park Service, or Department of Defense 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 Ventura Fish and Wildlife 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 northwestern pond turtle and southwestern pond turtle by encouraging management of the habitat for both species in ways that facilitate conservation for each species. The provisions of this proposed rule are one of many tools that we would use to promote the conservation of the northwestern pond turtle and southwestern pond turtle. This proposed 4(d) rule would apply only if and when we make final the listing of the northwestern pond turtle and southwestern pond turtle as threatened species.

As mentioned previously in Available Conservation Measures for the Northwestern and Southwestern Pond Turtle, section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. 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 for the Northwestern and Southwestern Pond Turtles

Exercising the Secretary's authority under section 4(d) of the Act, we have developed a proposed rule that is designed to address the northwestern pond turtle's and southwestern pond turtle's conservation needs. As discussed previously in Summary of Biological Status and Threats, we have concluded that the northwestern pond turtle and southwestern pond turtle are likely to become in danger of extinction within the foreseeable future primarily due to threats associated with the ongoing residual effects of past habitat alteration, increased predation from nonnative bullfrogs, and the effects associated with climate change. 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 northwestern pond turtle and southwestern pond turtle.

The protective regulations we are proposing for the northwestern pond turtle and southwestern pond turtle 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 protective regulation includes all of

these prohibitions because the northwestern pond turtle and southwestern pond turtle are at risk of extinction in the foreseeable future and putting these prohibitions in place will help to prevent further declines, preserve the two species' remaining populations, slow their rates of decline, and decrease negative effects from other ongoing or future threats.

In particular, this proposed 4(d) rule would provide for the conservation of the northwestern pond turtle and southwestern pond turtle by prohibiting the following activities, unless they fall within specific exceptions or are otherwise authorized or permitted: 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.

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 two species' remaining populations and potentially slow the two species' future declines. Therefore, we propose to prohibit take of the northwestern pond turtle and southwestern pond turtle, 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 against take of endangered wildlife, as set forth in 50 CFR 17.21 and certain other specific activities that we propose for exception, as described below.

The proposed 4(d) rule would also provide for the conservation of the two species by allowing exceptions that incentivize conservation actions that, while they may have some minimal level of take of the northwestern pond turtle and southwestern pond turtle, are not expected to rise to the level that would have a negative impact (*i.e.,* would have only de minimis impacts) on the two species' conservation. As described in more detail below, the proposed exceptions to these prohibitions are expected to have negligible impacts to the northwestern pond turtle and southwestern pond turtle and their habitat.

We note that the long-term viability of the northwestern pond turtle and southwestern pond turtle, as with many wildlife species, is intimately tied to the condition of their habitat. As described in our analysis of the two species' status, one of the major threats to the northwestern pond turtle and southwestern pond turtle's continued viability is habitat loss, degradation, and fragmentation resulting from past or current anthropogenic impacts, nonnative bullfrogs, and impacts from an increase and intensity of drought conditions. The exceptions we have determined are appropriate to include for the northwestern pond turtle and southwestern pond turtle include: wildfire suppression and forest management activities; habitat restoration activities specifically identified for the two species otherwise not covered under other permitting processes as coordinated with the Service; nonnative bullfrog removal; and because the northwestern pond turtle and southwestern pond turtle can use various aquatic habitats and often take advantage of artificial ponds such as those developed for livestock, we are proposing to provide an exception for routine ranching activities associated with maintenance of livestock ponds by private landowners. The exceptions we are considering are outlined below.

(1) Forest or wildland management activities that are conducted for the purpose of and in accordance with an established forest or fuels management plan and that include measures that minimize impacts to the species and its aquatic habitat for the purposes of reducing the risk or severity of catastrophic wildfire or maintaining the minimum clearance (defensible space) requirement to provide reasonable fire safety and to reduce wildfire risks consistent with State fire codes or local fire codes or ordinances. These measures include prescribed burns, fuel reduction activities, maintenance of fuel breaks, and defensible space maintenance actions.

(2) Habitat restoration activities conducted as part of nonpermitted Federal or State habitat restoration plans that are developed in coordination with the Service or the Washington Department of Fish and Wildlife, Oregon Department of Fish and Wildlife, California Department of Fish and Wildlife, or Nevada Department of Wildlife that are for the purpose of northwestern pond turtle and/or southwestern pond turtle conservation as appropriate. Measures may include enhancement of nesting sites, clearing of pond or stream habitat of material associated with debris flows, and improving basking areas for the species.

(3) Nonnative bullfrog removal activities that include bullfrog trapping, gigging, shooting with air guns (using nonlead ammunition), dipnetting, or hand catching. Activities that disrupt habitat (*e.g.,* vegetation removal, dewatering) or that may indiscriminately harm or kill wildlife or aquatic organisms (*e.g.,* use of chemicals, electro-shocking) are not included in this exception. Northwestern pond turtle or southwestern pond turtles that are caught alive as part of nonnative bullfrog removal must be returned to their source location.

(4) Routine management and maintenance of livestock ponds, including maintenance and management of berms and dams to maintain livestock water supplies, by landowners. The intentional introduction into a livestock pond of species that may prey on northwestern pond turtle or southwestern pond turtle adults, juveniles, or eggs is not included in this exception.

We described above the prohibitions that apply to threatened species. We may under certain circumstances issue permits to carry out one or more otherwise-prohibited activities. 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 northwestern pond turtle and/or the southwestern pond turtle 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 northwestern pond turtle and/or southwestern pond turtle. 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.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that each Federal action agency ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the Federal agency would have already been required to consult with the Service even absent the designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in 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.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is

unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in the 4(d) rule. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Critical Habitat Determinability

Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the northwestern pond turtle and southwestern pond turtle and habitat characteristics where the two species are located. A careful assessment of the economic impacts that may occur due to a critical habitat designation is still ongoing, and we are in the process of working with our Federal partners, Tribes, and State and other partners in acquiring the complex information needed to perform that assessment. Therefore, due to the current lack of data sufficient to perform required analyses, we conclude that the designation of critical habitat for the northwestern pond turtle and southwestern pond turtle is not determinable at this time. The Act allows the Service an additional year to publish a critical habitat designation that is not determinable at the time of listing (16 U.S.C. 1533(b)(6)(C)(ii)).

Required Determinations

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 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. During the development of the SSA report for the western pond turtle, we asked for information and concerns from all the federally recognized Tribes in the range of the two species in Washington, Oregon, Nevada, and California. We did not receive any information regarding the western pond turtle from any Tribe. We will continue to work with Tribal entities during the development of the final rule for listing of the northwestern pond turtle and southwestern pond turtle and the designation of critical habitat for the two species.

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 Ventura Fish and Wildlife 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 Service's Ecological Field Offices in the Pacific Northwest and Pacific Southwest Regions.

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, in paragraph (h), amend the List of Endangered and Threatened Wildlife by adding entries for ''Turtle, northwestern pond'' and ''Turtle, southwestern pond'' in alphabetical order under REPTILES to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	* * *
REPTILES				
*	*	*	*	* * *
Turtle, northwestern pond.	*Actinemys marmorata.*	Wherever found ..	T	[**Federal Register** citation when published as a final rule]; 50 CFR 17.42(p) [4d].
Turtle, southwestern pond.	*Actinemys pallida*	Wherever found ..	T	[**Federal Register** citation when published as a final rule]; 50 CFR 17.42(p) [4d].
*	*	*	*	* * *

■ 3. As proposed to be amended at 86 FR 62434 (November 9, 2021), § 17.42 is further amended by adding paragraph (p) to read as follows:

§ 17.42 Special rules—reptiles

* * * * *

(p) Northwestern pond turtle (*Actinemys marmorata*) and Southwestern pond turtle (*Actinemys pallida*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the northwestern pond turtle and southwestern pond turtle. Except as provided under paragraph (p)(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 these species:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to these 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 (c)(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) Forest or wildland management activities that are conducted for the purpose of and in accordance with an established forest or fuels management plan and that include measures that minimize impacts to the species and its aquatic habitat for the purposes of reducing the risk or severity of catastrophic wildfire or maintaining the minimum clearance (defensible space) requirement to provide reasonable fire safety and to reduce wildfire risks consistent with State fire codes or local fire codes or ordinances. These measures include prescribed burns, fuel reduction activities, maintenance of fuel breaks, and defensible space maintenance actions.

(B) Habitat restoration activities conducted as part of nonpermitted Federal or State habitat restoration plans that are developed in coordination with the Service or the Washington Department of Fish and Wildlife, Oregon Department of Fish and Wildlife, California Department of Fish and Wildlife, or Nevada Department of Wildlife that are for the purpose of northwestern pond turtle and/or southwestern pond turtle conservation as appropriate.

(C) Nonnative bullfrog removal activities that include bullfrog trapping, gigging, shooting with air guns (using only nonlead ammunition), dipnetting, or hand catching. Activities that disrupt habitat (*e.g.,* vegetation removal, dewatering) or that may indiscriminately harm or kill wildlife or aquatic organisms (*e.g.,* use of chemicals, electro-shocking) are not included in the exception in this paragraph (p)(2)(v)(C). Northwestern pond turtle and southwestern pond turtles that are caught alive as part of nonnative bullfrog removal must be returned to their source location.

(D) Routine management and maintenance of livestock ponds, including maintenance and management of berms and dams to maintain livestock water supplies, by landowners. The intentional introduction into a livestock pond of species that may prey on northwestern pond turtle or southwestern pond turtle adults, juveniles, or eggs is not included in the exception in this paragraph (p)(2)(v)(D).

* * * * *

Janine Velasco,

Acting Director, U.S. Fish and Wildlife Service.

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Federal Acquisition Regulation: Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 4, 7, 10, 11, 12, 37, 39 and 52

[FAR Case 2021–019; Docket No. FAR–2021–0019; Sequence No. 1]

RIN 9000–AO35

Federal Acquisition Regulation: Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to partially implement an Executive Order to standardize cybersecurity contractual requirements across Federal agencies for unclassified Federal information systems, and a statute on improving the Nation's cybersecurity.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before December 4, 2023 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2021–019 to the Federal eRulemaking portal at *https://www.regulations.gov* by searching for ''FAR Case 2021–019''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2021–019''. Follow the instructions provided on the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2021–019'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite ''FAR Case 2021–019'' in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at *https://www.regulations.gov/faq*). To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Carrie Moore, Procurement Analyst, at (571) 300–5917 or by email at *carrie.moore@gsa.gov.* For information pertaining to status, publication schedules, or alternative instructions for submitting comments if *https://www.regulations.gov* cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAR Case 2021–019.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to provide standardized cybersecurity contractual requirements across Federal agencies for Federal information systems (FIS) by implementing: (1) recommendations received in accordance with paragraph (i) of section 2 of Executive Order (E.O.) 14028, ''Improving the Nation's Cybersecurity,'' dated May 12, 2021; and (2) paragraphs (a) and (b)(1) of section 7 of the Internet of Things (IoT) Cybersecurity Improvement Act of 2020 (Pub. L. 116–207). Other aspects of section 2 of E.O. 14028 are being implemented in FAR Case 2021–017, Cyber Threat and Incident Reporting and Information Sharing. This rulemaking does not implement Office of Management and Budget Memorandum M–22–18, Enhancing the Security of the Software Supply Chain through Secure Software Development Practices, issued September 14, 2022.

The United States faces persistent and increasingly sophisticated malicious cyber campaigns that threaten the public and private sectors' security and privacy. The Council of Economic Advisors estimates that malicious cyber activity cost the U.S. economy between $57 billion and $109 billion in 2016. With threats continuing to grow, this activity could yield costs of more than $1 trillion over a decade. In addition to the aggregate effect on the economy, the impact of a single cyber incident to an individual company can be crippling. An October 2020 study from the Cybersecurity and Infrastructure Security Agency (CISA) in the Department of Homeland Security (DHS), entitled ''Cost of a Cyber Incident: Systematic Review and Cross-Validation,'' indicates that the average per-incident cost to small businesses of less than 250 employees and medium-sized businesses of at least 250 employees, but less than 1,000 employees, could range from $5,000 to $226,000, and from $102,000 to $40 million for large businesses of 1,000 employees or more.

The Government must improve its efforts to identify, deter, protect against, detect, and respond to these actions. Contractors must be able to adapt to the continuously changing threat environment, ensure products are built and operate securely, and coordinate with the Government to foster a more secure cyberspace. It also is essential that the Government—and its contractors—take a coordinated approach to complying with applicable security and privacy requirements, which are closely related, though they come from independent and separate disciplines. In the end, the trust the United States places in its digital infrastructure should be proportional to how trustworthy and transparent that infrastructure is, and to the consequences it will incur if that trust is misplaced.

The Government has a responsibility to protect and secure its computer systems, whether they are cloud-based, on-premises, or a hybrid of the two. The scope of that protection and security must encompass the systems that process data (*e.g.,* information technology (IT)) and those that run the vital machinery that ensures its safety (*e.g.,* operational technology (OT)). The Government contracts with IT and OT service providers to conduct an array of day-to-day functions on Federal Information Systems (FIS).

A FIS is an information system used or operated by an agency, by a contractor of an agency, or by another organization, on behalf of an agency. All FISs require protection as part of good risk management practices. Agencies are responsible for determining what information systems are FIS, in accordance with the definition provided in this rule.

Currently, contractual requirements for the cybersecurity standards of unclassified FISs are largely based on agency-specific policies and regulations. The risks associated with agency-specific policies can result in inconsistent security requirements across contracts, as well as be unclear, add costs, and restrict competition.

To address these risks, paragraph (i) of section 2 of E.O 14028 requires the DHS Secretary, acting through the Director of CISA, to review agency-specific cybersecurity requirements that currently exist as a matter of law, policy, or contract and recommend to the FAR Council standardized contract language for appropriate cybersecurity

requirements. Paragraph (j) of section 2 of E.O. 14028 then directs that FAR Council to consider the contract language received from DHS and publish for public comment any proposed updates to the FAR. This proposed rule would implement the DHS recommendations across all Federal agencies to streamline requirements and improve compliance for contractors and the Government.

By standardizing a set of minimum cybersecurity standards to be applied consistently to FISs, the proposed rule would ensure that such systems are better positioned in advance to protect from cyber threats. In addition, and as required by paragraph (k) of section 2 of E.O. 14028, upon issuance of a final rule, agencies shall update their agency-specific requirements to remove any requirements that are duplicative of such FAR updates.

II. Discussion and Analysis

This proposed rule provides cybersecurity policies, procedures, and requirements for contractor services to develop, implement, operate, or maintain a FIS. This rule underscores that compliance with these requirements is material to eligibility and payment under Government contracts.

A contract to develop, implement, operate, or maintain a FIS may require contractors to utilize cloud computing services, services other than cloud computing services (*i.e.,* non-cloud computing services, also known as on-premises computing services), or a hybrid of both approaches when providing services under the contract. As such, this rule specifies the policies, procedures, and requirements that apply to each service approach (*i.e.,* a FIS that uses non-cloud computing services and a FIS that uses cloud computing services). When an acquisition requires the use of both non-cloud computing services and cloud computing services in performance of the contract, the rule would require compliance with the policies, procedures, and requirements for each service approach, as they respectively apply to the FIS.

This rule proposes to: (1) add a new FAR subpart 39.X, ''Federal Information Systems,'' to prescribe policies and procedures for agencies when acquiring services to develop, implement, operate, or maintain a FIS; (2) add and revise definitions in parts 2 and 39.X using current language from statute, regulation, Office of Management and Budget memoranda and circulars, and National Institute of Standards and Technology (NIST) Special Publications (SP) guidance; (3) make conforming changes to parts 4, 7, 37, and 39 to further implement policies and procedures described below; and (4) add two new FAR clauses to be used in contracts for services to develop, implement, operate, or maintain a FIS: FAR clause 52.239–YY, ''Federal Information Systems Using Non-Cloud Computing Services,'' which is included in solicitations and contracts that use non-cloud computing services in performance of the contract; and FAR clause 52.239–XX, ''Federal Information Systems Using Cloud Computing Services,'' which is included in solicitations and contracts that use cloud computing services in performance of the contract. The policies and requirements specified in this rule are discussed below.

A. FISs Using Non-Cloud Computing Services

FIPS Publication 199 Impact Level and Mandatory Security and Privacy Controls. As each requirement will vary in scope, as well as the function of each FIS, adequate security and privacy controls must be identified when agencies define their acquisition requirements. Agencies will use Federal Information Processing Standard (FIPS) Publication 199 to categorize the FIS based on its impact analysis of the information processed, stored, or transmitted by the system. As a result of the analysis, the FIPS Publication 199 impact level of the FIS, as well as a set of necessary security and privacy controls for the FIS, will be specified by the agency in the contract. As part of the security and privacy controls identified by the agency, the rule would require agencies to address multifactor authentication, administrative accounts, consent banners, Internet of Things device controls, and assessment requirements, when applicable, in every applicable contract. The proposed rule adds text to FAR part 7 to ensure that acquisition planners develop agency requirements in accordance with the rule's requirements.

Records Management and Government Access. To assist the Government: (1) in carrying out a program of inspection to safeguard against threats and hazards to the security and privacy of Government data, or (2) for the purpose of audits, investigations, inspections or similar activities, paragraph (c) of the clause 52.239–YY would require contractors to provide the Government's authorized representatives, which includes CISA (for civilian agencies) as well as other Federal agencies as specified by the contracting officer, with timely and full access to Government data and Government-related data, timely access to contractor personnel involved in performance of the contract, and specifically for the purpose of audit, investigation, inspection, or other similar activity, physical access to any contractor facility with Government data including any associated metadata. If the contractor receives a request for access from CISA, the contractor must confirm the validity of the request by contacting CISA and notifying the contracting officer in writing of the request for access.

Assessments. When a FIS is designated as a moderate or high FIPS Publication 199 impact level, paragraph (d) of the clause 52.239–YY would require contractors: (1) to conduct, at least annually, a cyber threat hunting and vulnerability assessment to search for vulnerabilities, risks, and indicators of compromise; and (2) to perform to an annual, independent assessment of the security of each FIS. Upon completion, contractors would submit the results of an assessment, including any recommended improvements or risk mitigations, to the contracting officer. The agency will review the results of the assessment. The agency may require the contractor to implement the recommended improvement or mitigation. The agency may provide the contractor with a rationale for not requiring the contractor to implement the recommendation or mitigation, and if so, the contractor would document the agency's rationale in the System Security Plan (SSP).

If the contractor contracts with a third-party assessment organization to perform these assessments, contractors must enter into a confidentiality agreement with the organization to protect Federal data under the contract. To assist with mitigating any potential conflicts of interest, the clause would also require contractors to notify the contracting officer of any existing business relationships the contractor may have with the organization.

Specification of Additional Security and Privacy Controls. Agencies will also specify in the requirement the security and privacy controls necessary for contract performance. In accordance with paragraph (e) of the clause 52.239–YY, the controls specified by the agency will be based on the current version of the following documents at the time of contract award: NIST SP 800–53, ''Security and Privacy Controls for Information Systems and Organizations;'' NIST SP 800–213 ''IOT Device Cybersecurity Guidance for the Federal Government: Establishing IoT Device Cybersecurity Requirements;'' NIST SP 800–161, ''Cybersecurity

Supply Chain Risk Management Practices for Systems and Organizations;'' and NIST SP 800–82, ''Guide to Industrial Control Systems Security.'' Paragraph (e) also requires contractors to: (1) develop, review, and update, if appropriate, an SSP to support authorization of all applicable FIS, and (2) have contingency plans for all information technology systems, aligned to NIST SP 800–34, ''Contingency Planning Guide for Federal Information Systems.'' The rule does not require a specific format for the SSP, but NIST SP 800–34 provides information on a template that contractors may choose to use. Contractors will be expected to provide a copy of the SSP, as well as make contingency plans available, to an agency upon request.

In some situations, an information system may be designated as a high value asset by the agency. In accordance with paragraph (e) of the clause 52.239–YY, contractors will be subject to, as specified in the requirement, additional security and privacy controls for a high value asset, that could include the implementation of a high value asset overlay, immediate failover and/or recover plans, and complying with requisite cybersecurity assessments (*e.g.,* contractor cooperation and allowing access).

Additional considerations. For each non-cloud FIS developed, implemented, operated, or maintained, paragraph (f) of the clause 52.239–YY requires contractors to apply NIST SP guidance on various topics when performing or managing certain activities related to the FIS, including: managing information system risk when supporting agency risk management activities; developing risk management processes; conducting and communicating the results of risk assessments; designing zero trust architecture approaches; considering security when executing within the context of systems engineering; selecting, adapting, and using cyber resiliency constructs for new systems, system upgrades, or repurposed systems; implementing continuous monitoring strategies for FISs; and implementing digital identity services and requirements. Further, paragraph (f)(7) requires contractors to provide the Government with a copy of their continuous monitoring strategy for the FIS that demonstrates an ongoing awareness of information security, vulnerabilities, and threats in order to support risk management decisions, and applies the use of automation, wherever possible; protects vulnerability scan data, logs, and telemetry; and applies the guidance of NIST SP 800–137, ''Information Security Continuous Monitoring (ISCM) for Federal Information Systems and Organizations.''

Cyber supply chain risk management. Paragraph (g) of the clause 52.239–YY advises that contractors may implement alternative, additional, or compensating cyber supply chain risk management security controls from those stated in the contract, when authorized in writing to do so by the contracting officer.

Notifiable incident reporting, incident response, and threat reporting. Paragraph (h) of the clause 52.239–YY reminds contractors that they must refer to FAR clause 52.239–ZZ, ''Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology'' (see FAR case 2021–017), for guidance on handling security incident and cyber threat reporting.

Other protections. Paragraph (i) of the clause 52.239–YY specifies the limitations on contractor access to, use, and disclosure of Government data, Government-related data, and metadata under the contract, and requires contractors to notify the contracting officer of any requests from an entity other than the contracting activity (including warrants, seizures, or subpoenas the contractor receives from another Federal, State, or local agency) for access to Government data, Government-related data, or any associated metadata. The clause also notifies contractors that they must also comply with applicable clauses, regulations, and laws regarding unauthorized disclosure.

Cryptographic Key Services. When providing cryptographic key services under the contract, paragraph (j) of the clause 52.239–YY requires contractors to provide the agency with applicable key material and services; however, the Government reserves the right to implement and operate its own cryptographic key services under the contract.

Operational Technology Equipment List. Paragraph (k) of the clause 52.239–YY requires contractors to develop and maintain a list of the physical location of all operational technology equipment included within the boundary for the non-cloud FIS and provide a copy to the Government, upon request. While the proposed rule does not specify a format for the operational technology equipment list, contractors must ensure that the list includes enough information about the equipment to positively locate and track any movement of the equipment during contract performance, including details on password protection and the ability for remote access to the equipment.

Binding Operational Directives and Emergency Directives. Paragraph (l) of clause 52.239–YY advises that contractors must comply with Binding Operational Directives (BODs) and Emergency Directives (EDs) issued by CISA that have specific applicability to a FIS used or operated by a contractor. A list of BODs and EDs can be found at *https://www.cisa.gov/directives.* Occasionally, a BOD or ED with an explicit applicability to a FIS used or operated by a contractor will not need to apply to a contract. In such situations, the contracting officer will identify, in paragraph (l)(2) of the clause, any such BODs or EDs that are not applicable to the contract.

Indemnification. Paragraph (m) of the clause 52.239–YY indemnifies the Government from any liability that arises out of the performance of the contract and is incurred because of the contractor's introduction of certain information or matter into Government data or the contractor's unauthorized disclosure of certain information or material. The paragraph serves as a waiver of defense to change the analysis from negligence, which is the defense, to strict liability, which doesn't allow for a defense. The paragraph also provides terms and requirements in the event of a claim or suit against the Government for such an unauthorized disclosure or introduction of data or information. The proposed text was taken from industry terms of service agreements for cloud services providers.

Subcontracts. Paragraph (n) of the clause 52.239–YY advises contractors that the substance of the clause must be included in any subcontracts issued under the contract that are for services to develop, implement, operate, or maintain a FIS using non-cloud computing services.

Prohibition on IoT Devices. The rule also implements a portion of the ''Internet of Things Cybersecurity Improvement Act of 2020'' (Pub. L. 116–207), which prohibits agencies from procuring or obtaining, renewing a contract to procure or obtain, or using an IoT device if the agency's Chief Information Officer determines in certain situations that the use of such a device prevents compliance with NIST SP 800–213. The rule advises contracting officers at 39.X03–1(b) of the prohibition and how the prohibition may be waived by the head of the agency if certain criteria are met.

B. FIS Using Cloud Computing Services

When acquiring services to develop, implement, operate, or maintain a FIS

using cloud computing services, agencies will identify the FIPS Publication 199 impact level and the corresponding Federal Risk and Authorization Management Program (FedRAMP) authorization level for all applicable cloud computing services in the contract.

Safeguards, controls, and maintenance of certain systems within the United States. Paragraph (c) of the clause 52.239–XX requires contractors to implement and maintain the security and privacy safeguards and controls in accordance with the FedRAMP level specified by the agency, engage in continuous monitoring activities, and provide continuous monitoring deliverables as required for FedRAMP approved capabilities. More information on these deliverables can be found in the ''FedRAMP Continuous Monitoring Strategy Guide'' at *https://www.fedramp.gov/assets/resources/documents/CSP_Continuous_Monitoring_Strategy_Guide.pdf.*

Additionally, paragraph (c) specifies that, when a system is categorized as having FIPS Publication 199 high impact, contractors must maintain within the United States or its outlying areas (see FAR 2.101) all Government data that is not physically located on U.S. Government premises, unless otherwise specified in the contract.

Government data. Paragraph (f) of the clause 52.239–XX requires contractors to provide and dispose of Government data and Government-related data in the manner and format specified in the contract. Contractors must also provide confirmation to the contracting officer that such data has been disposed of in accordance with contract closeout procedures.

Other protections. Similar to the requirements for non-cloud FISs in clause 52.239–YY, the clause 52.239–XX: (1) at paragraph (c), reserves the Government's right to implement and operate its own cryptographic key services under the contract; (2) at paragraph (d), specifies the limitations on contractor access to, use, and disclosure of Government data and Government-related data under the contract; (3) at paragraph (e), requires contractors to handle security incident and cyber threat reporting in accordance with proposed FAR clause 52.239–ZZ; (4) at paragraph (f), specifies the terms for the Government's authorized representatives' access to Government and Government-related data, contractor personnel, and contractor facilities; (5) at paragraph (g), requires contractors to notify the contracting officer of any requests from a third-party (including another Federal, State, or local agency) for access to Government data and Government-related data; (6) at paragraph (h), requires contractors to indemnify the Government from any liability that arises out of the performance of the contract because of the contractor's introduction of certain information or matter into Government data or the contractor's unauthorized disclosure of certain information or material; and (7) at paragraph (i), specifies when to include the substance of the clause in subcontracts.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items) or for Commercial Services

This rule applies section 7 of the Internet of Things Cybersecurity Improvement Act of 2020 (15 U.S.C. 278g–3e) to acquisitions valued at or below the SAT because of the ''notwithstanding section 1905'' in 15 U.S.C. 278g–3e(a)(2) which applies the Act to such acquisitions. This rule also applies to acquisitions for commercial products, including COTS items, and commercial services because Government data and systems require protection regardless of dollar value or commerciality of the product or service.

To implement paragraphs (a) and (b)(1) of section 7 of the Act, this rule adds a new policy at FAR 39.X02–1(b), Prohibited IoT devices in Federal information systems. The policy prescribed at FAR 39.X02–1(b) applies when agencies are acquiring IoT devices.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law. At the time of the final rule the FAR Council does not intend to make a determination to apply 15 U.S.C. 278g–3e to acquisitions at or below the SAT because paragraph (a)(2) of 15 U.S.C. 278g–3e expressly states that it applies to acquisitions in amounts not greater than the SAT; therefore, no additional determination is necessary under 41 U.S.C. 1905.

B. Applicability to Contracts for the Acquisition of Commercial Products and Commercial Services, Including Commercially Available Off-the-Shelf (COTS) Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services, and is intended to limit the applicability of laws to contracts for the acquisition of commercial products and commercial services. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial products and commercial services.

41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from certain provisions of law unless the Administrator for Federal Procurement Policy makes a written determination and finds that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items.

At the time of the final rule the FAR Council intends to make a determination to apply 15 U.S.C. 278g–3e to acquisitions for commercial products and commercial services. At the time of the final rule, the Administrator for Federal Procurement Policy intends to make a determination to apply 15 U.S.C. 278g–3e to acquisitions for COTS items.

C. Determination(s)

This rule applies to acquisitions for commercial products, including COTS items, and commercial services, because Government data and systems require protection regardless of dollar value or commerciality of the product or service.

IV. Expected Impact of the Rule

The Government anticipates that this rule will reduce administrative costs for contractors interested in providing services to develop, implement, operate, or maintain a FIS. Over time, the FAR Council anticipates this proposed rule, once finalized, will increase competition by establishing a common set of policies and procedures that apply to FISs.

Establishing uniform requirements for the Government and contractors regarding FISs will significantly assist the Government in protecting Federal information and systems from malicious cyber campaigns that threaten the public and private sectors' security and

privacy. Currently, contract requirements for the cybersecurity standards of unclassified FISs are largely based on agency-specific policies and regulations, which can lead to inconsistent security requirements across contracts and unclear, inconsistent, or overly restrictive guidance to contractors. This rule will provide a more consistent and streamlined implementation of cybersecurity standards across the Federal Government.

A. Affected Entities

This rule proposes two new contract clauses for use when acquiring services to develop, implement, operate, or maintain a FIS. Specifically, the contracting officer will include—

- The clause at FAR 52.239–YY, Federal Information Systems Using Non-Cloud Computing Services, in solicitations and contracts that use or may use non-cloud computing services in performance of the contract; and
- The clause at FAR 52.239–XX, Federal Information Systems Using Cloud Computing Services, in solicitations and contracts that use or may use cloud computing services in performance of the contract.

According to subject matter experts, there are approximately 140 non-cloud FISs currently being operated or maintained by contractors on behalf of the Government. For this estimate, the Government conservatively assumes that the services for each of these non-cloud FISs are awarded on individual contracts and that each contract is awarded to a unique entity. It is assumed that each of these contracts have a five-year period of performance, and that the Government evenly awards the estimated 140 contracts over a five-year period (20 percent each year). Therefore, the Government estimates it awards 28 contracts ((20 percent * 140 non-cloud FISs) * 1 contract/FIS) to 28 unique contractors (28 contracts = 28 unique entities) annually for the development, implementation, operation, or maintenance of a non-cloud FIS on behalf of the Government.

According to FedRAMP data and subject matter experts, there are approximately 280 unique FedRAMP-authorized and ready cloud service offerings available to the Federal Government. For this estimate, the Government will award approximately 280 contracts for cloud services impacted by this rule over a five-year period (20 percent each year). Based on the number of FedRAMP-authorized offerings, the Government estimates that there are approximately 56 new or revised FIS offerings (20 percent * 280 cloud service offerings) each year for which the Government contracts. For this estimate, the Government assumes: the number of new or revised FIS offerings the Government contracts for each year is equivalent to the number new FIS impacted by this rule annually; one service provider is responsible for executing all the requirements of this rule for a FIS; and that each FIS is being serviced by a different contractor. Therefore, the Government estimates that 56 unique entities will be awarded a contract annually for the development, implementation, operation, or maintenance of a cloud FIS on behalf of the Government.

Based on the input of subject matter experts, the Government further estimates that:

- Of the 28 contractors that will be awarded a contract each year to operate or maintain a non-cloud FIS, approximately three (10 percent) are small businesses and 25 (90 percent) are other than small businesses.
- Of the 56 contractors that will be awarded a contract each year to operate or maintain a cloud FIS, approximately three (five percent) are small businesses and 53 (95 percent) are other than small businesses.

B. Contractor Compliance Requirements and Estimate of Cost

The total estimated annualized public costs associated with this FAR rule over a ten-year period (calculated at a 7-percent discount rate) are approximately $55 million annually, or $388 million in net present value, based on the discussion in paragraphs IV.B.1. through IV.B.7 below.

The following compliance requirements in FAR clause 52.239–YY and 52.239–XX are considered new to the FAR for all Federal contractors that develop, implement, operate, or maintain a FIS using cloud or non-cloud computing services, as applicable:

1. Regulatory Familiarization

The new FAR clauses are prescribed for use in solicitations and contracts for services to develop, implement, operate, or maintain a FIS. It is expected that all 84 contractors (28 non-cloud FIS contractors + 56 cloud FIS contractors) awarded a contract annually for these services will need, to some degree, to become familiar with the various compliance requirements of the FAR, as well as the requisite and applicable NIST SP guidelines, FIPS Publication standards, CISA BODs and EDs, and FedRAMP requirements, to be prepared to implement and maintain the cybersecurity standards and requirements for a FIS in performance of a Federal contract. It is assumed that most contractors will be familiar with, to some degree, some or all these documents.

Offerors will also need to be familiar with these requirements before submitting a proposal to provide such services. For each of the 84 contractors that receive a contract annually for these services, the Government estimates that, on average, two other offerors, or a total of 168 offerors (84 contractor awards * 2 unsuccessful offerors) will familiarize themselves with the clause requirements, submit a proposal, but will not receive a contract award.

As a result, it is expected that all 252 (84 contractors + 168 offerors) of these contractors and offerors will be required to become familiar with the various compliance requirements of the rule.

It is estimated that it will take each offeror or contractor eight hours, on average, to review the rule and gain a basic understanding these new requirements. The average wage rate of a contractor employee is estimated to be $57.28 per hour, which is the average of the mean wages reported by the Bureau of Labor Statistics (BLS) for various occupational categories that design, analyze, maintain, and oversee information systems for an organization. A factor of 42 percent, based on the BLS Employer Costs for Employee Compensation Summary dated March 17, 2023 (*https://www.bls.gov/news.release/ecec.nr0.htm*), is applied to the average wage rate to account for total employee benefits paid for by the employer ($57.28 * 1.42 = $81.34), and a factor of 12 percent is then applied to the rate of $81.34 to account for employer overhead, which results in a loaded rate of $91.10 ($81.34 * 1.12) for FIS occupations.

Therefore, the estimated cost for 252 contractors and offerors to familiarize themselves with the rule in year one is approximately $183,700 (252 contractors and offerors * 8 hours/entity * $91.10/hour). The cost accounts for the time needed to comprehend the text of the rule, as well as locate and generally review the requirements within each of the cited documents in the rule.

2. Compliance With NIST Guidelines

All 28 contractors that develop, implement, operate, or maintain a FIS using non-cloud computing services are required by paragraphs (e) and (f) of the new clause 52.239–YY to use or apply various NIST SP guidelines for managing risk, security, and privacy, as applicable. The extent to which each of these guidance documents needs to be implemented by a contractor depends

on many variables, including: the extent to which the guidance is already implemented in the contractor's existing practices; the scope and requirements of each contract; the knowledge and expertise of the contractor's employees; the manner in which a contractor chooses to implement a requirement; and the resources and tools available to the contractor in performing the contract.

Based on the discussion in paragraphs IV.B.2.i. through IV.B.2.x. below, the total annual estimated cost for 28 contractors, as applicable, awarded a contract to develop, implement, operate, or maintain an existing or custom-build, non-cloud FIS on behalf of the Government, to comply with NIST guidelines in year one is approximately $19.6 million, and approximately $12 million each subsequent year for annual maintenance to remain compliant with existing NIST guidelines.

The cost for complying with NIST guidelines accounts for the time it takes contractors to closely read through the documents, analyze the requirements against the current state and identify any necessary changes, and implement and document the change, as needed.

i. NIST SP 800–53. The effort and resources a contractor will expend to comply with NIST SP 800–53 will also vary depending on whether the affected FIS is an existing system or a system that will be custom built to Government specifications.

Existing systems already implement some of the guidelines required by the clause or their implementation has been accepted by the Government, while custom-built systems have no pre-existing controls in place and will require a greater amount of effort and resources to be compliant with the clause. The Government estimates that of the 28 contractors annually awarded a contract to develop, implement, operate, or maintain a non-cloud FIS, approximately six contractors (20 percent) are awarded a contract involving a custom-build system, while the remaining 22 contractors (80 percent) are awarded a contract involving an existing system.

Contractors awarded a contract involving an existing non-cloud FIS are anticipated to expend between 2,300 and 6,500 hours and $218,000 and $683,000 in labor and materials in year one to implement, and between $127,000 and $478,000 each following year to maintain compliance with NIST SP 800–53. The cost and effort to implement and maintain compliance will vary by contractor depending on various factors, including: the complexity of the information system; the availability of employees with the requisite knowledge and skills to implement the necessary controls; the need to install hardware or software, and the chosen solution, as well as the number of users impacted, the types of devices used, and the complexity of the contractor's network.

Contractors awarded a contract involving a custom build non-cloud FIS will expend between 3,000 and 7,300 hours and between $308,000 and $976,000 in labor and materials in year one to implement, and between $126,000 and $478,000 each following year to maintain compliance with NIST SP 800–53. The cost and effort to maintain compliance will vary by contractor based on the factors discussed above.

ii. NIST SP 800–213. This document provides high level guidance that refers readers to other NIST SP documents addressed in this rule. Contractors may reference this guidance when their contracts involve IoT devices. As such, the Government assumes that a small percentage of the 28 contractors awarded a contract involving a non-cloud FIS, whose contract also involves IoT devices, may refer to this publication for direction to more detailed policy and guidance regarding the devices; However, the Government does not anticipate contractors expending significant effort reading and familiarizing themselves with the publication and considers these costs to be de minimis.

iii. NIST SP 800–39. NIST SP 800–39 identifies the Government's risk management responsibilities related to information systems. All contractors awarded a contract involving a non-cloud FIS will need to be aware of the requirements of the publication to adequately support the non-cloud FIS on behalf of the Government. As such, the Government assumes all 28 contractors awarded a contract involving a non-cloud FIS will expend effort to read and become more familiar with the publication. It is estimated that a contractor will expend approximately 4 hours reading NIST SP 800–39 in year one to become more familiar with its contents. Using an average loaded wage rate of $91.10 for FIS occupations, the total estimated labor cost for a contractor to comply with NIST SP 800–39 is approximately $370(4 hours * $91.10).

iv. NIST SP 800–37. Contractors will reference this guidance to develop a high-level process to manage system risk through preparation, categorization, control selection, control implementation and assessment, system authorizations, and continuous monitoring. This guidance applies to contracts involving a custom-build system. As such, the Government assumes all 6 contractors awarded a contract involving a custom-build, non-cloud FIS will expend effort to comply with this guidance.

It is estimated that, in year one, a contractor will expend approximately 8 hours reading and ensuring the processes they develop incorporate the high-level guidance of NIST SP 800–37. Using an average loaded wage rate of $91.10 for FIS occupations, the total estimated labor cost for a contractor to comply with NIST SP 800–37 is approximately $730 (8 hours * $91.10).

v. NIST SP 800–207. Contractors will reference this guidance when designing a zero-trust architecture approach for a system. This guidance applies to contracts involving a custom-build system; However, this document is very high level and applies to custom-build requirements in limited circumstances. For these reasons, the Government does not anticipate most contractors needing to read and familiarize themselves with the publication, as its application is unlikely in most custom-build contracts and, in such circumstances, any time spent reviewing the guidance will be very minimal.

vi. NIST SP 800–160, Volume 1. This guidance applies to contracts involving a custom-build system. Contractors will reference the current version of this guidance for considerations, concepts, tasks, and activities to be taken when designing a system. As such, the Government assumes all 6 contractors awarded a contract involving a custom-build, non-cloud FIS will expend effort to read and familiarize themselves with the publication and make any requisite adjustments to their security design process to be compliant with the guidance.

It is estimated that a contractor will expend approximately 40 hours reading to become more familiar and adjusting the FIS design process to comply with NIST SP 800–160 Volume 1 in year one. Using an average loaded wage rate of $91.10 for FIS occupations, the total estimated labor cost for a contractor to comply with NIST SP 800–160 Volume 1 is approximately $3,600 (40 hours * $91.10).

vii. NIST SP 800–160, Volume 2. When requested by the Government, contractors will reference the current version of this guidance to select, adapt, and use cyber resiliency constructs for new systems, system upgrades, or repurposed systems. This guidance applies to contracts involving a custom-build system. As such, the Government assumes all 6 contractors awarded a

contract involving a custom-build, non-cloud FIS will expend effort to read and become more familiar with the publication.

It is estimated that a contractor will expend approximately 16 hours reading NIST SP 800–160 Volume 2 to become more familiar with its requirements in year one. Using an average loaded wage rate of $91.10 for FIS occupations, the total estimated labor cost for a contractor to comply with NIST SP 800–160 Volume 2 is $1,500(16 hours * $91.10).

viii. NIST SP 800–30. Contractors will reference the current version of this guidance to develop and ensure existing processes prepare for, conduct, communicate results from, and maintain risk assessments over time. This guidance is applicable to all contracts involving a custom-build system, as these processes will need to be developed for those FIS, as well as some contracts involving existing systems where current processes need to be modified to comply with the guidance. As such, the Government assumes all 6 contractors awarded a contract involving a custom-build, non-cloud FIS, and 4 (20 percent * 22) contractors awarded a contract involving an existing, non-cloud FIS will expend effort to read and better familiarize themselves with the publication and develop new or adapt existing processes to the guidance of NIST SP 800–30.

Some contractors awarded a contract involving a non-cloud FIS will reference NIST SP 800–30 to develop and ensure risk assessment processes and procedures for the system incorporate the requirements of the publication. It is estimated that all 6 contractors awarded a contract involving a non-cloud, custom-build FIS, as well as 4 contractors (20 percent) awarded a contract involving an existing non-cloud FIS will expend approximately 120 hours (3 employees * 8 hours/day * 5 days) reading to become more familiar with and developing or adjusting processes and procedures to comply with NIST SP 800–30 in year one. Using an average loaded wage rate of $91.10 for FIS occupations, the total estimated labor cost for a contractor to comply with NIST SP 800–30 is approximately $10,900 (120 hours * $91.10).

ix. NIST SP 800–63–3. Contractors may reference the current version of this guidance for more specific information regarding NIST SP 800–53 controls. As such, the Government assumes that the 28 contractors awarded a contract involving a non-cloud FIS will read and better familiarize themselves with this publication in conjunction with and as a part of their familiarization efforts and costs for NIST SP 800–53.

x. NIST SP 800–34. Contractors will reference the current version of this guidance to align its contingency plans for all IT systems to the requirements of NIST SP 800–34. This guidance will be applicable to all contracts involving a custom-build system, as these plans will need to be developed for when a new non-cloud FIS is being designed, as well as some contracts involving existing systems where current plans need to be modified to comply with the guidance. As such, the Government assumes all 6 contractors awarded a contract involving a custom-build, non-cloud FIS and 4 (20 percent * 22) of the contractors awarded a contract involving an existing, non-cloud FIS will expend effort to read and better familiarize themselves with the publication and develop new or adapt existing plans to the guidance of NIST SP 800–34.

Some contractors awarded a contract involving a non-cloud FIS will reference this guidance when developing new contingency plans for custom-build FISs and reviewing plans for some existing FISs to ensure the contractor's IT systems meet the requirements set forth in NIST SP 800–34. It is estimated that all 6 contractors awarded a contract involving a non-cloud, custom-build FIS, as well as 4 (20 percent) contractors awarded a contract involving an existing non-cloud FIS will expend approximately 120 hours (3 employees * 8 hours/day * 5 days) reading to become more familiar with and developing or adjusting plans to comply with NIST SP 800–34 in year one. Using an average loaded wage rate of $91.10 for FIS occupations, the total estimated labor cost for a contractor to comply with NIST SP 800–34 is $10,900(120 hours * $91.10).

3. Annual Assessments of the FIS

Paragraph (d) of the new clause 52.239–YY requires a contractor that develops, implements, operates, or maintains a FIS using non-cloud computing services and that FIS is designated as a moderate or high FIPS Publication 199 impact, to perform an annual, independent assessment of the security of each FIS, which includes an architectural review and penetration testing of the FIS. The contractor must also conduct, at least annually, cyber threat hunting and vulnerability assessment to search for cybersecurity risks, vulnerabilities, and indicators of compromise. Contractors are required to provide the contracting officer with the results of both assessments, including any recommended improvements or risk mitigations identified for the FIS. If the Government chooses not to require the contractor to implement a recommended improvement or risk mitigation and provides the contractor with a rationale for not implementing the recommendation, the contractor is required to document the Government's rationale for not implementing the recommendation in the contractor's system security plan.

Of the 140 non-cloud FISs currently being operated or maintained by contractors on behalf of the Government, the Government estimates that approximately 95 percent of those systems are designated as moderate or high FIPS 199 impacts. Applying that percentage to the estimated number of contractors annually awarded a contract to develop, implement, operate, or maintain a non-cloud FIS, it is estimated that 27 contractors (95 percent * 28 contractors) will be subject to the annual assessment requirements.

Based on the discussion in paragraphs IV.B.3.i. through IV.B.3.iii. below, the total annual estimated cost for 27 contractors that operate or maintain a non-cloud FIS designated as a moderate or high FIPS 199 impact to comply with the annual assessment requirements of the rule is approximately $6.6 million (27 contractors * ($112,000 + $132,000 + $182)). The cost of the annual assessments accounts for the time it takes contractors to prepare for, conduct, document, review, and submit an assessment.

i. Annual Independent Architectural Review and Penetration Test. This annual assessment includes an architectural review of the FIS, as well as penetration testing of the system. Based on the input of subject matter experts, the Government estimates the annual cost for a contractor to obtain an independent security assessment and architectural review of a FIS is approximately $52,000.

The Government estimates that four senior level employees will expend a total of 320 hours (4 individuals * 8 hours * 10 days) to complete the penetration testing of a FIS. According to subject matter experts, the average loaded wage rate of for a penetration tester is $250.00. The Government estimates the annual cost for a contractor to obtain independent penetration testing of a FIS is $80,000 (320 hours * $250).

Together, the annual cost to a contractor to obtain an independent assessment of the security of a FIS is approximately $132,000 ($52,000 + 80,000).

ii. Cyber Threat Hunting and Vulnerability Assessment. The

Government estimates that four senior level employees will expend a total of 448 hours (4 individuals * 8 hours * 14 days) to complete cyber threat hunting and the vulnerability assessment of a FIS. Using an average loaded wage rate of $250.00 for a cyber threat hunter/vulnerability assessor, the Government estimates the annual cost for a contractor to conduct a cyber threat hunting and vulnerability assessment of a FIS is approximately $112,000 (448 hours * $250).

iii. Submission of Assessments. The Government estimates a contractor will spend one hour preparing and submitting each assessment to the Government. Using an average loaded wage rate of $91.10 for FIS occupations, the total annual estimated cost for a contractor that operates or maintains a non-cloud FIS designated as a moderate or high FIPS 199 impact to submit both assessments to the Government is approximately $182 (1 hour * 2 responses * $91.10).

4. Submission of a Continuous Monitoring Strategy

Paragraph (f)(7) of the new clause 52.239–YY requires a contractor that develops, implements, operates, or maintains a non-cloud FIS to provide the Government with a continuous monitoring strategy for the FIS (as developed under NIST SP 800–53) that demonstrates an ongoing awareness of information security, vulnerabilities, and threats in order to support risk management decisions, and applies the use of automation, wherever possible; protects vulnerability scan data, logs, and telemetry; and applies the guidance of NIST SP 800–137, ''Information Security Continuous Monitoring (ISCM) for Federal Information Systems and Organizations.''

All 28 contractors awarded a contract involving a non-cloud FIS will be required to develop or update their continuous monitoring strategy to meet the requirements of this rule. Many contractors will have developed a continuous monitoring strategy to comply with the guidance in NIST 800–53; however, those plans may need to be revised to demonstrate a continuous monitoring strategy. The Government estimates a contractor will spend, on average, 160 hours developing and/or documenting a continuous monitoring strategy, revising their existing strategy, as needed, and submitting the strategy to the Government. Using an average loaded wage rate of $91.10 for FIS occupations, the total annual estimated cost for a contractor that operates or maintains a non-cloud FIS to submit a continuous monitoring strategy to the Government is approximately $14,600 (160 hours * $91.10).

Based on the information above, the total annual estimated cost for 28 contractors that design, develop, operate, or maintain a non-cloud FIS to comply with the requirement for a continuous monitoring strategy in year one is approximately $408,000 (28 contractors * 160 hours * $91.10). The cost of the continuous monitoring strategy accounts for the time needed to analyze, develop, and document a strategy or review an existing strategy and make revisions, and prepare and submit the strategy to the Government.

5. Develop and Maintain a List of Operational Technology Equipment

Paragraph (k) of the new clause 52.239–YY requires all contractors that develop, implement, operate, or maintain a FIS using non-cloud computing services to develop and maintain a list of the physical location and other pertinent data on all of the operational technology (OT) equipment included within the boundary of the FIS. Contractors must provide the Government with a copy of the current and/or historical lists, upon request. All 28 contractors awarded a contract involving a non-cloud FIS will be required to develop, submit, and maintain a list of OT equipment.

The Government estimates that a contractor will expend approximately 80 hours developing the list in year one, and 40 hours updating and maintaining the list each year thereafter. Using an average loaded wage rate of $91.10 for FIS occupations, the annual estimated cost for a contractor that operates or maintains a non-cloud FIS to develop a list of OT equipment is approximately $7,300 (80 hours * $91.10), and approximately $3,600 to maintain the list thereafter.

It is estimated that the Government will annually request 6 (20 percent * 28 contractors) contractors provide a copy of the OT equipment list to the Government. It is estimated that a contractor will spend one hour preparing and submitting the list to the Government. Using an average loaded wage rate of $91.10 for FIS occupations, the total annual estimated cost for contractors to submit the OT equipment lists to the Government is approximately $550 (6 contractors * 1 hours * $91.10).

Based on the discussion above, the total annual estimated cost for 28 contractors that develop, implement, operate, or maintain a non-cloud FIS to develop the required OT equipment list in year one is approximately $204,000 (28 contractors * 80 hours * $91.10), and approximately $102,000 (28 contractors * 40 hours * $91.10) each following year to maintain the list annually. The cost accounts for the time needed to identify the requisite equipment, gather the required data, and document or update the information.

6. Binding Operational Directives and Emergency Directives

Paragraph (l) of the new clause 52.239–YY requires all contractors that develop, implement, operate, or maintain a FIS using non-cloud computing services to comply with any BODs or EDs issued by CISA that have a specific applicability to a FIS used or operated by a contractor. All 28 contractors awarded a contract involving a non-cloud FIS will be required to comply with CISA BODs and EDs. Currently, there are approximately 15 BODs and 10 EDs posted on CISA's cybersecurity directives website. The Government anticipates that contractors have already implemented all or some of the requirements of all or some BODs or EDs, as part of their company's cybersecurity health. As a result, the Government estimates that the requirements of approximately half of the BODs, or 8 BODS, and EDs, or 5 EDs, will still need to be implemented by a contractor because of this rule in year one. The Government estimates that approximately 3 new BODs or EDs will be issued, and need to be implemented by contractors, in each following year.

The requirements of the BODs and EDs vary in depth, scope, and complexity depending on the topic and issue being addressed. For this reason, subject matter experts estimate that, on average, it costs a contractor $10,000 to implement a new BOD or ED. As a result, the total annual estimated cost for a contractor that operates or maintains a non-cloud FIS to implement existing CISA BODs and EDs in year one is approximately $130,000 (13 × $10,000), and approximately $30,000 to implement new BODs or EDs issued each following year.

Based on the discussion above, the total annual estimated cost for 28 contractors that develop, implement, operate, or maintain a non-cloud FIS to implement the requirements of CISA BODs and EDs in year one is approximately $3,640,000 (28 contractors * 13 BODs and EDs * $10,000), and approximately $840,000 (28 contractors * 3 BODs & EDs * $10,000) each following year to maintain the list annually. The cost accounts for the time needed to identify

and implement the requisite requirements, as well as any material cost.

7. FedRAMP Cloud Computing Security and Privacy Requirements

The new clause 52.239–XX requires contractors that develop, implement, operate, or maintain a FIS using cloud computing services to implement and maintain security and privacy safeguards and controls for the system in accordance with the FedRAMP level specified in the contract, as well as certain requirements on multifactor authentication, administrative accounts, and consent banners specified in the contract. All 56 contractors awarded a contract to develop, implement, operate, or maintain a cloud FIS on behalf of the Government will expend effort and resources to be compliant with cloud computing security requirements at the FedRAMP level specified in the contract and certain requirements specified in the contract.

FedRAMP safeguards and controls are based upon the requirements of NIST SP 800–53 and specify the requirements that must be met for a cloud offering depending on the designation of the information system as a low, moderate, or high FIPS 199 impact level, which then equates to a single FedRAMP impact level. Based on a survey of the FedRAMP Marketplace website, most of the FedRAMP-authorized cloud service providers offer solutions designated as moderate FedRAMP impact level; Therefore, the Government bases the effort and resources needed to implement the requirements of FAR clause 52.239–XX on a cloud FIS designated as a FedRAMP moderate impact level.

The safeguards and controls required to meet a FedRAMP moderate impact level include and build upon the NIST SP 800–53 requirements for existing non-cloud FIS systems. As such, the rule uses the costs to implement NIST SP 800–53 for non-cloud FIS as a starting point and then accounts for the additional costs and impacts for contractors to implement approximately 16 additional NIST SP 800–53 controls, which are not required for non-cloud FISs, to be compliant with FedRAMP moderate impact level requirements. Subject matter expects estimate that the effort to implement these 16 additional controls, and those requirements for multifactor authentication, administrative accounts, and consent banners, is approximately 25 percent of the total estimated hours and cost to implement NIST SP 800–53.

Therefore, contractors awarded a contract involving a cloud FIS are anticipated to expend between 2,900 (2,300 hours * 1.25) and 8,200 hours (6,500 hours * 1.25) and $273,000 ($218,000 * 1.25) and $854,000 ($683,000 * 1.25) in labor and materials in year one to implement, and between $158,000 ($127,000 * 1.25) and $598,000 (478,000 * 1.25) each following year to maintain compliance with NIST SP 800–53 and the contract requirements on multifactor authentication, administrative accounts, and consent banners.

Based on the discussion above, the total annual estimated cost for 56 contractors that develop, implement, operate, or maintain a cloud FIS to maintain compliance with FedRAMP requirements, and the requirements specified in the contract as identified above, in year one is approximately $46 million, and approximately $32,000,000, each following year to maintain compliance with FedRAMP requirements and the contract, as specified. The cost of the compliance includes the time needed to read and implement NIST SP 800–53 requirements, as well as the additional NIST SP 800–53 controls needed to be compliant with FedRAMP and the contract requirements regarding multifactor authentication, administrative accounts, and consent banners.

The following is a summary of the total initial and subsequent year costs to the public as described in section IV.

Requirement	Number of entities impacted	Estimated total cost—first year	Estimated total cost—each subsequent year
Regulatory Familiarization	252	$183,700	N/A
Compliance with NIST Guidelines	28	19,600,000	12,000,000
Annual Assessments	27	6,600,000	6,600,000
Continuous Monitoring Strategy	28	408,000	N/A
Develop and Maintain OT List	28	204,000	102,000
Binding Operational Directives and Emergency Directives	28	3,640,000	840,000
FEDRamp Compliance	53	46,000,000	32,000,000
Totals	.....	76,635,700	51,543,000

C. Government Compliance Requirements

The total estimated annualized costs to the Government associated with this FAR rule over a ten-year period are approximately $136,000 (calculated at a 7-percent discount rate).

The following specific compliance requirements related to FAR clause 52.239–XX and 52.239–YY are tasks for the Government:

1. Review and Analyze Annual Assessments

The Government must review and analyze each of the 54 assessments provided by contractors annually (see 39.X03(c)) and provide a recommendation to the contractor to implement, or a rationale for not implementing, each recommendation in the contractor's assessments.

It is estimated that a General Schedule (GS) 15/step 5 employee will spend 20 hours reviewing, analyzing, and drafting recommendation responses for each assessment. The wage rate of a GS 15/step 5 employee is $74.35 per hour, according to the Office of Personnel Management (OPM) 2023 GS Locality Pay Table for the rest of the United States (*https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf*). A factor of 36.25 percent, based on OMB M–08–13, Update to Civilian Position Full Fringe Benefit Cost Factor, is applied to the average wage rate to account for total employee benefits paid for by the Government ($74.35 * 1.3625 = $101.30), and a factor of 12 percent is then applied to the rate of $101.30 to account for overhead, which results in a loaded rate of $113.46 ($101.30 * 1.12).

Based on the discussion above, the total annual estimated cost for the Government to review, analyze, and

respond to 54 annual assessment submissions each year is approximately $122,537 (54 responses * 20 hours * $113.46).

2. Review List of Operational Technology Equipment

Upon submission, the Government must review approximately six lists of OT equipment submitted by contractors each year (see 39.X03(k)).

It is estimated that a GS 15/step 5 employee will spend 20 hours reviewing, analyzing, and processing a contractor's submission. Using an average loaded wage rate of $113.46 for GS Schedule 15/step 5 employees, the total annual estimated cost for the Government to review, analyze, and file six OT equipment list submissions each year is approximately $13,615 (6 responses * 20 hours * $113.46).

3. Review Continuous Monitoring Strategy

Upon submission, the Government must review approximately 28 continuous monitoring strategies provided by contractors each year (see 39.X03(f)). It is estimated that a GS 15/step 5 employee will spend 20 hours reviewing, analyzing, and processing a contractor's submission. Using an average loaded wage rate of $113.46 for GS 15/step 5 employees, the total annual estimated cost for the Government to review, analyze, and file 28 continuous monitoring strategy submissions each year is approximately $63,538 (28 responses * 20 hours * $113.46).

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is a significant regulatory action under E.O. 12866, and therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule, when finalized, to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612, because the rule applies to a small number of entities that develop, implement, operate, or maintain a FIS on behalf of the Government. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement standardized cybersecurity contractual requirements across Federal agencies for unclassified Federal Information Systems (FIS) pursuant to recommendations received in accordance with paragraph (i) of section 2 of E.O. 14028, ''Improving the Nation's Cybersecurity,'' dated May 12, 2021.

The objective of this rule is to implement standardized cybersecurity requirements in Federal contracts for services to develop, implement, operate, or maintain a FIS on behalf of the Government. This rule will help protect and secure FISs, while streamlining the cybersecurity requirements for applicable contracts and improving contractor and Federal compliance with cybersecurity requirements for these systems. The legal basis for this rule is paragraph (i) of section 2 of Executive Order 14028, ''Improving the Nation's Cybersecurity,'' dated May 12, 2021; and paragraphs (a) and (b)(1) of section 7 of the Internet of Things (IoT) Cybersecurity Improvement Act of 2020 (Pub. L. 116–207). Promulgation of FAR regulations is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

This proposed rule will impact small businesses awarded a contract to develop, implement, operate, or maintain a FIS on behalf of the Government. The Government acknowledges that large businesses awarded a contract for such services may further subcontract some of the services that are subject to the requirements of the clauses. As such, the Government estimates that up to an additional seven small business entities may receive a subcontract to develop, implement, operate, or maintain a FIS under a prime contract for the same services.

The responsibilities prescribed to contractors under this rule apply per FIS, not per contractor or subcontractor. Multiple entities will not be responsible for implementing or executing the same requirement for the same FIS; As such, the Government describes the impact of this rule on small business under the assumption that each of the responsibilities described below will be subcontracted to a small business at least once annually.

According to subject matter experts, there are approximately 140 non-cloud FISs currently being operated or maintained by contractors on behalf of the Government. The Government estimates it awards 28 contracts ((20 percent * 140 non-cloud FISs) * 1 contract/FIS) to 28 unique contractors (28 contracts = 28 unique entities) annually for the development, implementation, operation, or maintenance of a non-cloud FIS on behalf of the Government. Of the 28 contractors to be awarded a contract each year to operate or maintain a non-cloud FIS, approximately three (28 contractors * 10 percent) are small businesses.

According to FedRAMP data and subject matter experts, there are approximately 280 unique FedRAMP-authorized and ready cloud service offerings available to the Federal Government. Based on the number of FedRAMP-authorized offerings, the Government estimates that there are approximately 56 new or revised FIS offerings (20 percent * 280 cloud service offerings) each year for which the Government contracts. Therefore, the Government estimates that 56 unique entities to be awarded a contract annually for the development, implementation, operation, or maintenance of a cloud FIS on behalf of the Government, of which approximately three (56 contractors * five percent) are small businesses.

The proposed rule requires contractors awarded a contract or subcontract to develop, implement, operate, or maintain a FIS to read and become familiar with the rule, as well as review the applicable standards documents identified in the rule. The proposed rule also requires contractors awarded a contract or subcontract to develop, implement, operate, or maintain a FIS using other than cloud computing services (*i.e.,* ''non-cloud FIS'') to: (1) Develop and maintain a list of the physical location of all operational technology (OT) equipment included within the boundary of the non-cloud FIS; (2) When requested by the Government, submit a copy of the OT equipment list to the Government; (3) Submit a copy of their continuous monitoring strategy for the FIS; and (4) For FISs categorized as FIPS Publication 199 moderate or high security impact, submit the results of: an annual independent assessment of the security of the FIS, and an annual cyber threat hunting and vulnerability assessment.

A. Regulatory Familiarization and Standards Document Reviews

It is estimated that approximately all six small business entities, and up to seven small business subcontractor entities, awarded a contract to design, implement, operate, or maintain a FIS on behalf of the Government will need to become familiar with the various compliance requirements of the new clauses 52.239–YY or 52.239–XX, as well as review any applicable standards documents, to be prepared to develop, implement, operate, or maintain a cloud and/or non-cloud FIS, as applicable.

B. Develop and Submit OT Equipment List

It is estimated that approximately three small business entities, and up to seven small business subcontractor entities, will be awarded a contract or subcontract annually to develop, implement, operate, or maintain a non-cloud FIS. Each of these entities, will be required to develop, maintain, and submit a list of OT equipment for the duration of the contract. The list must include: (1) the identification and location of any controllers, relays, sensors, pumps, actuators, Open Platform Communications Unified Architecture devices, and other industrial control system devices, as well as all the IP

addresses assigned to the different hardware components, used in performance of the contract; (2) An explanation of whether the device is password protected and, if so, whether it can be changed, (3) an explanation of whether the device is accessible remotely; and (4) whether multi-factor authentication is present and enabled. The location information in the list must include enough detail to affirmatively locate the OT equipment, when necessary, and track any movement of such equipment during performance of the contract. It is estimated that one of these three small business entities, and up to seven small business subcontractor entities, will be asked to submit the OT equipment list to the Government each year.

To develop and maintain the list of OT equipment, a small business will need at least one employee within an information system occupation series (*e.g.,* computer system analyst, information security analyst, system administrator, network architect) to identify the requisite devices used in performance of the contract, track the location of such devices as changes occur, and update and modify the OT equipment list as necessary.

C. Submit Continuous Monitoring Strategy

All three small business entities, and up to seven small business subcontractor entities, awarded a contract annually to develop, implement, operate, or maintain a non-cloud FIS will be required to submit a copy of their continuous monitoring strategy for the FIS that demonstrates an ongoing awareness of information security, vulnerabilities, and threats in order to support risk management decisions, and applies the use of automation, wherever possible; protects vulnerability scan data, logs, and telemetry; and applies the guidance of NIST SP 800–137, ''Information Security Continuous Monitoring (ISCM) for Federal Information Systems and Organizations.'' A small business will need at least one employee within an information system occupation series (*e.g.,* computer system analyst, information security analyst, system administrator, network architect) to review and submit the continuous monitoring strategy.

D. Submit Annual Assessments

Of the 140 non-cloud FISs currently being operated or maintained by contractors on behalf of the Government, the Government estimates that approximately 95 percent of those systems are designated as moderate or high FIPS 199 impacts. Applying that percentage to the estimated number of contractors annually awarded a contract to develop, implement, operate, or maintain a non-cloud FIS, it is estimated that 27 contractors (95 percent * 28 contractors), of which 2 are estimated to be small business, will be subject to the annual assessment requirements.

These two small business entities, and up to seven small business subcontractor entities, will be awarded a contract with a FIS designated as moderate or high FIPS Publication 199 impact and be required to submit the results of the two annual assessments to the Government. The assessment of the security of the FIS must be an independent assessment that is not conducted by the contractor. The cyber threat hunting and vulnerability assessment may be completed by the contractor. A small business must submit the results of both assessments, including any recommended improvements or risk mitigations identified for the FIS, to the Government. A small business will need at least one employee within an information system occupation series to review and submit the annual assessments to the Government, as well as implement any recommended solutions resulting from the assessments. If an entity chooses to conduct the cyber threat hunting and vulnerability assessment on their own, the entity will need at least one subject matter expert in cyber threat hunting and vulnerability assessment, as well as experience with system assessment, analysis, and audit.

This rule proposes to standardize common cybersecurity contractual requirements across Federal agencies. To do so, E.O. 14028 required a review of agency-specific cybersecurity requirements that currently exist as a matter of law, policy, or contract to form the recommendation for the standardized contract language proposed in this rule. As a result, this rule may duplicate, overlap, or conflict with existing agency-specific cybersecurity contract clauses. Section 2. Paragraph (k) of the E.O. resolves the issue of duplication, overlap, or conflict by requiring agencies, upon final publication of this rule, to update their agency-specific cybersecurity requirements to remove any requirements that are duplicative of this rule. There are no known significant alternative approaches to the proposed rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite ''5 U.S.C. 610 (FAR Case 2021–019)'', in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501–3521) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat Division has submitted a request for approval of a new information collection requirement concerning Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems to the Office of Management and Budget.

A. Public Reporting Burden for This Collection of Information

1. Submit Annual Assessment of FIS

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

Respondents/Recordkeepers: 27.

Total Annual Responses: 54.

Total Burden Hours: 54.

This estimate is based on two responses per respondent.

2. Maintain and Submit a List of Operational Technology Equipment

The public recordkeeping burden for this collection of information is estimated to annually require one recordkeeper who spends 80 hours per contract to maintain the list:

Recordkeepers: 28.

Total annual records: 28.

Total recordkeeping burden hours: 2,240.

The public reporting burden for this collection of information is estimated to average 1 hour per response to review and submit the list. The annual reporting burden is estimated as follows:

Respondents: 6.

Total Annual Responses: 6.

Total Burden Hours: 6.

This estimate is based on one response per respondent.

3. Submit Continuous Monitoring Strategy

Public reporting burden for this collection of information is estimated to average 160 hours per response to develop, document, review, and submit the strategy. The annual reporting burden is estimated as follows:

Respondents: 28.

Total Annual Responses: 28.

Total Burden Hours: 4,480.

This estimate is based on one response per respondent.

B. Request for Comments Regarding Paperwork Burden

Submit comments on this collection of information no later than December 4, 2023 through *https://www.regulations.gov* and follow the instructions on the site. All items submitted must cite OMB Control No. 9000–XXXX, Standardizing Cybersecurity Requirements for

Unclassified Federal Information Systems. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.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.*

Public comments are particularly invited on:

- The necessity of this collection of information for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility;
- The accuracy of the estimate of the burden of this collection of information;
- 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 respondents, including the use of automated collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control Number 9000–XXXX, Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems, in all correspondence.

List of Subjects in 48 CFR Parts 1, 2, 4, 7, 10, 11, 12, 37, 39, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1, 2, 4, 7, 10, 11, 12, 37, 39, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 4, 7, 10, 11, 12, 37, 39, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106 amend in the table following the introductory text, by adding in numerical order, entries for ''52.239–XX'' and ''52.239–YY'' and its corresponding OMB control No. ''9000–XXXX'' to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment	OMB control No.
* * * * *	
52.239–XX	9000–XXXX
52.239–YY	9000–XXXX
* * * * *	

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 3. Amend section 2.101, in paragraph (b)(2) by—

■ a. In the definition of ''Component'', removing from the end of paragraph (3) the word ''and''; removing from the end of paragraph (4) ''52.225–23(a).'' and adding ''52.225–23(a); and'' in its place; and adding a new paragraph (5);

■ b. Removing the definitions ''Federally-controlled information system'' and ''Information and communication technology (ICT)'';

■ c. Adding in alphabetical order the definitions ''Federal information system'', ''Government data'', ''Information'', ''Information and communications technology (ICT)'', and ''Information system'';

■ d. In the definition of ''Information technology'', revising paragraph (3)(ii); and

■ e. Adding in alphabetical order the definitions ''Internet of Things (IoT) devices'', ''Operational technology'', ''Telecommunications equipment'', and ''Telecommunications services''.

The revisions and additions read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Component * * *

* * * * *

(5) Subpart 39.X, see the definition in 39.X01.

* * * * *

Federal information system—

(1) Means an information system (44 U.S.C. 3502(8)) used or operated by an agency, by a contractor of an agency, or by another organization, on behalf of an agency;

(2) *On behalf of an agency* as used in this definition, means when a contractor uses or operates an information system or maintains or collects information for the purpose of processing, storing, or transmitting Government data, and those activities are not incidental to providing a service or product to the Government (32 CFR part 2002).

* * * * *

Government data means any information, (including metadata), document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by the Government, or a contractor on behalf of the Government, in the course of official Government business.

* * * * *

Information, as used in subparts 4.19 and 39.X, means any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, electronic, or audiovisual forms (see Office of Management and Budget (OMB) Circular No. A–130, Managing Information as a Strategic Resource).

Information and communications technology (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; telecommunications services; customer premises equipment; multifunction office machines; computer software; applications; websites; electronic media; electronic documents; Internet of Things (IoT) devices; and operational technology.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502(8)). Information resources, as used in this definition, includes any ICT.

Information technology * * *

* * * * *

(3) * * *

(ii) Is operational technology.

* * * * *

Internet of Things (IoT) devices means, consistent with section 2 paragraph 4 of Public Law 116–207, devices that—

(1) Have at least one transducer (sensor or actuator) for interacting directly with the physical world, have at least one network interface, and are not conventional information technology devices, such as smartphones and

laptops, for which the identification and implementation of cybersecurity features is already well understood; and

(2) Can function on their own and are not only able to function when acting as a component of another device, such as a processor.

* * * * *

Operational technology means programmable systems or devices that interact with the physical environment (or manage devices that interact with the physical environment). These systems or devices detect or cause a direct change through the monitoring and/or control of devices, processes, and events. Examples of operational technology include industrial control systems, building management systems, fire control systems, and physical access control mechanisms (NIST SP 800–160 vol 2).

* * * * *

Telecommunications equipment means equipment used to transmit, emit, or receive signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

Telecommunications services means services used to transmit, emit, or receive signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

* * * * *

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

4.1301 [Amended]

■ 4. Amend section 4.1301 by removing from paragraphs (a) and (b) ''Federally-controlled information'' and adding ''Federal information'' in their places; respectively.

4.1303 [Amended]

■ 5. Amend section 4.1303 by removing from the text ''Federally-controlled information'' and adding ''Federal information'' in its place.

4.1901 [Amended]

■ 6. Amend section 4.1901 by removing the definitions of ''Information'' and ''Information system''.

PART 7—ACQUISITION PLANNING

■ 7. Amend section 7.103 by—

■ a. Removing from paragraph (q) ''information and communication technology'' and adding ''information and communications technology'' in its place; and

■ b. Adding paragraph (z).

The addition reads as follows.

7.103 Agency-head responsibilities.

* * * * *

(z) For service acquisitions that will require a contractor to develop, implement, operate, or maintain a Federal information system, ensuring that acquisition planners (see 2.101(b)), in consultation with the agency's authorizing official (see 39.X01), develop requirements in accordance with the procedures at 39.X02–1 and 39.X02–2.

■ 8. Amend section 7.105 by removing from paragraph (b)(18)(iii) ''Federally-controlled information'' and adding ''Federal information'' in its place and adding paragraph (b)(18)(v) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(18) * * *

(v) For service acquisitions that will require a contractor to develop, implement, operate, or maintain a Federal information system, discuss compliance with 39.X02–1 and 39.X02–2.

* * * * *

PART 10—MARKET RESEARCH

10.001 [Amended]

■ 9. Amend section 10.001 by removing from paragraph (a)(3)(ix) ''information and communication technology'' and adding ''information and communications technology'' in its place.

PART 11—DESCRIBING AGENCY NEEDS

11.002 [Amended]

■ 10. Amend section 11.002 by removing from paragraph (f)(1)(i) ''information and communication technology'' and adding ''information and communications technology'' in its place.

PART 12—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

12.202 [Amended]

■ 11. Amend section 12.202 by removing from paragraph (d) ''information and communication technology'' and adding ''information and communications technology'' in its place.

PART 37—SERVICE CONTRACTING

37.000 [Amended]

■ 12. Amend section 37.000 by removing from the text ''information technology'' and adding ''information and communications technology'' in its place.

PART 39—ACQUISITION OF INFORMATION AND COMMUNICATIONS TECHNOLOGY

■ 13. Revise the heading for part 39 to read as set forth above.

■ 14. Amend section 39.000 by removing from paragraph (a) ''Management of Federal Information Resources'' and adding ''Managing Information as a Strategic Resource'' in its place; and revising paragraph (b) to read as follows:

39.000 Scope of part.

* * * * *

(b) Information and communications technology (ICT), as well as supplies and services that use ICT (see 2.101(b)).

■ 15. Amend section 39.001 by revising the first sentence of paragraph (a) and revising paragraph (b) to read as follows:

39.001 Applicability.

* * * * *

(a) ICT, as well as supplies and services that use ICT, which includes information technology, Internet of Things (IoT) devices (*e.g.,* connected appliances, wearables), and operational technology, by or for the use of agencies except for acquisitions of information technology for national security systems. * * *

(b) ICT by or for the use of agencies or for the use of the public. When applying the policy in subpart 39.2, see the exceptions at 39.204 and exemptions at 39.205.

■ 16. Revise subpart 39.2 heading to read as follows:

Subpart 39.2—Information and Communications Technology Accessibility

* * * * *

39.201 [Amended]

■ 17. Amend section 39.201 by removing from paragraph (a) ''information and communication technology'' and adding ''information and communications technology'' in its place.

■ 18. Add a new subpart 39.X to read as follows:

Subpart 39.X—Federal Information Systems

39.X00 Scope of subpart.

This subpart provides policies and procedures for acquiring services to develop, implement, operate, or maintain a Federal information system (FIS) (E.O. 14028, Improving the Nation's Cybersecurity, dated May 12, 2021). This subpart does not apply to National security systems (see 39.002).

39.X01 Definitions.

As used in this subpart—

Administrative account means a user account with full privileges (*i.e.,* with full function and access rights) intended to be used only when performing management tasks, such as installing updates and application software, managing user accounts, and modifying operating system and application settings.

Authorization boundary means all components of an information system to be authorized for operation by an authorizing official. This excludes separately authorized systems to which the information system is connected (OMB Circular No. A–130).

Authorizing official means a senior Federal official or executive with the authority to authorize (*i.e.,* assume responsibility for) the operation of an information system or the use of a designated set of common controls at an acceptable level of risk to agency operations (including mission, functions, image, or reputation), agency assets, individuals, other organizations, and the Nation (OMB Circular No. A–130).

Cloud computing means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.,* networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. Cloud computing is characterized by on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service; and includes service models such as software-as-a-service, infrastructure-as-a-service, and platform-as-a-service (NIST SP 800–145).

Component means a discrete identifiable information and operational technology asset that represents a building block of a system and may include hardware, software, and firmware.

Cyber supply chain risk means the potential for harm or compromise that arises as a result of cybersecurity risks from suppliers, their supply chains, and their products or services. This includes risks that arise from threats exploiting vulnerabilities or exposures within products and services traversing the supply chain as well as threats or exposures within the supply chain itself. The level of risk depends on the likelihood that relevant threats may exploit applicable vulnerabilities and the consequential potential impacts (NIST SP 800–161 and 800–203).

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. Government-related data does not include—

(1) A contractor's business records (*e.g.,* financial records, legal records) that do not incorporate Government data, or

(2) Data such as operating procedures, software coding or algorithms that are not primarily applied to the Government data.

High value asset means Government data or a Federal information system that is designated as a high value asset pursuant to OMB Memorandum M–19–03, Strengthening the Cybersecurity of Federal Agencies by enhancing the High Value Asset Program.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system (NIST SP 800–37).

Metadata means information describing the characteristics of data including, but not limited to, structural metadata that describes data structures (*e.g.,* data format, syntax, and semantics) and descriptive metadata that describes data contents (*e.g.,* information security labels) (NIST SP 800–53).

Service account means an account used by machines, *e.g.,* an operating system, application, process, or service, not used by a human.

39.X02 Procedures.

All FIS require protection as part of good risk management practices. A contract for services to develop, implement, operate, or maintain a FIS may require contractors to utilize cloud computing services, computing services other than cloud computing services (*i.e.,* non-cloud computing services), or both service approaches in performing the contract. Each service approach requires certain compliances and standards to be met to ensure appropriate FIS protection.

39.X02–1 Federal information systems using non-cloud computing services.

(a) Contracting officer verification.

(1) *Requirement criteria.* When acquiring services to develop, implement, operate, or maintain a FIS using non-cloud computing services, the contracting officer shall verify with the requiring activity that the requirement—

(i) Categorizes the FIS based on an impact analysis of the information processed, stored, and transmitted by the system (see the current version of Federal Information Processing Standards (FIPS) Publication 199, Standards for Security Categorization of Federal Information and Information Systems, for additional information);

(ii) Identifies a set of controls to protect the FIS based on an assessment of risk in accordance with—

(A) The current version of FIPS Publication 200, Minimum Security Requirements for Federal Information and Information Systems;

(B) The current version of National Institute of Standards and Technology (NIST) Special Publication (SP) 800–53B, Control Baselines for Information Systems and Organizations; and

(C) Agency procedures (see paragraph (a)(2) of this section for mandatory controls to be addressed in all requirements);

(iii) Includes the FIPS Publication 199 impact level (paragraph (a)(1)(i) of this section) and the identified controls (paragraph (a)(1)(ii) of this section) in the contract;

(iv) Identifies any Cybersecurity and Infrastructure Security Agency (CISA) Binding Operational Directives and Emergency Directives (from the list at *https://www.cisa.gov/directives*) that will not apply to the requirement (see fill-in at paragraph (l)(2) of 52.239–YY); and

(v) Addresses each of the elements identified at 52.239–YY(f), as applicable.

(2) *Mandatory controls.* The controls identified in paragraph (a)(1)(ii) of this section must address the following requirements:

(i) *Multifactor authentication.*

(A) All accounts other than service accounts must employ multifactor authentication that meets or exceeds Authenticator Assurance Level 2 (AAL2), as defined in the most recent version of NIST SP 800–63B, Digital Identity Guidelines: Authentication and Lifecycle Management. Agencies may mandate accounts for Government or contractor personnel requiring phishing resistant multifactor authentication

exceeding AAL2, depending on the sensitivity of the system or non-public data accessed.

(B) Any administrative access must be conducted using a hardware-based multifactor cryptographic device authenticator.

(ii) *Administrative accounts.*

(A) All systems and services provided shall have unique administrative accounts, with the exception of service accounts.

(B) Any accounts that administer any part of the systems used in the performance of the contract, to include support systems and infrastructure, shall be considered part of the system authorization boundary and must have unique administrative accounts that are unique and exclusive to agency systems. Administrator accounts must be disclosed, upon request by the contracting officer.

(iii) *Consent banners.* Login and consent banners must be deployed on all systems and networks. Such banners must be consistent with CISA guidance at *https://www.cisa.gov/publication/guidance-consent-banners.* The contract may include more specific requirements for consent banners; such requirements will be consistent with the CISA guidance linked above;

(iv) *Internet of Things devices.* Apply any additional cybersecurity requirements necessary for IoT devices located within the boundary of the FIS in accordance with the current version of NIST SP 800–213, IoT Device Cybersecurity Guidance for the Federal Government: Establishing IoT Device Cybersecurity Requirements; and

(v) *Annual assessments.* For a FIS designated as a moderate or high FIPS Publication 199 impact, specify the specific requirements for the annual assessments (see FAR 52.239–YY(d)).

(b) *Prohibited IoT devices in Federal information systems.* The Internet of Things Cybersecurity Improvement Act of 2020 (Pub. L. 116–207) prohibits agencies from procuring or obtaining, renewing a contract to procure or obtain, or using an IoT device, if the agency's Chief Information Officer determines (during a review required by 40 U.S.C. 11319(b)(1)(C) of a contract for such device) that the use of such a device prevents compliance with NIST SP 800–213.

(1) The head of the agency may waive the prohibition in this paragraph (b) if the agency's Chief Information Officer determines, in writing, that—

(i) A waiver is necessary in the interest of national security;

(ii) Procuring, obtaining, or using such device is necessary for research purposes; or

(iii) The device is secured using alternative and effective methods appropriate to the function of the device.

(2) When the prohibition is waived in accordance with 39.X02–1(b)(1), contracting officers shall obtain confirmation of the waiver from the agency's Chief Information Officer and document the confirmation in the contract file.

39.X02—2 Federal information systems using cloud computing services.

When acquiring services to develop, implement, operate, or maintain a FIS using cloud computing services, the contracting officer shall verify with the requiring activity that the requirement—

(a) Specifies the FIPS Publication 199 impact level and the Federal Risk and Authorization Management Program (FedRAMP) authorization level that corresponds with the FIPS Publication 199 impact level for all applicable cloud computing services;

(b) For systems categorized as FIPS Publication 199 high impact—

(1) Ensures all Government data is maintained (*i.e.,* stored or processed) within the United States and its outlying areas (see 2.101(b)) or is physically located on U.S. Government premises, unless otherwise authorized in writing by the Authorizing Official for the information system; or

(2) When another location is authorized for the maintenance of Government data in accordance with paragraph (b)(1), specifies the location(s) authorized by the Authorizing Official for the information system;

(c) Specifies the format(s) in which all Government data and Government-related data is to be received from the contractor;

(d) Specifies how the contractor must dispose of Government data and Government-related data; and

(e) Complies with the following requirements—

(1) *Multifactor authentication.*

(i) All accounts other than service accounts must employ multifactor authentication that meets or exceeds Authenticator Assurance Level 2 (AAL2), as defined in the most recent version of NIST SP 800–63B, Digital Identity Guidelines: Authentication and Lifecycle Management. Agencies may mandate accounts for Government or contractor personnel requiring phishing resistant multifactor authentication exceeding AAL2, depending on the sensitivity of the system or non-public data accessed.

(ii) Any administrative access must be conducted using a hardware-based multifactor cryptographic device authenticator.

(2) *Administrative accounts.*

(i) All systems and services provided shall have unique administrative accounts, with the exception of service accounts.

(ii) Any accounts that administer any part of a system used in the performance of the contract, to include support systems and infrastructure, shall be considered part of the system authorization boundary and must have unique administrative accounts that are unique and exclusive to agency systems. Administrator accounts must be disclosed, upon request by the contracting officer.

(3) *Consent banners.* Login and consent banners must be deployed on all systems and networks. Such banners must be consistent with CISA guidance at *https://www.cisa.gov/publication/guidance-consent-banners.*

The contract may include more specific requirements for consent banners; such requirements will be consistent with the CISA guidance linked above.

39.X03 Contracting officer coordination.

The contracting officer shall coordinate the following requests and submissions with the requiring activity (to enable coordination with the agency chief information security officer, senior agency official for privacy, and agency legal counsel, as necessary)—

(a) Any request for information or access pursuant to the clause at 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology (ICT);

(b) A submission of a reportable incident pursuant to FAR clause 52.239–ZZ, when such incident involves a FIS;

(c) The contractor's annual, independent assessment of the security of each FIS (52.239–YY(d)(1)(iii)). If received from the requiring activity, the contracting officer shall provide the contractor with the agency's request to implement or rationale for not implementing a recommendation for improvement or mitigation (52.239–YY(d)(1)(iv) and (v));

(d) A contractor's request to use Government-related data for a purpose other than to manage the operational environment that supports the Government data information (52.239–XX(d)(2));

(e) A contractor's submission of its system security plan, when requested by the agency (52.239–YY(e)(3)(ii));

(f) A contractor's submission of its continuous monitoring strategy for the FIS (52.239–YY(f)(7));

(g) A contractor's request to implement alternative, additional, or compensating security controls, to include those pertaining to cyber supply chain risk management, not otherwise identified in the contract (52.239–YY(g));

(h) A contractor's request to use Government metadata for a purpose other than to manage the operational environment that supports the Government data (52.239–YY(i)(2));

(i) A contractor's notification of a third-party request for access to Government data or any associated metadata, or access to information systems with access to Government data or any associated metadata (52.239–YY(i)(3));

(j) A contractor's request to publish or disclose the details of any safeguards either designed or developed by the contractor under the contract, or otherwise provided by the Government (52.239–YY(i)(4));

(k) A contractor's submission of its operational technology equipment list, when requested by the agency (52.239–YY(k)(3)); and

(l) Any other relevant contractor or third-party requests for access or data not covered herein.

39.X04 Contract clauses.

When acquiring services to develop, implement, operate, or maintain a FIS, the contracting officer shall insert—

(a) The clause at 52.239–YY, Federal Information Systems Using Non-Cloud Computing Services, in solicitations and contracts that use, or are anticipated to use, non-cloud computing services in performance of the contract; and

(b) The clause at 52.239–XX, Federal Information Systems Using Cloud Computing Services, in solicitations and contracts that use, or are anticipated to use, cloud computing services in performance of the contract.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 19. Amend section 52.204–9 by—
■ a. Revising the date of the clause; and
■ b. Removing from paragraph (d) ''Federally-controlled information'' and adding ''Federal information'' in its place.

The revision reads as follows:

52.204–9 Personal Identity Verification of Contractor Personnel.

* * * * *

Personal Identity Verification of Contractor Personnel (DATE)

* * * * *

■ 20. Amend section 52.212–5 by—
■ a. Revising the date of the clause;
■ b. Redesignating paragraphs (b)(63) through (64) as paragraphs (b)(65) through (66);
■ c. Adding new paragraphs (b)(63) and (64);
■ d. Redesignating paragraph (e)(1)(xxiv) as paragraph (e)(1)(xxvi);
■ e. Adding new paragraphs (e)(1)(xxiv) and (xxv);
■ f. In Alternate II by—
■ i. Revising the date of Alternate II;
■ ii. Redesignating paragraphs (e)(1)(ii)(W) as paragraph (e)(1)(ii)(Y); and adding new paragraphs (e)(1)(ii)(W) and (X);

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (DATE)

* * * * *

(b) * * *

__ (63) 52.239–YY Federal Information Systems Using Non-Cloud Computing Services (DATE) (E.O. 14028 and 15 U.S.C. 278g–3e).

__ (64) 52.239–XX Federal Information Systems Using Cloud Computing Services (DATE) (E.O. 14028).

* * * * *

(e)(1) * * *

(xxiv) 52.239–YY Federal Information Systems Using Non-Cloud Computing Services (DATE) (E.O. 14028 and 15 U.S.C. 278g–3e).

(xxv) 52.239–XX Federal Information Systems Using Cloud Computing Services (DATE) (E.O. 14028).

* * * * *

Alternate II. (DATE) * * *

(e)(1) * * *

(ii) * * *

(W) 52.239–YY Federal Information Systems Using Non-Cloud Computing Services (DATE) (E.O. 14028 and 15 U.S.C. 278g–3e).

(X) 52.239–XX Federal Information Systems Using Cloud Computing Services (DATE) (E.O. 14028).

* * * * *

■ 21. Amend section 52.213–4 by—
■ a. Revising the date of the clause;
■ b. Adding paragraphs (a)(1)(xii) and (xiii); and
■ c. Revising the date of paragraph (a)(2)(vii).

The additions and revisions read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (DATE)

* * * * *

(a) * * *

(1) * * *

(xii) 52.239–YY Federal Information Systems Using Non-Cloud Computing Services (DATE) (E.O. 14028 and 15 U.S.C. 278g–3e).

(xiii) 52.239–XX Federal Information Systems Using Cloud Computing Services (DATE) (E.O. 14028).

(2) * * *

(vii) 52.244–6, Subcontracts for Commercial Products and Commercial Services (DATE).

* * * * *

■ 22. Adding new sections 52.239–XX and 52.239–YY to read as follows:

52.239–XX Federal Information Systems Using Cloud Computing Services.

As prescribed in 39.X04(b) insert the following clause:

Federal Information Systems Using Cloud Computing Services (DATE)

(a) *Definitions.* As used in this clause—

Cloud computing means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.,* networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. Cloud computing is characterized by on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service; and includes service models such as software-as-a-service, infrastructure-as-a-service, and platform-as-a-service (NIST SP 800–145).

Federal information system—

(1) Means an information system (44 U.S.C. 3502(8)) used or operated by an agency, by a contractor of an agency, or by another organization, on behalf of an agency;

(2) *On behalf of an agency* as used in this definition, means when a contractor uses or operates an information system or maintains or collects information for the purpose of processing, storing, or transmitting Government data, and those activities are not incidental to providing a service or product to the Government (32 CFR part 2002).

Full access means, for all contractor information systems used in performance, or which support performance, of the contract—

(1) Physical and electronic access to—

(i) Contractor networks;

(ii) Systems;

(iii) Accounts with access to Government systems;

(iv) Other infrastructure housed on the same computer network;

(v) Other infrastructure with a shared identity boundary or interconnection to the Government system; and

(2) Provision of all requested Government data or Government-related data, including—

(i) Images;

(ii) Log files;

(iii) Event information; and

(iv) Statements, written or audio, of contractor employees describing what they witnessed or experienced in connection with the contractor's performance of the contract.

Government data means any information (including metadata), document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by the Government, or a contractor on behalf of the Government, in the course of official Government business.

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. Government-related data does not include—

(1) A contractor's business records (*e.g.,* financial records, legal records) that do not incorporate Government data; or

(2) Data such as operating procedures, software coding or algorithms that are not primarily applied to the Government data.

Information means any communication or representation of knowledge, such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, electronic, or audiovisual forms (see Office of Management and Budget (OMB) Circular No. A–130, Managing Information as a Strategic Resource).

Information and communications technology (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; telecommunications services; customer premises equipment; multifunction office machines; computer software; applications; websites; electronic media; electronic documents; Internet of Things (IoT) devices; and operational technology.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502(8)). Information resources as used in this definition, includes any ICT.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system (NIST SP 800–53).

(b) *Applicability.* The requirements of this clause shall only apply to aspects of a Federal information system (FIS) that involve cloud computing services.

(c) *Cloud computing security requirements.*

(1) The Contractor shall implement and maintain security and privacy safeguards and controls with the security level and services required in accordance with the Federal Risk and Authorization Management Program (FedRAMP) authorization level specified.

(i) Cloud continuous monitoring requirement. The Contractor shall engage in continuous monitoring activities and provide continuous monitoring deliverables as required for FedRAMP approved capabilities (see FedRAMP Continuous Monitoring Strategy Guide).

(ii) Cryptographic key services. The Government reserves the right to implement and operate its own cryptographic key management, key revocation and key escrow services.

(2) For cloud computing services required to meet FIPS Publication 199 high impact requirements, the Contractor shall maintain within the United States and its outlying areas (see FAR 2.101) all Government data that is not physically located on U.S. Government premises, unless otherwise specified in the contract.

(d) *Limitations on access to, and use and disclosure of, Government data and Government-related data.*

(1) The Contractor shall not access, use, or disclose Government data or Government-related data unless specifically authorized under the contract or task or delivery order or in writing by the Contracting Officer.

(i) When authorized, any access to, or use or disclosure of, Government data or Government-related data shall only be for purposes specified in the contract or task order or delivery order.

(ii) The Contractor shall ensure that its employees are subject to all such access, use, and disclosure prohibitions and obligations of this paragraph.

(iii) The access, use, and disclosure prohibitions and obligations of this paragraph shall survive the expiration or termination of this contract.

(2) The Contractor shall use Government-related data only to manage the operational environment that supports the Government data and for no other purpose unless otherwise permitted with the prior written approval of the Contracting Officer.

(e) *Notifiable incident reporting, incident response and threat reporting.*

For contract coverage on security incident and cyber threat reporting, see FAR clause 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology, in this contract.

(f) *Records management and Government access.*

(1) The Contractor shall provide the Contracting Officer with all Government data and Government-related data in the format specified in the contract.

(2) The Contractor shall dispose of Government data and Government-related data in accordance with the terms of the contract and provide the confirmation of disposition to the Contracting Officer in accordance with contract closeout procedures.

(3)(i) To the extent required to carry out a program of inspection to safeguard against threats and hazards to the security, (*i.e.,* confidentiality, integrity, and availability) and privacy of Government data; or for the purpose of audits, investigations, inspections, or other similar activities, as authorized by law, regulation, or this contract, the Contractor shall provide the Government's authorized representatives (authorized representatives include CISA, except for contracts with the Department of Defense, the Intelligence Community, or for National Security Systems, and could include other Federal agencies, as specified by the Contracting Officer) with—

(A) Timely access, including full access, to all Government data and Government-related data;

(B) Timely access to contractor personnel involved in performance of the contract; and

(C) Specifically for the purpose of audit, investigation, inspection, or other similar activity, as authorized by law, regulation, or this contract, timely physical access to any Contractor facility with Government data.

(ii) In response to a request for access from CISA, the Contractor shall—

(A) First confirm the validity of the request by contacting CISA Central by email at *report@cisa.gov,* or by telephone at 888–282–0870; and

(B) Immediately notify the Contracting Officer and any other agency official designated in the contract, in writing, of receipt of the request. Provision of information and access to CISA under this clause shall not be delayed by submission of this notification or awaiting acknowledgement of its receipt.

(g) *Notification of third-party access requests.* The Contractor shall notify the Contracting Officer promptly of any requests from a third-party for access to Government data or Government-related data, including any warrants, seizures, or subpoenas it receives, including those from another Federal, State, or local agency. The Contractor shall comply with applicable clauses, regulations, and laws concerning protection of Government data and Government-related data from any unauthorized disclosure.

(h) *Indemnity for potential or actual loss or damage of Government data.*

(1) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability arising out of the performance of this contract, including costs and expenses, incurred as the result of the Contractor's unauthorized introduction of copyrighted material to which the Contractor has no rights or license that may infringe on the copyright interest of others, information subject to a right of privacy, and any libelous or other unlawful matter into Government data. The Contractor agrees to waive any and all defenses that may be asserted for its benefit, including (without limitation) the ''Government Contractors Defense.''

(2) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against

any liability arising out of the performance of this contract, including costs and expenses, incurred as the result of the Contractor's potential or actual unauthorized disclosure of trade secrets, copyrighted materials, contractor bid or proposal information, source selection information, classified information, material marked as ''Controlled Unclassified Information'', information subject to a right of privacy or publicity, personally identifiable information as defined by OMB Circular A–130 (2016) or successor thereof, or any record as defined in 5 U.S.C. 552a.

(3) In the event of any claim or suit against the Government on account of any alleged unauthorized disclosure or introduction of data or information arising out of the performance of this contract or services performed under this contract, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in the Contractor's possession pertaining to such claim or suit.

(4) The provisions of this paragraph (h) do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense of the claim or suit, and these provisions do not apply to any libelous or other unlawful matter contained in such data furnished to the Contractor by the Government and incorporated in data to which this clause applies. Further, this indemnity shall not apply to—

(i) A disclosure or inclusion of data or information upon specific written instructions of the Contracting Officer directing the disclosure or inclusion of such information or data;

(ii) A third-party claim that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(i) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (i), in all subcontracts under this contract for services to develop, implement, operate, or maintain a FIS using cloud computing services.

(End of clause)

52.239–YY Federal Information Systems Using Non-Cloud Computing Services.

As prescribed in 39.X04(a) insert the following clause:

Federal Information Systems Using Non-Cloud Computing Services (DATE)

(a) Definitions. As used in this clause—

Cloud computing means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.,* networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. Cloud computing is characterized by on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service; and includes service models such as software-as-a-service, infrastructure-as-a-service, and platform-as-a-service (NIST SP 800–145).

Component means a discrete identifiable information and operational technology asset that represents a building block of a system and may include hardware, software, and firmware.

Cyber supply chain risk means the potential for harm or compromise that arises as a result of cybersecurity risks from suppliers, their supply chains, and their products or services. This includes risks that arise from threats exploiting vulnerabilities or exposures within products and services traversing the supply chain as well as threats or exposures within the supply chain itself. The level of risk depends on the likelihood that relevant threats may exploit applicable vulnerabilities and the consequential potential impacts. (NIST SP 800–161 and 800–203).

Federal information system—

(1) Means an information system (44 U.S.C. 3502(8)) used or operated by an agency, by a contractor of an agency, or by another organization, on behalf of an agency;

(2) *On behalf of an agency* as used in this definition, means when a contractor uses or operates an information system or maintains or collects information for the purpose of processing, storing, or transmitting Government data, and those activities are not incidental to providing a service or product to the Government (32 CFR part 2002).

Full access means, for all contractor information systems used in performance, or which support performance, of the contract—

(1) Physical and electronic access to—

(i) Contractor networks;

(ii) Systems;

(iii) Accounts with access to Government systems;

(iv) Other infrastructure housed on the same computer network;

(v) Other infrastructure with a shared identity boundary or interconnection to the Government system; and

(2) Provision of all requested Government data or Government-related data, including—

(i) Images;

(ii) Log files;

(iii) Event information; and

(iv) Statements, written or audio, of contractor employees describing what they witnessed or experienced in connection with the contractor's performance of the contract.

Government data means any information, (including metadata), document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by the Government, or a contractor on behalf of the Government, in the course of official Government business.

Government-related data means any information, document, media, or machine-readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. Government-related data does not include—

(1) A contractor's business records (*e.g.,* financial records, legal records) that do not incorporate Government data; or

(2) Data such as operating procedures, software coding or algorithms that are not primarily applied to the Government data.

High value asset means Government data or a Federal information system that is designated as a high value asset pursuant to OMB Memorandum M–19–03, Strengthening the Cybersecurity of Federal Agencies by enhancing the High Value Asset Program.

Information means any communication or representation of knowledge, such as facts, data, or opinions, in any medium or form, including textual, numerical, graphic, cartographic, narrative, electronic, or audiovisual forms (see Office of Management and Budget (OMB) Circular No. A–130, Managing Information as a Strategic Resource).

Information and communications technology (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; telecommunications services; customer premises equipment; multifunction office machines; computer software; applications; websites; electronic media; electronic documents; Internet of Things (IoT) devices; and operational technology.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502(8)). Information resources, as used in this definition, includes any ICT.

Information technology means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.

(1) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency that requires—

(i) Its use; or

(ii) To a significant extent, its use in the performance of a service or the furnishing of a product.

(2) The term ''information technology'' includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources.

(3) The term ''information technology'' does not include any equipment that—

(i) Is acquired by a contractor incidental to a contract; or

(ii) Is operational technology.

Internet of Things (IoT) devices means, consistent with section 2 paragraph 4 of Public Law 116–207, devices that—

(1) Have at least one transducer (sensor or actuator) for interacting directly with the physical world, have at least one network interface, and are not conventional information technology devices, such as smartphones and laptops, for which the identification and implementation of cybersecurity features is already well understood; and

(2) Can function on their own and are not only able to function when acting as a component of another device, such as a processor.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system (NIST SP 800–53).

Metadata means information describing the characteristics of data including, but not limited to, structural metadata that describes data structures (*e.g.,* data format, syntax, and semantics) and descriptive metadata that describes data contents (*e.g.,* information security labels) (NIST SP 800–37).

Operational technology (OT) means programmable systems or devices that interact with the physical environment or manage devices that interact with the physical environment. These systems or devices detect or cause a direct change through the monitoring and/or control of devices, processes, and events. Examples of operational technology include industrial control systems, building management systems, fire control systems, and physical access control mechanisms (NIST SP 800–160 vol 2).

Overlay means a specification of security or privacy controls, control enhancements, supplemental guidance, and other supporting information employed during the tailoring process, that is intended to complement and further refine security control baselines. An overlay specification may be more stringent or less stringent than the original security control baseline specification and can be applied to multiple information systems (OMB Circular No. A–130).

Telemetry means the automatic recording and transmission of data from remote or inaccessible sources to an information system in a different location for monitoring and analysis. Telemetry data may be relayed using radio, infrared ultrasonic, cellular, satellite or cable, depending on the application.

(b) *Applicability.* The requirements of this clause shall only apply to aspects of a Federal information system (FIS) that do not involve cloud computing services.

(c) *Records management and Government access.*

(1) The Contractor shall provide the Contracting Officer with all Government data and Government-related data in the format specified in the contract.

(2) The Contractor shall dispose of Government data and Government-related data in accordance with the terms of the contract and provide the confirmation of disposition to the Contracting Officer in accordance with contract closeout procedures.

(3)(i) To the extent required to carry out a program of inspection to safeguard against threats and hazards to the security (*i.e.,* confidentiality, integrity, and availability) and privacy of Government data; or for the purpose of audits, investigations, inspections, or other similar activities, as authorized by law, regulation, or this contract, the Contractor shall provide the Government's authorized representatives (authorized representatives include CISA, except for contracts with the Department of Defense, the Intelligence Community, or for National Security Systems, and could include other Federal agencies as specified by the Contracting Officer), with—

(A) Timely access, including full access, to all Government data and Government-related data;

(B) Timely access to contractor personnel involved in performance of the contract; and

(C) Specifically for the purpose of audit, investigation, inspection, or other similar activity, as authorized by law, regulation, or this contract, timely physical access to any Contractor facility with Government data.

(ii) In response to a request for access from CISA, the Contractor shall—

(A) First confirm the validity of the request by contacting CISA Central by email at *report@cisa.gov,* or by telephone at 888–282–0870; and

(B) Immediately notify the Contracting Officer and any other agency official designated in the contract, in writing, of receipt of the request. Provision of information and access to CISA under this clause shall not be delayed by submission of this notification or awaiting acknowledgement of its receipt.

(d) *Annual assessments.* (1) If the Contractor is required to develop, implement, operate, or maintain a FIS that is designated as a moderate or high Federal Information Processing Standards (FIPS) Publication 199 impact, the Contractor shall, unless otherwise stated in the contract—

(i) Perform an annual, independent assessment of the security of each FIS to include an architectural review and penetration testing of the FIS;

(ii) At least annually, conduct a cyber threat hunting and vulnerability assessment to search for cybersecurity risks, vulnerabilities and indicators of compromise;

(iii) Promptly provide the Contracting Officer with the results of the assessments at paragraphs (d)(1)(i) and (ii) of this clause, including any recommended improvements or risk mitigations for each FIS;

(iv) Upon agency request, promptly implement the recommended improvements and mitigations, if any, for the FIS; and

(v) For any recommendation the agency does not request be implemented, document the agency-provided rationale for not implementing the improvement or mitigation in the Contractor's System Security Plan (SSP).

(2) If the Contractor contracts with a third-party assessment organization to perform the assessments required in paragraph (d)(1)(i) and (ii) of this clause, the Contractor shall enter into a strict confidentiality agreement with the third-party assessment organization. The Contractor shall notify the Contracting Officer of any existing business relationships the Contractor has with the third-party assessment organization. The confidentiality agreement shall—

(i) Ensure compliance with all applicable requirements for disclosing information to the Government; and

(ii) Prohibit the third-party assessment organization from—

(A) Disclosing any Government data, and

(B) Retaining on its systems any Government data following the conclusion of the assessment and transfer of all information related to the assessment results to the Contractor.

(e) *Security and privacy controls.*

(1) The Contractor shall implement the controls, as specified by the agency, in—

(i) National Institute of Standards and Technology (NIST) Special Publication (SP) 800–53, Security and Privacy Controls for Information Systems and Organizations;

(ii) NIST SP 800–161, Cybersecurity Supply Chain Risk Management Practices for Systems and Organizations;

(iii) NIST SP 800–82, Guide to Industrial Control Systems Security; and

(iv) NIST SP 800–213, IoT Device Cybersecurity Guidance for the Federal Government: Establishing IoT Device Cybersecurity Requirements.

(2) The Contractor shall implement any additional requirements, as identified in the contract, for an information system designated by the agency as a high value asset. These requirements may include implementation of a high value asset overlay and cooperation in the conduct of all required cybersecurity assessments.

(3) The security and privacy controls specified by the agency in accordance with paragraph (e)(1) of this section will include a requirement to develop, review, and update, if appropriate, an SSP to support authorization of all applicable FIS.

(i) NIST SP 800–18, Guide for Developing Security Plans for Federal Information Systems, contains a template for an Information SSP; and

(ii) The Contractor shall submit a copy of the SSP to the agency upon request.

(4) The Contractor shall make contingency plans for all information systems, aligned to NIST SP 800–34, Contingency Planning Guide for Federal Information Systems, available to the agency upon request.

(5) For a FIS required to meet FIPS Publication 199 high impact requirements, the Contractor shall maintain within the United States and its outlying areas (see FAR 2.101) all Government data that is not physically located on U.S. Government premises, unless otherwise specified in the contract.

(f) *Additional considerations.* For each FIS being developed, implemented, operated, or maintained, the Contractor shall-

(1) Apply NIST SP 800–39, Managing Information Security Risk: Organization, Mission, and Information System View, as the basis for the Contractor's risk management process (framing, assessing, responding to, and monitoring risk) when supporting agency risk management activities;

(2) Apply NIST SP 800–37, Risk Management Framework for Information

Systems and Organizations: A System Life Cycle Approach for Security and Privacy, as the process to manage system risk through preparation, categorization, control selection, control implementation and assessment, system authorizations, and continuous monitoring;

(3) Apply NIST SP 800–207, Zero Trust Architecture, when designing zero trust architecture approaches;

(4) Apply NIST SP 800–160, Vol. 1, Systems Security Engineering: Considerations for a Multidisciplinary Approach in the Engineering of Trustworthy Secure Systems, which addresses the activities and tasks, the concepts and principles, and most importantly, what needs to be considered from a security perspective when executing within the context of systems engineering;

(5) Apply NIST SP 800–160, Vol. 2, Developing Cyber-Resilient Systems: A Systems Security Engineering Approach, when selecting, adapting, and using cyber resiliency constructs for new systems, system upgrades, or repurposed systems;

(6) Apply NIST SP 800–30, Guide for Conducting Risk Assessments, when preparing for, conducting, communicating results from, and maintaining risk assessments over time;

(7) Provide the Government with a continuous monitoring strategy for the FIS that maintains ongoing awareness of information security, vulnerabilities, and threats, in order to support organizational risk management decisions, and applies the following—

(i) NIST SP 800–137, Information Security Continuous Monitoring (ISCM) for Federal Information Systems and Organizations, which describes development and implementation of an ISCM Program, including development of an ISCM strategy;

(ii) Use of automation, wherever possible, to increase the speed, effectiveness, and efficiency of continuous monitoring; and

(iii) Protection of vulnerability scan data, logs, and telemetry data (*e.g.,* from Cybersecurity and Infrastructure Security Agency's (CISA) Continuous Diagnostics and Mitigation program) commensurate with the aggregate sensitivity of the collected data. The data and logs shall be promptly made available to the Government upon the Contracting Officer's request;

(8) Apply NIST SP 800–63–3, Digital Identity Guidelines, when—

(i) Selecting appropriate digital identity services;

(ii) Digitally authenticating a subject to Federal information systems over a network; and

(iii) Implementing identity assurance, authenticator assurance, and federation assurance levels based on risk; and

(9) Apply NIST SP 800–92, Guide to Computer Security Log Management, when generating, transmitting, storing, analyzing, and disposing of computer security log data.

(g) *Cyber supply chain risk management.* The Contractor may implement alternative, additional, or compensating cyber supply chain risk management security controls from those stated in the contract, when authorized in writing by the Contracting Officer.

(h) *Notifiable incident reporting, incident response and threat reporting.*

For contract coverage on security incident and cyber threat reporting, see FAR clause 52.239–ZZ, Incident and Threat Reporting and Incident Response Requirements for Products or Services Containing Information and Communications Technology, in this contract.

(i) *Limitations on access to, use, and disclosure of Government data, Government-related data, and any associated metadata.*

(1) The Contractor shall not access, use, or disclose Government data, Government-related data, and any associated metadata unless specifically authorized under the contract or task or delivery order or in writing by the Contracting Officer.

(i) When authorized, the access, use, or disclosure of Government data, Government-related data, and any associated metadata shall only be for purposes specified in the contract or task or delivery order.

(ii) The Contractor shall ensure that its employees are subject to all such access, use, and disclosure prohibitions and obligations of this paragraph.

(iii) The access, use, and disclosure prohibitions and obligations of this paragraph shall survive the expiration or termination of this contract.

(2) The Contractor shall use Government metadata only to manage the operational environment that supports the Government data and for no other purpose unless otherwise permitted with the prior written approval of the Contracting Officer.

(3) The Contractor shall notify the Contracting Officer promptly of any requests from a third-party for access to Government data, Government-related data, or any associated metadata, including any warrants, seizures, or subpoenas it receives, including those from another Federal, State, or local agency. The Contractor shall comply with applicable clauses, regulations, and laws concerning protection of Government data and Government-related data from any unauthorized disclosure.

(4) The Contractor shall not publish or disclose in any manner, without the Contracting Officer's written consent, the details of any safeguards either designed or developed by the Contractor under this contract or otherwise provided by the Government.

(j) *Cryptographic key services.* The Government reserves the right to implement and operate its own cryptographic key management, key revocation, and key escrow services. If key services are provided by the contractor, the contractor shall provide the agency with applicable key material and services.

(k) *List of operational technology equipment.* Unless the contract states otherwise, the Contractor shall develop and maintain a list of the physical location of all operational technology included within the boundary of a FIS covered by this contract.

(1) The list shall be considered Government data. At a minimum, the list shall include—

(i) The identification and description of any controllers, relays, sensors, pumps, actuators, Open Platform Communications Unified Architecture devices, and other industrial control system devices; including, when available, the manufacturer, part number, software version, communication protocols, and all static IP addresses assigned to the different hardware components used in performance of the contract;

(ii) An explanation of whether the device is password protected and, if so, whether the password can be changed from the default password provided by the manufacturer;

(iii) An explanation of whether the device is accessible remotely (*e.g.,* through internet or another network connection);

(iv) Location information in enough detail to affirmatively locate the operational technology equipment, if necessary; and

(v) Whether multi-factor authentication is present and enabled.

(2) The Contractor shall update the list to track any movement of the equipment during contract performance, as software or firmware updates are applied, when equipment is removed or taken out of service; or when equipment is added or placed into service.

(3) Upon request by the Contracting Officer, the Contractor shall provide the Government a copy of the current and/or historical list(s).

(l) *Binding Operational Directives and Emergency Directives.*

(1) Except as identified in paragraph (l)(2) of this clause, the Contractor shall comply with the Binding Operational Directives (BODs) and Emergency Directives (EDs) issued by CISA and having a specific applicability to a FIS used or operated by a contractor. The list of BODs and EDs can be found at *https://www.cisa.gov/directives.*

(2) The following BODs and EDs that have a specific applicability to a FIS used or operated by a contractor will not apply to this contract: _____.

[*Contracting Officer to list any BODs or EDs not applicable to the contract, as specified by the requiring activity*]

(3) BODs and EDs with specific applicability to a FIS used or operated by a contractor that are issued after the date of award will be applied to this contract, at the Contracting Officer's discretion, through appropriate modification of the contract.

(m) *Indemnity for potential or actual loss or damage of Government data.*

(1) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability arising out of the performance of the contract, including costs and expenses, incurred as the result of the Contractor's unauthorized introduction of copyrighted material to which the Contractor has no rights or license that may infringe on the copyright interest of others, information subject to a right of privacy, and any libelous or other unlawful matter into Government data. The Contractor agrees to waive any and all defenses that may be asserted for its benefit, including (without limitation) the ''Government Contractors Defense.''

(2) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability arising out of the performance of this contract, including costs and expenses,

incurred as the result of the Contractor's potential or actual unauthorized disclosure of trade secrets, copyrighted materials, contractor bid or proposal information, source selection information, classified information, material marked as ''Controlled Unclassified Information'', information subject to a right of privacy or publicity, personally identifiable information as defined by OMB Circular A–130 (2016) or successor thereof, or any record as defined in 5 U.S.C. 552a.

(3) In the event of any claim or suit against the Government on account of any alleged unauthorized disclosure or introduction of data or information arising out of the performance of this contract or services performed under this contract, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in the Contractor's possession pertaining to such claim or suit.

(4) The provisions of this paragraph (m) do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense of the claim or suit, and these provisions do not apply to any libelous or other unlawful matter contained in such data furnished to the Contractor by the Government and incorporated in data to which this clause applies. Further, this indemnity shall not apply to—

(i) A disclosure or inclusion of data or information upon specific written instructions of the Contracting Officer directing the disclosure or inclusion of such information or data; or

(ii) A third-party claim that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(n) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (n), in all subcontracts under this contract for services to develop, implement, operate, or maintain, a FIS using other than cloud computing services.

(End of clause)

■ 23. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Redesignating paragraph (c)(1)(xxi) as (c)(1)(xxiii) and adding new paragraphs (c)(1)(xxi) and (xxii).

The revisions read as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (DATE)

* * * * *

(c)(1) * * *

(xxi) 52.239–YY Federal Information Systems Using Non-Cloud Computing Services (DATE) (E.O. 14028 and 15 U.S.C. 278g-3e) if flow down is required in accordance with paragraph (n) of FAR clause 52.239–YY.

(xxii) 52.239–XX Federal Information Systems Using Cloud Computing Services (DATE) (E.O. 14028) if flow down is required in accordance with paragraph (i) of FAR clause 52.239–XX.

* * * * *

[FR Doc. 2023–21327 Filed 10–2–23; 8:45 am]

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